



NOTE

Legal regulation of the prevention of abuse of the procedure of disciplinary complaint against a judge – international standards and national practice in England and Wales

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I. Introduction

1. This note is prepared in the framework of the Council of Europe project “Support to the functioning of justice in the war and post-war context in Ukraine”, on request of the Ukrainian Parliamentary Committee on Legal Policy.

2. The note is prepared by Nina Betetto, international consultant of the Council of Europe, and contains an overview of international standards and of legal regulation on the prevention of abuse of the procedure of disciplinary complaint against a judge in England and Wales. The note answers the following questions:

a. Do international standards and the national legislation in England and Wales prohibit or prevent the abuse of the right to file a disciplinary complaint against a judge?

b. What are the respective mechanisms or legal procedures that allow the bodies authorised to conduct disciplinary proceedings against a judge to prevent or cease this type of abuse?

c. Can the respective authorities, in case of the abuse of the right to file the respective complaint, restrict or impose certain conditions on the use of such right by the complainant in question?

3. The Ukrainian legislation stipulates that it is prohibited to abuse the right to apply to the body authorised to conduct disciplinary proceedings including initiating the issue of judicial liability without sufficient grounds established by law. The use of this right as a means of pressure on a judge with regard to his/her administration of justice (Article 107 § 4 of the Law of Ukraine on the judiciary and status of judges"). At the same time, Ukrainian legislation does not provide for any mechanisms or instruments that would allow the body authorised to conduct disciplinary proceedings against a judge to respond to such cases, stop them, or prevent them.

4. This note focuses mainly on responding to the aforementioned questions. Thus, limited in scope, it does not constitute a full and comprehensive overview of all matters pertaining to disciplinary proceedings against judges. The note includes references to relevant documents from the Council of Europe and related bodies in the field of disciplinary proceedings against judges. References have also been included to other pertinent European and international standards, insofar as they may be used as guidance on key issues, especially Minimum Judicial Standards V – Disciplinary proceedings and liability of judges, Report 2014-2015 (hereafter Report 2014-2015), adopted by the European Network for the Councils for the Judiciary (hereafter ENCJ).

II. International standards

a. There needs to be a distinction between the bodies responsible for investigating complaints and determining the disciplinary proceedings

5. There are only few clear international standards providing guidance on the initiation of disciplinary proceedings against judges. First, it is important to distinguish between the right to complain against judges' behaviour and ask for the initiation of disciplinary proceedings, and the task of *actually commencing* investigations into a judge. With respect to the former, a potentially wide array of offices, bodies and individuals may have the right to complain. Depending on the individual country, these may be heads of courts, judicial councils, or special judicial commissions or inspectors, the Minister of Justice, and/or individuals.

6. Investigations will usually be undertaken by some sort of separate body, board or other institution that will be responsible for accepting and examining complaints about judges, will review evidence and will then decide whether there is a case against a judge; they may even have the power to initiate disciplinary proceedings against judges *ex officio*. Some

states have special independent bodies established by judiciary that undertake this task, which in certain countries may summarily dismiss vexatious or unsubstantiated claims. At times, investigation of complaints may also be conducted by a special panel, investigator, rapporteur or committee of inquiry appointed by the body responsible for the administration of disciplinary proceedings. In other countries, a disciplinary committee or the judicial inspection unit of the judicial council accepts and examines complaints.

7. The independent body initiating the investigation into a judge should be separate from the independent body that eventually takes the final decision on the matter, to ensure independence of the latter. Accordingly, in its Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (hereafter Opinion No. 3), para. 68, the CCJE proposes that "*countries should envisage introducing a specific body or person in each country with responsibility for receiving complaints, for obtaining the representations of the judge concerned upon them and for deciding in their light whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action, in which case it would pass the matter to the disciplinary authority.*"¹ The ENCJ shares this position (Report 2014-2015, p. 28) endorsing "*a distinction between the bodies responsible for investigating complaints and determining the disciplinary proceedings.*" The Venice Commission takes a similar stance but notes that it may not be necessary to create a separate institution for this purpose. Rather, it should suffice to ensure that members who were involved at the initial stage of the disciplinary proceedings as "accusers" or "investigators" do not participate in the adjudication of disciplinary cases as "judges".²

b. There needs to be a filtering mechanism

8. Appropriate and workable judicial disciplinary mechanisms are required in order to achieve accountability of the judiciary. However, disciplinary processes are an area of vulnerability for the independence of the Judiciary. An ill-disposed authority may search in judicial disciplinary procedures for a way to intimidate judges in the exercise of their functions. This may be done through bogus, frivolous or vexatious complaints made against a judge. Any disciplinary measures and procedures should be regulated by law and there must be carefully designed procedures to protect judges against such or any abuse of the judicial disciplinary process. Disciplinary procedures established to provide for the accountability of the Judiciary must not be allowed to become a means of intimidating judges.

9. When looking at this question, the CCJE noted, in its Opinion No. 3, para. 67, that individuals alleging to have suffered due to a judge's professional misconduct should be able to submit a complaint, which could then lead to the initiation of disciplinary proceedings. However, "*they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants.*"

10. The ENCJ, in its Report 2014-2015, p. 28. stressed that "*in order to fully guarantee the adequate protection of judicial independence against disturbing or frivolous complaints, where any individual can make a complaint about a judge, there should be a summary dismissal body to ensure that vexatious claims or claims with no substance can be dismissed expeditiously.*" More specifically, in regard to anonymous complaints, the ENCJ (p.

¹ See also OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) (hereafter Kyiv Recommendations), para. 5.

² Venice Commission Opinion on the laws on disciplinary liability and evaluation of judges of the Former Yugoslav Republic of Macedonia, CDL-AD(2015)042, 21 December 2015, paras. 73 and 78. See also ECtHR, *Kamenos v. Cyprus*, application no. 147/07, judgment of 31 October 2017, paras. 102-110; *Volkov v. Ukraine*, application no. 21722/11, judgment of 9 January 2013, para. 115.

25) generally agreed that these were undesirable but that the minimum standard should be formulated to reflect that the practice is allowed in some countries, particularly if the matter arising from an anonymous complaint could then be investigated by way of an *ex officio* investigation. Accordingly, the minimum standard states that, *"except where there is established and proven tradition, a complainant should normally be identified. Moreover, it is recommended that, whether or not a complainant is identified, if a complaint can be made by anyone, there needs to be a mechanism or summary procedure by which the complaint can be dismissed, or a decision can be taken that the complaint should not be progressed."* /.../ The purpose of this mechanism or summary procedure in the control of a person or body directly answerable to the judiciary is to ensure that vexatious claims or claims with no substance can be dismissed expeditiously.

11. Therefore, allowing individual complaints against judges does not mean that there is an individual right to initiate or insist on disciplinary action – rather, the above-mentioned filtering mechanism will assess the circumstances of the case, to avoid situations where judges become embroiled in disciplinary procedures initiated by disappointed litigants and dismiss manifestly unfounded, frivolous or vexatious complaints as early as possible. As stated by the Judicial Integrity Group, *"the body receiving and administering complaints against judges will also receive responses of the judge to the complaints, and will then, in light of all documentation at its disposal, decide whether or not there is a sufficient prima facie disciplinary case against the judge to call for the initiation of disciplinary action. If so, it will refer the matter to the disciplinary body."*³

c. There should be a time limit for the bringing of a complaint

12. In relation to bringing a complaint it would be unfair to a judge for there to be a lack of expediency. As the ENCJ in the Report 2014-2015 (p. 29) stressed: *"Time limits should be set for the bringing of a complaint to ensure legal certainty."* In some countries, such as Denmark, England and Wales and Northern Ireland, there is a limited power to extend the time limit in exceptional circumstances. The ENCJ found (p. 29) that *"any extension of time ought to be allowed only in exceptional circumstances."*

III. Legal regulations in England and Wales regarding the prevention of abuse of the procedure of disciplinary complaint against a judge

a. Background

13. Many countries have established independent bodies in charge of receiving and administering complaints against judges, and some countries also have the power to summarily dismiss vexatious claims or claims which appear to be insubstantial (for instance, England and Wales, Northern Ireland, Norway, Scotland, Sweden, Italy). The legal regulation regarding the prevention of abuse of the procedure of disciplinary complaints against a judge in England and Wales embodies the standards and good practices outlined in Section II., this being the reason for the presentation in the note.

14. Disciplinary powers are vested jointly in the Lord Chancellor and Lord Chief Justice. The Lord Chancellor's and Lord Chief Justice's disciplinary powers are set out in primary legislation in Section 108 of the Constitutional Reform Act 2005 (hereafter CR). A significant change arising from the CR was to put the process for handling complaints on a statutory footing. The first set of disciplinary regulations, also known as "prescribed

³ Measures for the effective implementation of the Bangalore Principles, adopted by the Judicial Integrity Group at its meeting held in Lusaka, Zambia, on 21-22 January 2010, par 15.3.

procedures” was introduced in 2006. At present, the procedure for investigating complaints that may result in disciplinary action are prescribed in secondary legislation in the Judicial Discipline (Prescribed Procedures) Regulations 2023 and the three sets of supporting rules: for the purpose of this note only the Judicial Conduct (Judicial and other office holder) Rules 2023 (hereafter Rules),⁴ applicable to judges,⁵ are relevant.⁶

15. In 2006, following the CR, the Office for Judicial Complaints, now the Judicial Conduct Investigation Office (hereafter JCIO) was established to investigate complaints about judges. In 2011, the JCIO became part of the Judicial Office, which had been set up in 2006 to support the Lord Chief Justice with his new responsibilities as head of the judiciary. The JCIO operate independently and support both the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline.

b. Procedure

16. There is no list of the types of conduct that would amount to misconduct. Each complaint is considered on a case by case basis. The Guide to Judicial Conduct sets out in broad terms the standards of behaviour that are expected of a judicial office holder. The JCIO's website gives the following examples of the type of conduct that it may investigate: the use of racist, sexist or offensive language; falling asleep in court; general rudeness; misusing judicial status for personal gain or advantage; failing to fulfil judicial obligations or duties; criminal convictions; failure to declare a potential conflict of interest. The following sanctions may be imposed: formal advice; formal warning; reprimand; suspension; removal from office. As well as asking for a judge's comments, the JCIO can gather information from other sources, e. g. listening to a hearing recording and obtaining comments from third parties, such as court officials, solicitors and barristers. While the JCIO can reject or dismiss a complaint and can give advice to the Lord Chancellor and Lord Chief Justice on issues such as the level of disciplinary sanction recommended to them in a case, it has no powers to discipline a judge.

17. Independent judicial and lay involvement in the form of nominated judges, investigating judges, disciplinary panels is a key part of the system. It is these authorities which make findings of misconduct and recommend disciplinary sanctions. A complaint which the JCIO has not rejected or dismissed must be dealt with under the summary process or referred to a nominated judge selected by the Lord Chief Justice.⁷ Nominated judges consider complaints to decide whether misconduct has occurred and, if so, recommend a sanction. Approximately 20–30 cases per year are referred to a nominated judge. Cases which are especially serious or complex may also be referred to an investigating judge. They are appointed on a case-by-case basis to consider complaints which need more in-depth enquiry to decide whether misconduct has occurred and, if so, recommend an appropriate sanction to the Lord Chief Justice and Lord Chancellor. There are typically fewer than five such cases a year. Additionally, disciplinary panels, composed of two judicial and two lay members consider cases in which a judge has been recommended for suspension or removal from office, before deciding whether misconduct has occurred and, if so, recommending a sanction.

18. The summary process is an expedited process designed to deal with cases in which removal from office is recommended without a requirement for further investigation. Examples include conviction for a serious criminal offence and persistent failure, without a reasonable excuse, to meet sitting requirements.

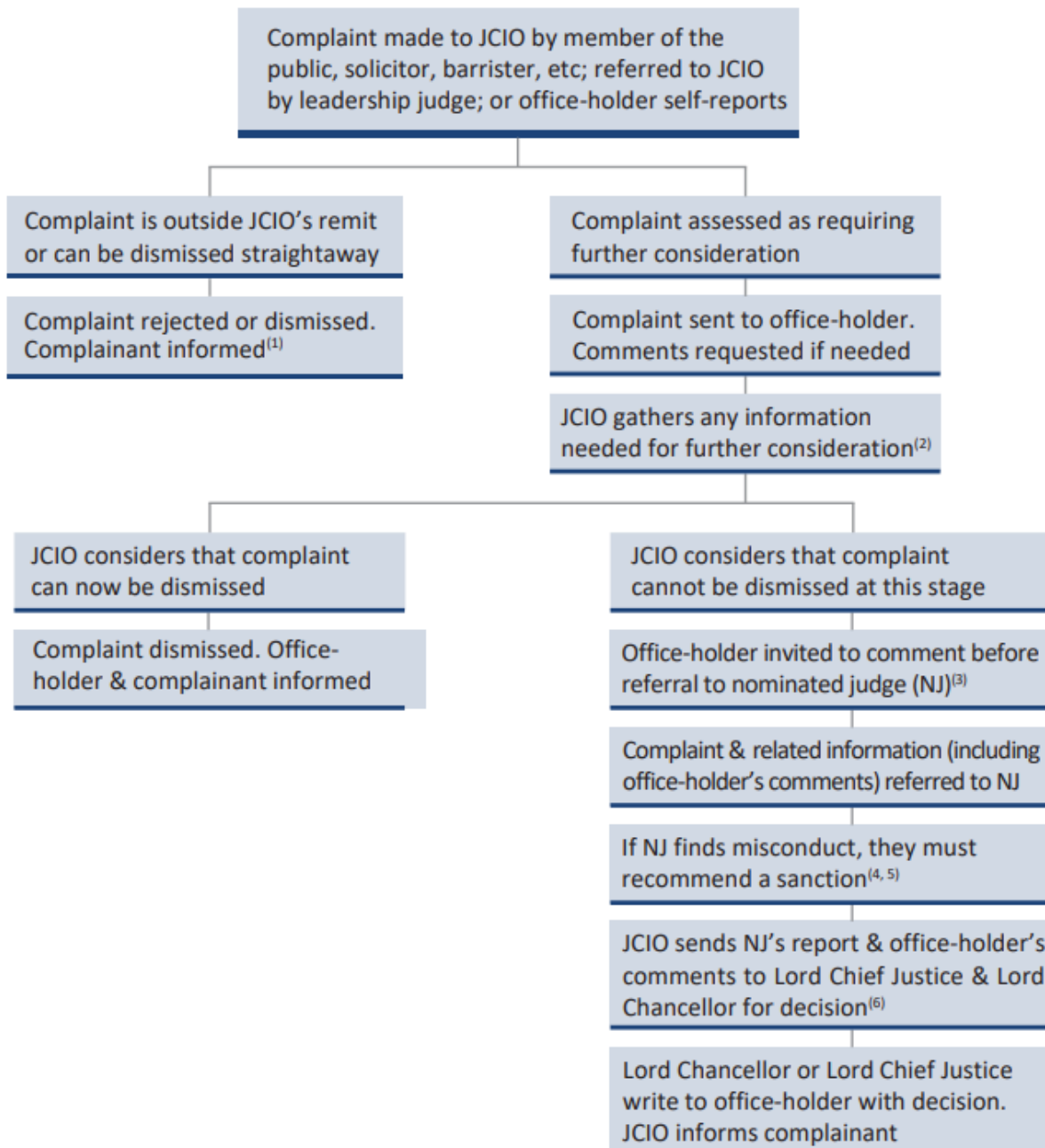
⁴ https://www.complaints.judicialconduct.gov.uk/rulesandregulations/The_Judicial_Conduct_Rules_2023.

⁵ Lord/Lady Justices of Appeal, High Court Judges, Circuit Judges, District Judges and Coroners.

⁶ The other two sets of rules, applicable to members of tribunals and magistrates, respectively, are the Judicial Conduct (Tribunals) Rules 2023, and the Judicial Conduct (Magistrates) Rules 2023.

⁷ Nominated judges are senior courts judges appointed by the Lord Chief Justice to consider complaints. At present, there are seven nominated judges, four from the Court of Appeal and three High Court judges.

The flowchart below gives an overview of the process JCIO follows in considering complaints:⁸



c. Rejection and dismissal of a complaint

19. The JCIO must reject complaints which are not made within three months of the latest event or matter complained of. Before a complainant can be dismissed as out of time, the complainant must be given the opportunity to provide reasons for the delay. If these reasons are considered exceptional, the JCIO can accept the complaint.

⁸ Source: JCIO Annual Report 2021-2022, p. 8.

20. Pursuant the Rules (rule 10), the JCIO must not accept a complaint in any case where the complaint does not meet the requirements under rule 8, i. e. the complaint does not state: (a) the name of the person making the complaint; (b) the address or email address of the person making the complaint; (c) it does not contain an allegation of misconduct on the part of an identified or identifiable person holding an office, which is supported by relevant details as specified in guidance published by the JCIO from time to time (for example, where a complainant alleges that a judge was rude without providing any details of what the judge said or did); (d) the date or dates that the alleged misconduct took place unless the JCIO decides that this is unnecessary taking into account all the circumstances of the complaint.

21. Rule 23 determines the circumstances in which the JCIO must dismiss a complaint. The JCIO must dismiss a complaint, or part of a complaint, if it falls into one or more of the following categories: (a) the alleged facts are obviously untrue (for example, the recording of a hearing in which it is alleged that a judge shouted at the complainant confirms that the judge was not shouting, but was using a firm tone of voice to keep a hearing on track, which judges are entitled to do); (b) even if the alleged facts were true, they would not require a disciplinary sanction to be issued (for example, a complaint that a judge frowned when the complainant was speaking); (c) it is about a judicial decision or judicial case management, and raises no question of misconduct; (d) it is vexatious; (e) it is misconceived; (f) it raises a matter which has already been dealt with, whether under the Rules or otherwise, and does not present any significant new evidence; (g) it is about the private life or the professional conduct in a non-judicial capacity of a person holding an office and raises no question of misconduct; (h) for any other reason it does not relate to misconduct by a person holding an office.

22. During reporting year 2021-2022 the JCIO received 1817 complaints. A substantial proportion of complaints (1029) could not be accepted because they did not meet the criteria for a complaint (957) or the complaint was out of date (57). A further proportion of complaints (511) were dismissed for a range of reasons, including, for example, that they were about a judicial decision or judicial case management, and raised no question of misconduct (211), or they were found to be misconceived (80). The Lord Chancellor and Lord Chief Justice issued 33 disciplinary sanctions.

23. The independent Judicial Appointments and Conduct Ombudsman is responsible for reviewing how complaints of misconduct have been handled by the JCIO. If the Ombudsman decides that the JCIO has mishandled a complaint, he may refer the matter back to the JCIO for re-investigation and/or recommend changes to procedures. In 2021-22, the Ombudsman determined 47 complaints about the JCIO's handling of complaints. He upheld, or partially upheld, 11 of those complaints.

d. In conclusion

The mechanism and legal procedures in England and Wales outlined above are designed to ensure that the process of handling complaints against judges is efficient, fair, and focused on addressing legitimate concerns related to judicial conduct:

- Several actors are involved in the process; each of them has a clearly defined and distinctive role to play. The investigative and filtering powers are vested in the JCIO. A complaint which the JCIO has not rejected or dismissed must be dealt with under the summary process or referred to a nominated judge, who considers complaints to decide whether misconduct has occurred and, if so, recommend a sanction.⁹ The independent Judicial Appointments and Conduct Ombudsman is responsible for reviewing how complaints of misconduct have been handled by the JCIO. Disciplinary sanctions are issued jointly by the Lord Chancellor and Lord Chief Justice.

⁹ If they do not find any misconduct, they can also dismiss a case.

- Time limits are set for the bringing of a complaint to ensure legal certainty.
- Setting out specific requirements for a valid complaint, such as the inclusion of the complainant's name, address, and a detailed allegation of misconduct (rule 8), ensures that the JCIO receives well-formed complaints. Moreover, clearly defined grounds for dismissing a complaint (rule 23) further contribute to filtering out cases that lack merit or are inappropriate for disciplinary action. For instance, dismissing complaints that relate to judicial decisions or case management without raising questions of misconduct, or are vexatious, misconceived, prevents the JCIO from being burdened with non-substantive matters, allowing resources to be focused on genuine concerns.