Judicial Review: Disclosure and Evidence

Evidence and Cross Examination in JR

Introduction

1.1 CPR 8.6(2) applies to JR claims. It says that "the court may require or permit a party to give oral evidence at the hearing, and cross examination may be permitted."

1.2 But factual disputes do not normally need to be resolved by the court in JR claims. Where, for example, a local authority reaches a decision on an applicant's application for interim accommodation as a homeless person there is rarely any dispute about the facts. The dispute will be about the rationality of the decision that the local authority has made, or the manner in which it has applied the law to the facts, or the way it has interpreted or applied the law. As much can be said for the large majority of JR claims - the facts will be straightforward and not capable of dispute. Witness evidence is likely to be limited to written statements of anyone with anything relevant to say.

1.3 There are however a number of instances in which the court hearing a JR will need to examine the disputed facts underlying the claim closely, and will need to allow live evidence and cross examination to do so.

1.4 Before we consider that issue, it is worth looking in a little detail at the circumstances where even *written* evidence is required or permitted from witnesses in JR claims.

Written evidence

1.5 In general, any witness evidence in JR:

a. should give relevant evidence to the court in the witness' own words;
b. should not to allow witnesses to make legal arguments drafted for them by their lawyers (see *William v Wandsworth LBC* [2006] EWCA Civ 535:

"witness statements are a proper vehicle for relevant and admissible evidence going to the issue before the court, and for nothing else. Argument is for advocates. Innuendo has no place at all.");

c. should avoid inappropriate comment or " an aggressively justificatory tone";
d. should not to overburden the court with papers so large as to constitute a "grotesque waste of trees and public money"; and
e. need normally only deal with the matters raised by the particular criticism(s) made by the claimant on the claim.

1.6 Expert evidence is relatively rare, but sometimes permitted. This will happen particularly in cases where the court is looking at the proportionality of a decision for HRA purposes. When it might be appropriate in practice?

a. where the case raises issues of professional or technical decision making – whether detention of a patient is proportionate for example;
b. where an assertion is capable of being rebutted by an expert opinion – a local authority says a person lacks capacity to make an application to it; evidence from a consultant going to that point likely to assist the court; or
c. where a question of justification of discrimination under Art 14 arises – for example (*R(Watkins-Singh) v Aberdare Girls High School Governors* [2008] EWHC 1865) where the court found the Claimant's evidence of the importance of the Sikh kara bangle to be useful and relevant; *R (Middlebrook Mushrooms) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 – the court held that it was not restricted in considering only matters that were in evidence before the original decision maker.

1.7 What about evidence of matters arising after the event? Nothing wrong with that, in certain circumstances at least. *R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584 sets out the main criteria for the admission of evidence:

a. to show what documents were before the decision maker at the time;
b. to assist in determining a fact going to jurisdiction, or to whether essential procedural requirements were met;
c. where evidence essential to prove misconduct – bias, fraud, perjury etc.

1.8 In some cases the court will want to focus on the up to date position, and evidence of that will be essential to allow a proper determination of the issues. *R (Limbuela) v SSHD* [2005] UKHL 66 is a good example – there the claimants were arguing that the deprivation of asylum support left them in a state such as to contravene Arts 3 and 8 ECHR. It would have been wrong for the court to simply look at whether such evidence existed at the time the decision was initially made, or the claim lodged (or any other earlier date). The question was whether the argument could be made out at the time the matter came before the court.

1.9 Sometimes too material which was not before a decision maker, but which would be if the case was remitted, will be adduced. One relevance of this is that – as JR is a discretionary remedy – the court might consider that even though the earlier decision was not lawful, a subsequent decision would be sure to be, in the light of the evidence now to hand. On the other hand, that new evidence might go the other way, as in *R v Inner London North Coroner ex parte Touche* [2001] QB 1206 – the original coroner's decision was correct but the coroner ought to have subsequently changed his mind on the information then brought to his attention by the claimant.

1.10 It is common to see a statement filed in a JR by the decision maker Often this is an attempt (however unwitting) to shore up the decision, perhaps by giving better or more detailed reasons for it. But in *R v Westminster CC ex parte Ermakov* [1996] 2 All ER 302 the CA held that the usual order in a case where reasons were not adequately stated would be one requiring the authority to consider the matter on a further review. As to the use of explanatory statements filed after the making of the original review, in an attempt to better explain the reasons for the decision, the court said that if such statements serve to <u>elucidate or clarify</u> the reasons in the decision letter than they will be admissible; if the statement is an attempt to <u>add to or alter</u> those reasons then they will not be.

<u>Live evidence and cross examination</u>

1.11 In general this will be only permitted where the justice of the case demands it. Of course this might be in a range of circumstances, but most likely where:

a. there is a conflict of evidence that the court has to resolve (although this can still be done on the paper evidence if the facts permit);
b. where the court has to determine a precedent fact in order to see whether the decision was lawful;
c. where the court has to reach its own view on the merits.

1.12 In just about every situation the courts have urged caution, and made it clear that live evidence and cross examination ought to be the exception to the rule. But it is clear that in some areas this kind of evidence is becoming more common.

Where Convention rights are at stake

1.13 First, cases involving Convention rights. It is important to distinguish between broad judgments whose outcome could be overruled only on grounds of irrationality and "hard-edged" questions where there is no room for legitimate disagreement. In *R(Al-Sweady) v SSHD* [2009] EWHC 2387 the court gave significant guidance as to the use of cross examination in JRs. This was a case arising out of the treatment of Iraqi detainees by British soldiers in Iraq; the success of the claim that Mr Al-Sweady's Article 2 rights had been infringed depended on proof that he was killed after he had been taken to their base at Camp Abu Najiin - and not on the battlefield. It was said that:

> "In our view, it was necessary to allow cross-examination of makers of witness statements on those "hard-edged" questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its Articles."

1.14 In the absence of agreement between the parties as to whether there ought to be cross examination of witnesses, an application should be made as early as possible. And, as the Court noted in *Al-Sweady*, an important consequence of the orders for cross-examination was that disclosure was needed to enable effective and proper cross-examination to take place. See Kate Stone's paper for more on this issue.

Precedent fact cases

1.15 This is another 'growth area' so far as the courts are concerned, particularly in relation to the question of the assessment of age of minors. Here we are looking at cases where there is a fact, to be determined by the authority or decision maker, on which the legality of the decision hinges. So questions of whether

a. a person is an "illegal entrant" able to thereby be removed by the Home Office, or
b. whether a disabled adult has the requisite capacity to apply to a local authority as homeless, or
c. whether an applicant for support and accommodation under s20 CA 1989 is a child or not

are such that the court can – after having identified such a question, simply answer it itself. If need be it can consider evidence obtained after the event which the decision maker did not have or could not have obtained.

1.16 So in *R v SSHD ex parte Khawaja* [1984] AC 74 – a case about whether the claimant was an "illegal entrant" - it was said that the existence of the power of removal depended upon that fact. It was not enough that an immigration officer had 'reasonable grounds' for believing the person to be an illegal entrant.

1.17 More recently, the Supreme Court held in *R (A) v Croydon London Borough Council* [2009] 1 WLR 2557 that the question whether a person is or is not a child is a fact precedent to the exercise of the local authority's powers under the 1989 Act and on that ground also is a question for the courts. If such a decision remains in dispute after its initial determination by the local authority, it is for the court to decide by JR. This, said the CA in the later case of R(FZ) v Croydon LBC [2011] means that the court hearing the JR claim will often have to determine the fact of a claimant's age by hearing and adjudicating upon oral evidence, which obviously may be an extensive and time consuming process.

1.18 The relevant rules now allow for the transfer of many contested JRs on age assessment cases to be heard in the Upper Tribunal rather than the Admin Court. See section 31A(3) of the Senior Courts Act 1981, as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007. In *FZ* the CA thought this kind of transfer likely to be appropriate because "the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims". If an age assessment judicial review claim is started in the Administrative Court, the Administrative Court will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal.

1.19 In age assessment cases recently there has been some discussion as to who ought to bear the burden of proof. The law is not entirely clear as present. One argument is that for the purpose of determining the age of a young person seeking to exercise his or her rights under the 1989 Act, there is no legislative provision placing the burden of proof on him or her. But after court proceedings have started – and when it is the court which has to assess the claimant's age is not so clear is still to be definitively decided.

1.20 In R(*MC) v Liverpool City Council* [2010] EWHC 2211 Langstaff J said at that he was not choosing between one of two alternatives, but deciding where within a possible range the claimant's true age was. So he did not think he had to do so by reference to a burden of proof falling on one party or the other.

1.21 On the other hand in *R (on the application of CJ) v Cardiff City Council* [2011] EWHC 23 (Admin), Ouseley J acknowledged at [126] that he "had intended not to decide this case by what could be an unsatisfactory resort to the burden of proof". But because the decision was a close one, he concluded that he had to decide who bore the burden of proof. His conclusion was that:

> "In my view it is for the Claimant to show that he is or was under 18 at the time that he asserts a duty was owed to him as a child. First, in judicial review proceedings it is for the Claimant to show that the public authority has erred in its duties. Second, but obviously related, it is the Claimant who is asserting that the duty is owed; the authority is not asserting a power to

do something. It is not crucial but supportive nonetheless that the readier means of knowledge lies with the Claimant on this issue."

1.22 And in the recent case of *R(Y) v Hillingdon LBC* [2011] EWHC 1477 Keith J was of a similar mind:

> "For my part, I am sure that when the court is having to assess a youngster's age for the purpose of determining whether and for how long the youngster is entitled to benefits under the 1989 Act, the concept of the burden of proof is entirely appropriate, and that the burden of proving his or her age is on the youngster. Although it is for the local authority to prove the facts which it needs to establish in order to give it such a power as it is seeking to exercise, it is not for the local authority to disprove the facts asserted by others as the basis for the duty which it is alleged the local authority owes to them. That does not mean that youngsters like Y have to prove their precise date of birth. There may be cases in which the youngster will not know their date of birth, and they may not have any documents showing what it was. In such a case, the court will give the claimant a presumed date of birth in the light of what the claimant proves his or her approximate age is, though in this case Y happens to claim that she knows what her actual date of birth was."

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Disclosure and JR

Introduction: the duty of candour

2.1. Practitioners will be aware that the usual rules of disclosure under CPR Part 31 are not generally applicable in JR proceedings.

2.2. The parties are, however, required to help the court further the overriding objective (CPR r1.3) and also have a duty of candour with regard to their conduct of the proceedings.

2.3. Although this paper will concentrate on the defendant's duty of candour it is worth noting that the duty falls upon the claimant as well. This includes a duty to draw all relevant pre-action correspondence to the attention of the permission judge so that the court is not misled: *R(F) v Head Teacher of Addington High School* [2003] EWHC 228 (Admin). It also includes a duty to inform the court of any "material change in circumstances" during the course of the litigation: *R (Tshikangu) v Newham London Borough Council* [2001] EWHC Admin 92.

2.4. The courts have devoted more attention to the defendant's duty of candour. The rationale behind this duty is contained within the judgment of Sir John Donaldson MR in *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941:

> [the development of the remedy of judicial review] 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 highest standards of public administration [at 945c]

2.5. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 Laws LJ noted that there was no general duty of disclosure in JR but observed as follows (at [50]):

> ..there is – of course – 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 […] 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 Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G-1062A

Disclosure: the historical position

2.6. Prior to 1978 the courts had no power to order disclosure in judicial review proceedings.

2.7. The provisions of RSC Ord 53 (the immediate predecessor of the present framework) enabled the parties to apply to the court for orders for disclosure. In practice the courts were sparing in the grant of disclosure orders, relying on public authorities to fulfil the duty of candour.

2.8. This position is continued under the CPR regime. CPR r.54 makes no mention of disclosure. Paragraph 12.1 of the Practice Direction provides as follows:

> Disclosure is not required unless the court orders otherwise.

2.9. Under the CPR an application for specific disclosure will be determined in accordance with Part 31: see r31.12. The provisions of Part 31 will be relevant in any JR case where disclosure is ordered.

2.10. The courts have rejected applications for disclosure in JR cases on the basis that they amount to a 'fishing expedition' or that disclosure is not necessary to deal justly with the issues. The general approach has been to reject applications for disclosure to go behind or controvert a defendant's evidence unless there is material before the court to suggest it may be inaccurate: see *R v Secretary of State for the Environment ex p Islington LBC and London Lesbian and Gay Centre* [1992] C.O.D. 67 and *R v Secretary of State for*

Foreign and Commonwealth Affairs ex p World Development Movement Ltd [1995] 1 WLR 386.

Tweed

2.11. The issue of disclosure in JR proceedings fell to be considered by the House of Lords in 2006 in the case of *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53.

2.12. Central to the case was the proportionality or otherwise of the defendant's interference with Mr Tweed's right to freedom of expression under article 10 ECHR. Against that background the HL had to consider whether it was appropriate to order full disclosure of a number of documents which had merely been summarised in the defendant's evidence.

2.13. Lord Bingham's judgment is helpful in putting the issue of disclosure and JR in context:

> 2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time–consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.

2.14. He went on to address the question of disclosure applications made in cases involving Convention rights:

> 3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. Such applications 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 even in these cases, orders for disclosure should not be automatic. The test will always be whether, in thegiven case, disclosure appears to be necessary in order to resolve the matter fairly and justly.

2.15. Finally Lord Bingham made some observations regarding procedure:

> 4. 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. Any summary, however conscientiously and skillfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.

2.16. In a similar vein Lord Carswell noted that ordinarily the approach to disclosure in judicial review was 'more narrowly confined' than in ordinary claims. He observed at [29] that "*the courts had developed a restrictive rule, whereby they held that 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 it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence*."

2.17. He went on at [32]:

> I do consider, however, that it would now be desirable to substitute for the rules hitherto applied 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. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require […] rather than asking for an order for general disclosure.

2.18. Thus the House of Lords signalled a departure from the previous restrictive regime, particularly in cases where Convention rights were at stake. Their Lordships were careful, however, not to suggest that disclosure should become routine even in cases where human rights were in issue.

Al-Sweady

2.19. Their Lordships' approach was further developed in the recent case of *R (Al-Sweady and others) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

2.20. Practitioners will no doubt be familiar with the facts of this case, in which the claimants alleged that British troops had ill-treated or killed a number of Iraqis whom they had taken prisoner. The claim was founded on alleged breaches of articles 2, 3 and 5 of the Convention.

2.21. Procedurally the claim was unusual because of the need for cross-examination of a number of witnesses and also the need for disclosure of what Scott Baker LJ described as a 'vast number of documents and witness statements'. As a result of serious ongoing failures in relation to disclosure the Secretary of State was eventually driven to concede the claimants' claims.

2.22. Despite the fact that the claim had been stayed, the court considered it appropriate to deliver a judgment in which it made a number of significant observations about disclosure:

i. The duty of disclosure was heightened by the fact that the allegations concerned some of the most important and basic rights under the ECHR [25];
ii. Where the court in a JR application was involved in fact-finding on issues crucial to the outcome of the case the approach to disclosure should be similar to that in an ordinary Queens Bench action [27];
iii. Practitioners should carefully scrutinise JR claims to ascertain whether there is any requirement for disclosure [29];
iv. Courts should not be reluctant to make orders for disclosure in suitable cases [29].

2.23. In a separate judgment in the same litigation (*R(Al-Sweady) v Secretary of State for* Defence [2009] EWHC 1687) the court considered the related issue of public interest immunity (PII), with particular regard to the redaction of documents. It noted the 'lamentable history' of PII applications in the litigation and emphasised that 'the complete integrity' of PII certificates and schedules is essential in order that the courts can have confidence in them [45].

2.24. Following *R v Chief Constable of West Midlands ex p Wiley* [1995] 1 AC 274 and *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth* Affairs [2009] EWHC 152 the four relevant questions to be considered by the court on a PII application were as follows [34]:

a. Is there a public interest in bringing the redacted paragraph into the public domain?
b. Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest?
c. Can the real risk of serious harm to national security be protected by other methods or more limited disclosure?
d. If the alternatives are insufficient, where does the balance of the public interest lie?

Treasury Solicitor's Guidance

2.25. As a result of the difficulties presented by *Al-Sweady* and the *Binyam Mohamed* litigation in relation to disclosure the Treasury Solicitor's Department published a document entitled *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review proceedings* in January 2010. It is available online at http://www.tsol.gov.uk/Publications/services.htm.

2.26. In a letter to the Attorney-General introducing the guidance the HM Procurator Paul Jenkins QC described its purpose as follows:

> The purpose of the guidance is to set out the law and standards applicable in discharging the duty of candour and in giving disclosure, where relevant, in judicial review proceedings; to give guidance on the procedures which should be followed in order to meet those standards, and to identify where responsibility for each element of the disclosure process rests in any particular case.

2.27. The guidance notes that in most cases it is the duty of candour which will be in issue and which must be fulfilled (p5). It indicates that 'a public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration' (p1).

2.28. The following points are made about the duty of candour:

- It is a 'weighty responsibility' (p2)
- It is information-based and not restricted to documents (p2)
- It applies to every stage of proceedings (p2)
- It is a continuous duty (p3)

2.29. The guidance goes on to deal with obligations relating to disclosure (section 1), roles and responsibilities (section 2) the search for documents (section 3), review of documentation (section 4), record-keeping (section 5), the disclosure statement (section 6), production and inspection (section 7) and disclosure of electronic documents (section 8).

2.30. PII and redaction of documents is considered within section 4.

2.31. The guidance does not apply to Data Protection Act or Freedom of Information Act requests for information. As practitioners will be aware these can be fruitful sources of relevant information for JR claims.

Applications for disclosure

2.32. The disclosure provisions of TSol's guidance will be most readily applicable to cases like *Al-Sweady* which involve vast numbers of documents and a significant number of government departments and agencies. However, the sections which deal with the duty of candour may prove useful when seeking documentation from a defendant.

2.33. Where possible disclosure applications should be targeted and refer to particular documents or classes of documents since it is likely to be easier to persuade the court that such disclosure is necessary in order to resolve the case justly.

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