

PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2017

THE DUTY OF CANDOUR: WHERE ARE WE NOW?

Iain Steele, Blackstone Chambers

Defendant's duty of candour

1. **The duty:** A public authority defendant in judicial review proceedings has a duty *"to co-operate and to make candid disclosure by way of affidavit of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged"*: *Belize Alliance of Conservation Non-Government Organisations v Department of the Environment* [2004] UKPC 6 at §86. Put another way, the public authority must assist the court with full and accurate explanations of all facts relevant to the issue the court must decide: *R (Quark Fishing Ltd) v SSFCA* [2002] EWCA Civ 1409 at §50.
2. The underlying principle is that a public authority's objective should not be to win the case at all costs, but to assist the court in its role of ensuring the lawfulness of the decision under challenge, with a view to upholding the rule of law and improving standards in public administration. It must therefore fairly and fully disclose all relevant information, including that which is harmful to its own case. See *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945:

"This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. ... The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why. ... Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

3. The duty's importance "*is impossible to overstate*" and every failure on the part of the executive "*is inimical to the rule of law*": *R (Saha) v Secretary of State for the Home Department (Secretary of State's duty of candour)* [2017] UKUT 17 (IAC) at §§47-48.
4. **Trigger:** The duty "*endures from the beginning to the end of the proceedings*": *R (Bilal Mahmood) v SSHD* [2014] UKUT 439 at §23. But when do "the proceedings" begin?
5. According to TSol's 2010 Guidance¹ (§1.2), the duty applies as soon as the relevant body is aware that someone is likely to test a decision or action affecting them. It applies "*to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and oral submissions*". It is an ongoing duty and must therefore be kept under review as the case progresses: "*For example, if after service of evidence, further relevant information comes to light, that information must be disclosed to the other parties to the proceedings and put before the Court at the earliest possible opportunity*".
6. By contrast, in April 2016 the Lord Chief Justice published a Discussion Paper² which proposed that "clarification" of the duty should be provided by amending CPR PD54A §12 to provide: "*12.2 A defendant should, in its detailed grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted.*" It was suggested that this wording reflects existing case law, although the point was left open in *I v SSHD* [2010] EWCA Civ 727 at §50. No change has yet been made to CPR PD54A.
7. **Documents / information:** The duty is not solely or specifically a duty to disclose documents. As the TSol Guidance notes, the duty is information-based and is not restricted to documents. A public authority must explain its decision-making process, not simply disclose documents created in that process. In particular, it may not suffice to provide "*a pile of undigested documents*", particularly in a document heavy claim, without an explanation of the full significance of a document: *R (Khan)*

¹ Treasury Solicitor's Department, "Guidance on discharging the duty of candour and disclosure in judicial review proceedings" (January 2010).

² "Defendant's duty of candour and disclosure in judicial review proceedings: A discussion paper" (28 April 2016). The paper was written by Cranston and Lewis JJ.

v SSHD [2016] EWCA Civ 416 at §46. Further, the obligation to serve relevant material is not displaced or diminished by the fact that material may be publicly available online: *UB (Sri Lanka) v SSHD* [2017] EWCA Civ 85 at §21.

8. **Relationship with disclosure:** The existence of the duty of candour explains why there is no general duty of disclosure in judicial review proceedings. See CPR PD54A §12.1: “Disclosure is not required unless the court orders otherwise.” This means that standard disclosure under CPR Part 31 does not ordinarily apply. The idea is that standard disclosure would generally be unnecessary because the defendant will in any event have discharged its duty of candour. See e.g. *R v SSHD, ex p Fayed* [1998] 1 WLR 763 at 775 per Lord Woolf MR. Standard disclosure is also viewed as unnecessary since the focus of judicial review is on the lawfulness of the decision under challenge, rather than on determining disputed issues of fact.
9. Disclosure of documents nevertheless has an important role in judicial review.
10. First, the voluntary provision of copies of documents may be a method of discharging the duty of candour: see for example *R (Sustainable Development Capital LLP) v SSBEIS* [2017] EWHC 771 (Admin) at §80.
11. Secondly, disclosure of documents (and not merely a précis in a witness statement) is required where it is necessary for fairly and justly disposing of an issue. This is generally more likely in HRA cases involving issues of proportionality: *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at §§3, 32, 57; *R (Al-Sweady) v SSD* [2009] EWHC 2387 (Admin) at §§24-29.
12. Disclosure may also be needed where there is a “hard-edged” question of fact in dispute, in particular a “jurisdictional” or “precedent” fact such as whether a person is a child for the purposes of entitlement to services under the Children Act 1989. See *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557 at §33 per Lady Hale: “[It is argued that the] only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises... That the remedy is judicial review does not dictate the issue for the court to decide or the way in which it should do so.”

13. Further, where a private law claim is brought as part of a judicial review (as permitted by CPR 54.3(2)), the ordinary CPR Part 7 procedures employed for resolving substantial disputes of fact will apply: *R (MH) v SSHD* [2009] EWHC 2506 (Admin) at §7 (a judicial review challenge to the lawfulness of immigration detention in which a claim for damages for false imprisonment was also pleaded).
14. It is in any event good practice for a public authority to exhibit a document on which it relies as significant to its decision, and a claimant seeking sight of a document whose effect has been summarised in witness evidence does not need to suggest some inaccuracy or incompleteness in the summary – “[i]t is enough that the document itself is the best evidence of what it says”: *Tweed* (cited above) at §4.
15. In *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, Sedley LJ emphasised at §49 that the best evidence rule “is not simply a handy tool in the litigator’s kit [but] a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead.”
16. **Scope of the duty:** A key issue concerns the extent to which the duty of candour requires a public authority to reveal features of the decision-making process which do not bear on the grounds of challenge currently advanced by the claimant, but which could potentially be relied on in support of additional grounds.
17. Some of the older case law suggested that the courts would not expect that once a claimant has been granted permission “he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him”: *Huddleston* (cited above) at p.947 per Parker LJ. Sir John Donaldson MR agreed at p.946: “the grant of [permission] does not constitute a licence to fish for new and hitherto unperceived grounds of complaint”.
18. However, there is a clear tension between the undesirability of allowing a claimant

to “fish” for new grounds of challenge – echoed by Lord Brown’s comment in *Tweed* that even post-HRA “the court should continue to guard against what appear to be merely ‘fishing expeditions’ for adventitious further grounds of challenge” (§56) – and the simple fact that a claimant will often not know the facts that might support a new ground of challenge unless and until the defendant reveals those facts.

19. Perhaps for that reason, the TSol Guidance states that the duty extends to documents/information which will assist the claimant’s case and/or give rise to additional (and otherwise unknown) grounds of challenge, citing *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052. *Hook* in fact addressed a related but distinct point, namely that if the material filed by the defendant does happen to reveal additional grounds, “the court can inquire into them without being bound by the grounds stated in the original statement [of grounds]” (p.1058).
20. *Hook* does not state in terms that there is a duty on the defendant in the first place to file material that reveals additional grounds. However, there is recent support at the highest level for the proposition that the duty of candour includes the need to give “disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground”: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35, [2016] 3 WLR 157 at §183 per Lord Kerr.
21. **Duty of non-participating defendant:** Even where a defendant decides not to take an active part in the proceedings, for example where it considers that an interested party is able to defend the claim, it nevertheless owes a duty to assist the court.
22. In *R (Midcounties Co-Operative Ltd) v Forest of Dean DC* [2015] EWHC 1251 (Admin), the defendant’s grant of planning permission was challenged and it informed the court that while it would not defend the claim due to financial constraints, it did not concede it and supported the developer’s opposition to it. Singh J held that the defendant at least needed to consider whether it had complied with its duty of candour by disclosing all relevant documents, whether the duty required it to file a witness statement to assist the court, whether it should file an acknowledgement of service and summary grounds even if only in outline form to explain the gist of

why it maintained that its decision was lawful, and whether a representative (not necessarily a lawyer) should be present in court at any hearing so the authority knew what was going on and could deal with any points that arose.

23. **Consequences of breach:** A variety of adverse consequences may arise where the duty of candour is breached by a defendant. The court can use its case management powers to remedy the deficiency in information provided by the defendant, for example by ordering it to provide disclosure of documents or further information about its case, or requiring its witnesses to attend for cross-examination. The court could stay proceedings pending such steps, and order indemnity costs: e.g. *R (Al-Sweady) v SSD* [2009] EWHC 1687 (Admin).
24. Lack of candour may allow the court to draw adverse inferences of fact. “[T]he court might simply decide that the [claimant] has made out a prima facie case and that, the authority having produced no sufficient answer, relief should be granted”: *Huddleston* (cited above) at p.947. “If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the [defendant] upon points which remain obscure”: *Quark* (cited above) at §50.
25. Where a defendant fails to file evidence to explain its decision-making process and the reasoning underlying the decision, “[t]he basis for drawing adverse inferences of fact against the [Defendant] will be particularly strong” given the stringent duty of candour: *R (Das) v SSHD* [2014] EWCA Civ 45, [2014] 1 WLR 3538 at §80.

Claimant’s duty of candour

26. **The duty:** It is not only a public authority defendant that owes a duty of candour. A claimant is similarly obliged, throughout the course of a claim for judicial review, to make full and frank disclosure of (a) all relevant facts of which he is aware, including those which are or appear to be adverse to his case, and (b) all such facts as he would have known had appropriate inquiries been made: *Cocks v Thanet DC* [1983] 2 AC 286 at 294G; *R (Khan) v SSHD* [2016] EWCA Civ 416 at §§35-37, 71.

27. **Scope:** The duty may require a claimant: (1) to disclose relevant documents (*Khan*, cited above, §37); (2) to cite adverse authority (*R v SSHD, ex p Li Bin Shi* [1995] COD 135); (3) to identify alternative remedies (*R v Law Society, ex p Bratsky Lesopromyshlenny Complex* [1995] COD 216); (4) to inform the court of other ongoing cases in which the same issues of law have been raised (*R (ICI) v HMRC* [2016] EWHC 279 (Admin) at §21); (5) to point out any relationship between himself and other unsuccessful previous challengers, as well as any issue of delay (*R v Lloyd's of London, ex p Briggs* (1993) 5 Admin LR 698); and (6) to point out any relevant ouster clause (*R v Cornwall County Council, ex p Huntington* [1992] 3 All ER 566 at 576).
28. **Ongoing duty:** The duty is a continuing one. A claimant must reassess the viability and propriety of a challenge in light of the material filed by the defendant, and must keep the court informed about material changes in circumstances that may mean judicial review is no longer required or appropriate: *R (Tshikangu) v Newham LBC* [2001] EWHC 92 (Admin) at §23; *Khan* (cited above) at §48.
29. **Consequences of breach:** If there has been a failure to comply with the duty of candour, permission may be set aside: *Tshikangu* (cited above); *Huntington* (cited above). Alternatively, (1) an injunction may be discharged (*R (MS (A Child)) v SSHD* [2010] EWHC 2400 (Admin) at §1; (2) the court may decline to order costs (*R v Liverpool City Council ex p Filla* [1996] COD 24); (3) relief may be refused (*R v Leeds City Council, ex p Hendry* (1994) 158 LG Rev 621); and (4) wasted costs may be ordered (*R v SSHD, ex p Shahina Begum* [1995] COD 176).

Interested Party's duty of candour

30. The duty of candour applies to all parties to judicial review proceedings, not merely the claimant and the defendant. Thus, for example, in *Belize Alliance of Conservation Non-Government Organisations* (cited above), the interested party developer which was in effect the defendant's partner in the relevant public works project was under "a duty to make candid disclosure to the court" (§87).

Iain Steele, Blackstone Chambers, 6 October 2017