

PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2019

THE DUTY OF CANDOUR AND CO-OPERATION:

CITIZENS UK AND THE SELF-POLICING DUTY

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I: Citizens UK

1. The principles on the application and interpretation of the duty of candour and co-operation which apply in judicial review proceedings are well-established¹. They can be found in case-law stretching back to *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, have been tested in courts at all levels, including the House of Lords, Privy Council and Supreme Court, and were recently summarised in a discussion by the Divisional Court in *R(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 at §9-23.
2. In *Hoareau Singh LJ* emphasised the courts' long-standing insistence in numerous judgments from the Privy Council in *BACONGO*² to the Supreme Court in *Bancoult (No 4)*³ (§17-18) on the distinct role of public authorities who, in judicial review are '*not engaged in ordinary litigation, trying to defend their own private interests..*' but '*in a common enterprise with the court to fulfil the public interest in upholding the rule of law*' (§20). Since that is their role, he explained, public authorities are expected to **assist the court** with full and accurate explanations of all relevant facts, and **co-operate** with it by themselves drawing attention to any defects in their case (§20). The duty is thus not complied with by off-loading large amounts of documentary material on claimants' representatives. Equally, however, Singh LJ referred to a string of judgments from 2005-2016 which between them highlight that the duty of candour and co-operation will also not be complied with if:
 - (1) Public authorities are selective in their disclosure (§21);

¹ See Iain Steele's Paper on Core Principles prepared for this Conference.

² [2004] Env LR 38 at §86

³ [2016] 3 WLR 157 at §183-4

- (2) The language of a witness statement deliberately or unintentionally obscures matters of central relevance, is ambiguous or economical with the truth, or employs 'spin' (§22);
 - (3) The court is misled by the non-disclosure of a material document or fact, or the failure to identify the significance of a particular fact or document (§23).
3. The courts soon found the need to apply these recently re-stated principles in a case which starkly illustrated the kinds of miscarriages of justice which can occur if the duty of candour and co-operation is not complied with. In *R(Citizens UK) v SSHD* [2018] 4 WLR 123 the Court of Appeal found, based on late disclosure made less than three weeks before the appeal hearing, that the High Court had, in the judgment of Soole J in *(Citizens UK) v SSHD* [2017] EWHC 2301, been materially misled in reaching the conclusion that the Secretary of State for the Home Department (SSHHD) had acted lawfully.
4. The *Citizens UK* case concerned the lawfulness of a highly expedited process the SSHHD had set up in October-December 2016 in the aftermath of the demolition of the notorious Jungle in Calais. What became known as the 'expedited process' considered whether unaccompanied asylum seeking children (UASC) in France had rights under the EU's Dublin III Regulation (604/2013) to join family members in the UK. By the time the process was concluded in January 2017, around 500 children had been transferred to the UK to join siblings, aunts and uncles, but a similar number had been refused. Those refused had not been given anything other than one word or phrase reasons for refusal on a spreadsheet e.g. "Family link not accepted".
5. The claimant (CUK) had argued that this together with other aspects of the process meant it was procedurally unfair at common law. In particular CUK argued that the fact that UASC were not told of the reasons why claims were to be rejected either before or after the decision meant that mistakes could not be identified and corrected.
6. In their defence of the claim the SSHHD produced, in April 2017, witness statements from two senior officials, Gary Cook and Julia Farman, who had overall responsibility for designing and implementing the process. In those statements the senior officials stated that more detailed reasons had not been given to the children because of requirements of

the French authorities and due to time pressures in the operation. The statements were not accompanied by any contemporaneous email correspondence, internal minutes or documents. When asked repeatedly to disclose the underlying documentation, the SSHD refused, claiming that the witness statements alone were sufficient to discharge the duty of candour.

7. In his 18 September 2017 judgment rejecting the claim of procedural unfairness Soole J (see §281) stated that he was particularly troubled by the sparse reasons, but that:

“...The non-communication [of adverse decisions] was a requirement of the French authorities; and the terse spreadsheet information was a consequence of that requirement and of the pressures of the operation.”

8. CUK appealed. Skeletons were exchanged between 2017 and 2018.
9. On 25 May 2018, less than three weeks before the hearing of the appeal, the SSHD applied to lodge new evidence which disclosed a chain of internal e-mail correspondence and correspondence with the French authorities from December 2016. Those e-mails showed that the French authorities had repeatedly sought more detailed reasons for the adverse decisions, complaining that without them the children could not effectively seek reconsideration of them (see *R(Citizens UK) v SSHD* [2018] 4 WLR 123 “*Citizens UK CA*” at §154-9), but that the SSHD’s internal legal department Home Office Legal Advisers (HOLA) had advised senior officials, including the authors of the key witness statements Mr Cook and Ms Farman, that detailed reasons should be withheld from the French authorities and the children **in order to avoid a legal challenge**.
10. Thus the e-mail correspondence showed that:
 - (1) The SSHD had withheld reasons from 500 children refused family reunion in order to avoid the legal challenge which is one of the key purposes for which reasons must be provided under the common law (see *R v SSHD ex parte Doody* [1984] 1 AC 531; *Citizens UK CA* at §91)
 - (2) The witness evidence of Mr Cook and Ms Farman was seriously misleading;
 - (3) Soole J’s judgment was, in its critical conclusion, based on that misleading evidence.

11. CUK's appeal was allowed on procedural fairness grounds (see *Citizens UK CA* at §85-102). As for the duty of candour, Singh LJ set out the principles summarised in *Hoareau* (see §105-6) and transcribed both the misleading evidence (§107-124) and key sections of the new evidence and newly disclosed e-mail correspondence (§125-167). All three judges gave judgments on the SSHD's breach of the duty of candour in the following terms.

Per Singh LJ

“168 In my view, there was a serious breach of the duty of candour and co-operation in the present proceedings. An incomplete picture was left in the mind of the reasonable reader, including Soole J, as a result of the evidence that was filed below. I dare say this was not deliberate. ...Nevertheless, the effect, even if it was unintentional, was that significant evidence was not brought to the attention of the High Court.

169 Although one of the reasons which has been given to explain this is that there was time pressure, I note that at no time, either before Soole J gave judgment in September 2017 (having heard the case in May) or subsequently until May 2018 was there any attempt made on behalf of the Secretary of State to file further evidence. That had to be done with only a few weeks to go before the hearing of these appeals in the middle of June. It also seems to have been done only once certain matters had become known (by chance it would seem) in an unrelated case: FH in the UT in early May 2018. In that sense it is purely by chance that this court has now come to learn of these important matters, including what was said in contemporaneous e-mails in December 2016 and January 2017.

170. The most serious omission, in my view, was the failure by those presenting evidence on behalf of the Secretary of State to inform the High Court that the reason why the reasons for an adverse decision in the expedited process were “sparse” (to use Soole J’s phrase) was not because of the urgency nor because the French authorities demanded that (as he thought and said in his judgment) but because the British authorities did not wish to give more reasons and that this was because of a perceived risk of legal challenge to the decisions.

171 As I have said earlier in reviewing the main authorities on the duty to act fairly, one of the rationales for that duty is precisely to permit a person to know whether they have any basis for mounting a legal challenge to a decision; and to enable a court or tribunal to assess whether a decision is wrong. These are elementary but fundamental features of the rule of law. They explain why reasons for a decision should be given; they are not reasons for why they should not be given. ...

Per Asplin LJ

178....I too consider the breach of the duty of candour in this case, whilst not deliberate, to have been very serious. It led to Soole J being materially misled. Furthermore, the relevant evidence only came to light by chance as a result of other proceedings. It seems to me that it should be borne in mind that the duty is a continuing one which must be addressed not only when first responding to a judicial review but throughout that litigation.

Per Hickinbottom LJ

187.the Secretary of State breached her duty of candour to and co-operation with the court in failing to inform the High Court that at least one of the reasons why the reasons for a negative decision were thin was because of the perceived risk of legal challenge to such a decision. I need not refer again to the authorities cited by Singh LJ. As Laws LJ put it in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, para 50: “there is ... a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.”

188 Whilst on the evidence I am not satisfied that the breach here was deliberate, in my view it was nevertheless a serious breach; and clearly led to Soole J being misled, and materially so. Indeed, given the procedural unfairness that this court has found as a result of the failure to give adequate reasons in respect of negative decisions under the expedited process, the breach of the duty of candour in this regard can be seen in a particularly stark light.

189 In my respectful view, the judgments of Singh LJ in *Hoareau* (see para 105 above) and this case serve as a timely reminder to public bodies as to both the scope and importance of the duty of candour to the court when they are responding to a judicial review.

II: AM and others, Help Refugees

12. The misleading evidence of Mr Cook and Ms Farman adduced in *Citizens UK* had also been relied on by the SSHD in a range of other cases concerning the lawfulness of the SSHD’s conduct in the aftermath of the Calais Jungle demolition. Indeed, as explained further below, it was an accidental disclosure by the SSHD in a related individual claim in the Upper Tribunal *FH* that ultimately led to the chain of e-mails referred to above being disclosed in the Court of Appeal. The Court’s findings of breach of the duty of candour and procedural unfairness in *Citizens UK CA* thus led in addition to the appeal being partially allowed in *R(Help Refugees) v SSHD* [2018] 4 WLR 168 (§131-134), the SSHD’s appeal being dismissed in *R(AM and others) v SSHD* [2019] 1 All ER 455 at §80-81 and 86, and a finding of breach of the duty of candour in the case of *R(ZS) v SSHD* [2019] EWHC 75 (see §169).

III: A self-policing duty

13. In *Hoareau* the Divisional Court referred to the self-policing nature of the duty of candour (§18). Since the duty is self-policing (§18 and *Citizens UK CA* at §106):

“A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.”

14. One of the concerning features of the breach of the duty of candour in *Citizens UK* was the manner in which it was ultimately corrected. As Singh LJ and Asplin LJ highlighted, the disclosure did not come about as a result of any self-policing by the SSHD in the *Citizens UK* claim or in the related and contemporaneous *AM and others* claims in the Tribunal. On the contrary, requests for further information and disclosure were repeatedly rebuffed (see *Citizens UK CA* at §128). It was instead an accidental disclosure of an e-mail from the French authorities produced by the SSHD in a later related case in the Tribunal, *FH*, which led the claimant in that case to ask the questions which led to the important disclosures described above. It was CUK's express submission in *Citizens UK* that had that accidental disclosure not occurred in *FH*, it is unlikely the disclosures would ever have been made. The Court of Appeal accepted that it was '*purely by chance that this court has come to learn of these important matters*' (§169).

15. It is still not clear how the misleading evidence came to be given and maintained for so long in *Citizens UK*, and all the related cases. The Court of Appeal rejected the SSHD's time pressure explanation noting the amount of time that had passed both before and after the judgment in the High Court (see *Citizens UK CA* §169 and §178); no other explanation has ever been advanced. It seems unlikely, however, that the misleading evidence could have been produced and remained uncorrected for over a year between April 2017 and May 2018 had paragraphs 1.3, 1.5 and 2.2-2.3 of the Treasury Solicitor's Guidance of January 2010⁴ (produced after another serious breach of the duty of candour in *R(Al Sweady) v Ministry of Defence* [2009] EWHC 2387) been fully complied with. Those paragraphs of the Guidance emphasise the heavy duties on solicitors and Counsel to take charge of the process of disclosure and not simply to leave it to the client, including in judicial review proceedings. The Guidance states (§1.3):

"The best way to fulfil this duty is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance – or even potential relevance – for himself, so either the client must send all the files to the solicitor or the solicitor must visit the client to review the files or take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable."

16. As for Counsel, s/he must (see §2.3):

⁴ Treasury Solicitor's Department, "Guidance on discharging the duty of candour and disclosure in judicial review proceedings" (January 2010)

“assist in the review of the documents for relevance, issues of privilege, public interest immunity and redaction.”

17. If the SSHD’s solicitors and Counsel had followed this guidance and taken charge of the critical e-mail correspondence which was ultimately disclosed in *Citizens UK* in May 2018, or the legal advice from HOLA which underlay it, it is difficult to see how the misleading evidence which led to the breach of the duty of candour could have been adduced.

IV: A relationship of trust

18. The foundation of the duty of candour and co-operation is the assumed partnership between the courts and public authority defendants in upholding the rule of law (see *Huddleston*). That partnership depends on trust, as the self-policing nature of the duty emphasises. Serious breaches of the duty of candour such as those which occurred in *Citizens UK* amount to a serious breach of the trust placed in public authorities, and have a corrosive effect. As Girvan J stated in the *Matter of an Application by Brenda Downes for Judicial Review* [2006] NIQB 77 at §31 (see *Hoareau* at §22):

“... Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraint on matters such as discovery [in England and Wales of course disclosure now] and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications.”

19. The loss of trust may not be the only consequence of conduct like that in *Citizens UK*. In the wake of the breaches of the duty of candour and co-operation which occurred in relation to the initial Hillsborough inquests, a proposal has been made for an Act of Parliament codifying the duty of candour on public authorities, *The Public Authority (Accountability) Bill*, with criminal penalties for non-compliance. This only goes to emphasise the importance of public authorities and those representing them ensuring that the high duties of candour and co-operation imposed on them are fully complied with, so that miscarriages of justice do not occur and the court’s trust is not misplaced.

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