

LANDMARK CHAMBERS JR UPDATE SEMINAR

Disclosure in Judicial Review

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Introduction

1. In general terms the traditional position in judicial review was that:
 - The defendant has a “duty of candour” (see e.g. *Belize Alliance v Department of the Environment* [2004] UKPC 6; *R (Quark Fishing) v SS Foreign & Commonwealth Affairs* [2002] EWCA Civ 1409 at [50] and *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 “it is a process to be conducted with all the cards face up on the table”);
 - Although the duty is owed by claimants (eg *R (I) v Secretary of State for the Home Department* [2007] EWHC 3103 (Admin), Collins J at paras 8 & 10-11) it weighs most heavily on defendants.
 - there was no general duty of inspection, disclosure etc. in judicial review unlike other civil litigation;
 - the ordering of specific disclosure in judicial review was rare. This would generally only be ordered where it was shown that the defendant’s evidence was inaccurate, inconsistent or incomplete: see e.g. *R v SSE, ex p Islington BC* [1997] JR 121 at 126 and 128 – 129 and *R v Secretary of State for Foreign & Commonwealth Affairs, ex p WDM* [1995] 1 WLR 286 at 396.
2. The general absence of disclosure in judicial review was considered by Jackson LJ in his Civil Litigation Costs Review Preliminary Report as an important feature of the procedure which helped to limit costs:

“The fact that ordinarily there is no disclosure [in judicial review] is the overriding feature in relation to costs. The parties simply put forward the documents upon which they rely, subject to any direction by the court that some specific document or

group of documents should be disclosed. During the eight years that I sat as an Administrative Court judge, I was not aware of the absence of disclosure becoming a source of injustice. Nor (so far as I can recollect) did counsel ever suggest that this was the case.”

(Civil Litigation Costs Review Preliminary Report by Lord Justice Jackson May 2009, chapter 7, para. 2.3)

3. This paper sets out the development of this obligation over recent years to conclude that there is a trend towards more disclosure in judicial review and this is likely to continue in the foreseeable future, or at least until some specific rules are laid down.

I. The overriding objective in the CPR

4. The CPR provides:

“The parties are required to help the court to further the overriding objective” (CPR, Part 1.3).

5. The overriding objective of the CPR is “enabling the court to deal with cases justly” (CPR, Part 1.1):

ensuring that the parties are on an equal footing;

saving expense;

dealing with the case in ways which are proportionate—

to the amount of money involved;

to the importance of the case;

to the complexity of the issues; and

to the financial position of each party;

ensuring that it is dealt with expeditiously and fairly; and

allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

6. The duty of disclosure in CPR part 31 does not apply however to claims for judicial review unless the court orders otherwise: PD54A, para. 12.1.

II. Tweed v Parades Commission

7. The legal landscape shifted in 2006 with the HL decision in *Tweed v Parades Commission* [2006] UKHL 53; [2007] 1 AC 650. This remains the starting point on the question of disclosure in judicial review.
8. In *Tweed* the claimant in judicial review proceedings in Northern Ireland challenged a determination of the Parades Commission for Northern Ireland permitting, on conditions, a proposed procession by a local Orange lodge to take place in a predominately Catholic town on Easter Day 2004. The claimant asserted that the conditions were unlawful since they constituted a disproportionate interference with his rights protected by articles 9, 10 and 11 of the European Convention. The chairman of the commission swore an affidavit summarising the effect of specific documents, including police reports, an internal memorandum of the commission and two situation reports, which were material to the determination. The claimant sought specific disclosure of the documents under RSC (NI) Ord 24, which applied the same principles as those applicable under the CPR. The case went to the House of Lords.
9. Although that case was a Northern Ireland appeal, it is expressly relevant to England and Wales. There were three key speeches: Lord Bingham, Lord Carswell and Lord Brown – Lords Hoffmann and Rodger both concurring with all three.
10. The main points of principle can be summarized as follows:
 - “Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence” (Lord Bingham, para 4).
 - It should not be necessary for the claimant, seeking sight of a key document summarised in the defendant’s evidence “to suggest some inaccuracy or incompleteness in the summary” as this is “usually an impossible task without sight of the document” and “it is enough that the document itself is the best evidence of what it says” (Lord Bingham, para

4).

Greater disclosure where human rights cases involved?

- Defendants should “routinely” exhibit key documents to their written evidence and “should be readier to do so whenever proportionality is in issue” (Lord Brown, para 57).
- Applications for specific disclosure in judicial review claims are “likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority’s interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts.

But

- But even in these cases, order for disclosure should not be automatic.” (Lord Bingham, para 3; to similar effect Lord Carswell at para.38; Lord Brown, para.56).
- “Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interest of justice.” (Lord Carswell, para.32)

Overall:

- If a key document is not exhibited because of concerns over volume or confidentiality, “The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made” (Lord Bingham, para 4).
- “A more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances” should be substituted for the pre-existing “approach to disclosure in judicial review which is more

narrowly confined than in actions commenced by writ” and the “restrictive rule” on which this approach is based whereby disclosure aimed at challenging the accuracy of affidavit evidence is refused as improper “unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate” (Lord Carswell, paras 29 and 32; Lord Brown, para 56).

- “On this [new] approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker” (Lord Brown, para 57).

In conclusion, the test:

- The test will remain “whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly” and “whether it is necessary for fairly disposing of the case to order disclosure of such documents” (Lord Bingham, para 3; Lord Carswell, para 38).

III. When it all goes wrong

11. It is rare for to come across a case in which the disclosure exercise goes spectacularly wrong and in public but that is what occurred in the *Al-Sweady* litigation. There are two judgments, both of which deal with disclosure and PII issues: *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 1687 (Admin) (“the July judgment”) and [2009] EWHC 2387 (Admin) (“the October judgment”).

12. *Al-Sweady* concerned the treatment of Iraqi detainees by British Forces in Camp Abu Naji in Southern Iraq in May 2004. A claim was brought in the High Court alleging serious breaches of the Convention on Human Rights and the principal remedy sought by the Claimants was an order that there be a new independent and effective investigation, satisfying the requirements of Articles 2 and 3 of the ECHR, into the allegations of murder and ill-treatment.

13. During the course of the proceedings the Court found “disturbing failures by the Ministry of Defence in its handling of the process for putting Ministerial PII Certificates and Schedules before the Court”¹ and that “the Secretary of State consistently and repeatedly failed to comply with [his disclosure obligations]”². In an excoriating judgment given in July 2009, the Court ordered a stay of the proceedings and ordered that the Secretary of State pay the costs of the whole proceedings on an indemnity basis (Claimants’ itemised bill in excess of £2m).

14. By the October judgment, the criticisms are no less trenchant but for the purposes of this paper the interest lies in paragraphs 15 to 27 of the October judgment. In those paragraphs the Court considers some of the practical issues associated with disclosure in judicial review where there are disputed issues of fact which are crucial to the determination of the case. After reviewing the authorities, the Court stated that where cross-examination is ordered to determine factual disputes and the allegations concern some of the most important and basic rights under the ECHR, for example Articles 2, 3 and 5 “*the approach to disclosure should be similar to that in an ordinary Queen’s Bench action*” (para.27).

IV. The Treasury Solicitor Guidance

15. In response to the criticisms contained in these decisions the Treasury Solicitor’s Department issued important guidance on the duty of candour and disclosure in judicial review: *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* – which is available on the internet at http://www.tsol.gov.uk/Publications/Scheme_Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf . A copy is attached as Annex I.

16. This Guidance gives many useful tips on how to carry out a disclosure exercise:

- 1) It starts by reminding public authorities that their objective must not be to win the

¹ [2009] EWHC 1687 (Admin) para.3 – the July 2009 judgment

² [2009] EWHC 2387 (Admin) para.22 – the October 2009 judgment

litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration;

- 2) It emphasizes that the duty of candour imposes a weighty responsibility, that it is not restricted to documents but is information based and applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters before action.
- 3) Where evidence is being prepared in response to a claim for judicial review, care must be given to considering the extent to which the duty of candour can be satisfied by providing a full and fair explanation of all relevant matters in a witness statement, and the extent to which such evidence must be supported by exhibiting relevant documents: "Usually a mix of explanation by way of witness statement, and exhibiting key documents will be appropriate."
- 4) As *Al-Sweady* highlighted, two disclosure obligations are imposed on solicitors in litigation: the duty to make sure that the client is fully aware of the duty to ensure that proper disclosure is given; and the duty to go through the documents disclosed by the client to make sure, as far as possible, that not documents have been omitted from the client's list.
- 5) Although the duty of disclosure in CPR part 31 does not apply to claims for judicial review unless the court orders otherwise, the principles governing disclosure are principles that should guide the actions of public bodies when complying with the duty of candour.
- 6) Disclosure should be thought of as project which requires a project manager of appropriate seniority and experience. The TSol case handler has overall responsibility for the disclosure exercise.
- 7) Practical guidance is given at pages 6-13 regarding the division roles and responsibilities, emphasizing the need for transparency, good record keeping on all decisions relating to disclosure matters, pre-search conferences and collection plans.

8) Documents should only be withheld if they cannot be redacted – redaction should only be performed on a copy of the original document and it should not destroy the meaning of that document. Again, records of all decisions on this should be kept.

V. Recent cases involving the duty of candour

17. The Ministry of Defence is obviously not the only body who has faced difficulty with the practical implications of the duty of candour, although a trawl of the publically available transcripts shows that there are ongoing arguments about disclosure in relation to the treatment of detainees in Afghanistan: e.g. *R (Mohammed & Evans) v Secretary of State for Defence* Collins J, 15 May 2012.

18. Duty of candour issues also arose in a major way in *R (Shoesmith) v Ofsted* [2010] EWHC 852. This case concerned the circumstances of Sharon Shoesmith's dismissal of following the Baby P scandal and she sought judicial review against OFSTED, the Secretary of State and Haringey. Part of her case was that the relevant reports and directions (and therefore the dismissal which were founded on those matters) were procedurally unfair.

19. Judgment was given by Foskett J in April 2010 after the main hearing had occurred in October 2009, but further hearings were necessitated in November and December 2009. Yet further submissions were made in February and March 2010.

20. By an annex to the judgment, the judge provided a separate document dealing solely with the question of disclosure and candour. In that document, the Judge went in to considerable detail regarding the application of the obligation in this case. At paragraph 5 he accepted that the duty of candour remained distinct from the duty of disclosure but stated, by reference to *Tweed* that the former often involves the latter. At paragraph 6 he cited with approval the Treasury Solicitor Guidance referred to earlier in this paper, before going on to consider the extent to which the duties had not been complied with in this case. At paragraph 42 that Judge stated:

“It is difficult for me to determine where the true responsibility lies for the wholly

inadequate way in which Ofsted's duty of candour was addressed initially in this case. At the end of the day, it has to represent a collective failure that, frankly, shakes one's confidence that the scope of the duty was fully understood by those involved. It appears now to have been rectified, but at some considerable cost, not merely financially, but by way of increasing the anxieties and pressures on the Claimant and delaying the outcome of a case that is of widespread interest. It should not have happened.”

21. It is apparent from the terms of his judgment (and some of the examples make quite shocking reading) that he had considerable concern about how Ofsted had complied (or failed to comply) with its obligations and he stated (at para.41) that he intended personally to raise the matter with the Treasury Solicitor. Although the substantive judgment was appealed ([2011] EWCA Civ 642, [2011] I.C.R. 1195) the outcome of what happened next in relation to this issue is not recorded in the judgment.
22. Questions of candour and disclosure are fundamentally linked to the proper administration of justice and none other makes this as clear as *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 56; [2011] QB 218, where the Court of Appeal gave guidance on the circumstances in which a court could redact part of its reasoning contained in a judgment.
23. The claimant, an Ethiopian national formerly resident in the United Kingdom, was held by the United States authorities in the detention facility at Guantanamo Bay, Cuba, where United States military prosecutors charged him with terrorist offences. His lawyers asked the Foreign Secretary to disclose to him information known to the United Kingdom Government which might support his defence that confessions which he had made were inadmissible as evidence in that they had been obtained by torture and other ill-treatment to which he had been subjected by the United States Government and others on its behalf. The Foreign Secretary refused to do so. The claimant applied for judicial review of that refusal, seeking an order for the disclosure of the information in confidence to his United States lawyers on the ground that the United Kingdom security services had facilitated his alleged ill-treatment.

24. The Secretary of State appealed against the Divisional Court's decision to include seven paragraphs in its publically available judgment. In dismissing the appeal, the Court of Appeal held that the principles of freedom of expression, democratic accountability and the rule of law were integral to the principle of open justice stating:

"42. Although expressed in wide and general terms – and perhaps inevitably so expressed – in my judgment the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question. They do not enable the media to require parties to litigation to continue it if they do not wish to do so in order for the media to have a better story, or permit the media to study material which has been made subject to non-disclosure on well established PII principles, or to report proceedings where, in the interests of justice, by operation of law, such reporting is prohibited. It is, of course, elementary that the courts do not function in order to provide the media with copy, or to provide ammunition for the media, or for that matter private individuals, to berate the government or the opposition of the day, or for that matter to berate or laud anyone else. They function to enable justice to be done between parties. However where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances."

"57 In my view, the arguments in favour of publication of the redacted paragraphs are compelling. Inevitably if they contained genuinely secret material, the disclosure of which would of itself damage the national interest, my conclusion might be different. However, dealing with this appeal as a matter of practical reality rather than abstract legal theory, unless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself." [Lord Judge, CJ]

25. A different question arose in *R (Public and Commercial Services Union) v Minister for the Civil Service* [2011] EWHC 2556, as to how far back one has to go in discharging the duty of candour. In this case the PCSU and another union challenge the decision to change the Civil Service Compensation Scheme in relation to payments made on redundancy or early retirement. An application for specific

disclosure was made seeking documents including submission to ministers, communications between ministers in connection with the options, including information as to costs and savings. It was made on the grounds that the Government's evidence only disclosed the final reasoning leading to its conclusions and not the underlying thought processes behind the decision nor the material on which it was based. In the end the Court stated gave indications to the parties relating to the material to be disclosed which enabled Counsel to reach agreement relating to the material and disclosure of the documents agreed was ordered. In his judgment McCombe J referred to the need to balance the competing requirements

“not to encourage fishing by the claimant, not to over-burden the disclosure exercise, with making sure I am equipped to make the correct decision on the correct materials.” [para.15]

26. Most recently, in *AHK & others v SSHD* [2012] EWHC 1117 (Admin) judgment given in May 2012, the Claimants sought judicial review of decisions of the Secretary of State for the Home Department refusing to grant them naturalisation as British citizens under section 6 of the British Nationality Act 1981. The refusals were made on the grounds that the SSHD was not satisfied that the applicant was of good character.

27. However, the common feature of the cases was that few or, occasionally, no reasons had been given as to why the Secretary of State was not so satisfied, and she had explained that to give more reasons would be harmful to national security. As a result she was also not willing to disclose documents upon which she relied in reaching her decisions.

28. The Claimants challenged the decisions on the grounds that the decisions were unlawful for lack of reasons and taken in a manner which was procedurally unfair and in breach of Article 6. Disclosure was effectively the substantive relief sought. The judgment concerns a directions hearing in which Ouseley J had to consider whether and if so in what circumstances and with what consequences a Closed Material Procedure, CMP, could be held where issues of national security arose. The Court had to consider “what disclosure the SSHD is obliged to make of her

areas of concern or of the reasons for her decision pursuant to her implied statutory duties of fairness or pursuant to her litigation duty of candour.” (para.25).

29. In a lengthy judgment which considered, amongst other things, the relationship between fairness and PII, the Judge concluded that absent express statutory provision, the CMP procedure could not be imposed in these cases and that the matter would have to proceed with a PII hearing, with Special Advocates appointed on behalf of the individuals. However on the subject of the duty of candour he took as his starting point *Tweed* and then went on to consider how the obligation fits with questions of national security, stating

“30 The litigation duty of candour cannot require a breach of national security. It overlaps with the duty to give reasons but is not quite the same in concept. If its scope is determined not by the implied intention of Parliament but by what the Court requires to do justice between the parties, to avoid making decisions on a misleading or materially incomplete basis, and to assert its authority over the lawfulness of the decision-making of public bodies, there is nonetheless no scope for a different result in this sort of case. The claims are about the disclosure of areas of concern and reasons. A different and more extensive duty of disclosure in the course of litigation would be at odds with the implied limits on the duty which it was the very purpose of the litigation to enforce. The implied restrictions on the duty in the Act would be evaded. Justice in the litigation requires testing whether the implied statutory duty of fairness has been met by the SSHD. It does not have the broader purpose it would have if the Court itself were deciding whether the Claimant were of good character. There is therefore no separate test for any of those duties.”

30. It remains to be seen how the matter evolves next, since the next step is for the material to be considered in a PII hearing.

VI. A few final thoughts

31. My impression is that judicial review litigation is being conducted with far more attention being paid to disclosure and candour issues than pre-*Tweed*. It is right that it should. I would suggest that this is due to a number of factors in addition to the caselaw referred to in this paper:

- There is an increase in awareness, certainly in the public law legal community, following the fall out of *Al-Sweady* and also due to *Shoemith*;

- The nature of some of the cases coming before the courts – in particular those involving British forces and detainees in foreign lands, which have given rise to considerable litigation;
- The Courts appear to be more receptive to applications and this may be due in part to an increase of material being available by way of the Freedom of Information Act requests but also as a result of, for example, obligations arising in the environmental context and under the Equalities Act. These specific regimes regulating disclosure mean that judges are becoming more used to receiving material which traditionally they might not have had, supplying a window into the nuts and bolts of administrative decision making.

32. The effect of this is the Administrative Court looks more readily behind public law decisions and are starting expect to see the background material even when the claimant's lawyers have not sought it. This is creating a gradual cultural change which I think will make judges more receptive to applications for disclosure in the months and years to come. In parallel with this however, is that public bodies, and those who advise them, are also more aware and more ready to give disclosure of documents that, in past years, may have been seen as unnecessary. This is particularly the case in respect of ministerial submissions, which now seem to appear in court bundles far more frequently than in the past.

33. However the process of applying the principles in any given case is still quite a difficult one. Questions as to how far one goes back, when is a document 'a key document' and how to set the parameters of a search can be very hard to answer. It is suggested that this area is ripe for an amendment to the CPR.

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