The Duty of Candour and Disclosure in Judicial Review

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29 October 2007

Duty of Candour

1. The Claimant is subject to an obligation to make full and frank disclosure when making a claim for judicial review, which is a continuing duty:

> "litigants and lawyers are under a **clear and well-known duty to inform the court of all material facts known to them**. That duty does not stop when proceedings are instituted. It continues until the decision is made by the Court; indeed, it continues after the decision is made without notice, if the applicant discovers that the facts placed before the Court were inaccurate or incomplete, or if there is a material change in circumstances while the proceedings continue without notice to the other side" (per Stanley Burnton J in *R (Tshikangu) v Newham LBC* [2001] EWHC Admin 92) (emphasis added)

2. The Defendant is also under a duty of candour – to make full and frank disclosure of material relevant to the decision under challenge.

3. In *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, 945g Sir John Donaldson referred to judicial review as

> "**a process which falls to be conducted with all the cards face upwards on the table** and [where] the vast majority of the cards will start in the [public] authority's hands." (emphasis added)

4. Lord Justice Parker explained that the Defendant

> "should set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge."

5. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 Laws LJ stated:

> "[Counsel] submits, correctly, that there is no duty of general disclosure in judicial review proceedings. However, 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 which the court must decide" (at [50])

6. In *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 at [86] Lord Walker stated:

> "It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A [Defendant] authority owes a duty to the court to cooperate and to make candid disclosure, by way of [witness statement], of all the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

7. In *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, 775C Lord Woolf MR explained the relationship between the duty of candour and disclosure:

> "On an application for judicial review there is usually no [disclosure] because [disclosure] should be unnecessary because it is the obligation of the [Defendant] public authority in its evidence to make frank disclosure to the court of its decision making process"

8. That view may come to be reconsidered after the most recent developments in the law of Disclosure.

Disclosure

9. Definition. CPR 31.2 states as follows:

> **Meaning of disclosure**
>
> **31.2 A party discloses a document by stating that the document exists or has existed**

10. Why does it matter? CPR 31.3 gives parties a right to inspect a document which has been disclosed, except where:

(1) The document is no longer in the control of the party who disclosed it;

(2) The party disclosing the document has a right or duty to withhold inspection of it; or

(3) A party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under rule 31.6(b) and states in his disclosure statement that inspection of those documents will not be permitted because disproportionate.

11. Not Required unless Ordered. Practice Direction 54 paragraph 12.1 clearly states:

> **Disclosure is not required unless the court orders otherwise.**

12. The guiding principles are general. All the rules should be applied "with the overriding objective of enabling the court to deal with cases justly": CPR r1.1.

13. This includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense

(c) dealing with the case in ways which are proportionate…

Different Types of Disclosure

14. The default form of disclosure is "Standard Disclosure" : CPR 31.5(1).

An order to give disclosure is an order to give standard disclosure unless the court directs otherwise

15. What is Standard Disclosure?

Standard disclosure – what documents are to be disclosed

31.6 Standard disclosure requires a party to disclose only -

(a) the documents on which he relies; and

(b) the documents which –
(i) adversely affect his own case;
(ii) adversely affect another party's case; or
(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

16. Specific Disclosure/Inspection

Specific disclosure or inspection

31.12 (1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2).

(Rule 31.3(2) allows a party to state in his disclosure statement that he will not permit inspection of a document on the grounds that it would be disproportionate to do so)

17. Documents referred to in Grounds/Statements.

31.14 (1) A party may inspect a document mentioned in –
(a) a statement of case;
(b) a witness statement;

(c) a witness summary; or

(d) an affidavit…

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

(Rule 35(10)(4) makes provision in relation to instructions referred to in an expert's report.)

The Previous Law

18. Under RSC Ord 24 r13 the test for deciding what if any disclosure should be ordered was the question: was it "necessary either for disposing fairly of the cause or matter or for saving costs?"

19. Disclosure was rare in judicial review cases. The court would not order disclosure to permit a Claimant to go behind a Defendant's statement in order to challenge it, unless there was some material before the court that suggested that the Defendant's statement was inaccurate, misleading, or incomplete in a material respect: *R v Secretary of State for the Environment, Ex parte Islington LBC* [1992] COD 67, cited in *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement* [1995] 1 WLR 386, 396 per Rose LJ:

> "it was common ground that in judicial review proceedings general discovery is not available, as it is in a writ action… that an application can be made under RSC O.24 r.3, which by virtue of RSC O.24 r.8 will be refused if discovery is not necessary for disposing of the case fairly, and that the judgments of the Court of Appeal in *R v Secretary of State for the Environment, Ex parte Islington LBC… are pertinent…*"

20. The *Islington* case contained the following statement of principle:

> "In *R v Secretary of State for the Home Department, Ex parte Harrison*… this court accepted two submission of Mr Laws, which are referred to as his 'narrower argument' and his 'wider argument'. The wider argument is stated to have been that **an applicant is not entitled to go behind an affidavit in order to seek to ascertain whether it is correct or not unless there is some material available outside that contained in the affidavit to suggest that in some material respect the affidavit is not genuine. Without some prima facie case for suggesting that the affidavit is in some respects incorrect it is improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit.** With that I would, in general, agree – and indeed the decision binds us. But I would add the qualification that **if the affidavit only deals partially, and not sufficiently adequately, with an issue it may be appropriate to order discovery to supplement the affidavit, rather than to challenge its accuracy. That must depend on the nature of the issue**." (per Dillon LJ) (emphasis added)

21. In the same case McCowan LJ said:

> "The second matter which emerges from the authorities is that unless the applicant in judicial review is in a position to assert that the evidence relied on by a minister is false, or at least inaccurate, it is inappropriate to grant discovery in order to allow the applicant to check the accuracy of the evidence in question."

22. The court therefore refused to go behind affidavits and order disclosure of departmental minutes. The court required cogent grounds to support a contention that a Defendant's statement is inaccurate, misleading or incomplete.

A New Approach ?

23. That approach changed with the recent decision of *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650.

24. The House of Lords has now stated that the presumption against disclosure at least in cases involving proportionality is no longer readily applicable.

25. The Claimant was challenging a determination of the Defendant to impose certain conditions on a procession by a local Orange lodge to take place in a predominantly Catholic town on Easter Day 2004, alleging that the conditions were a disproportionate interference with his rights under articles 9 (Freedom of thought, conscience and religion), 10 (Freedom of expression) and 11 (Freedom of association) of the ECHR. The court assumed that all three articles were engaged, the relevant point being that under each article the acts of the Commission in imposing restrictions must be proportionate.

26. The Commission decided to confine the parade to a very short stretch of road outside the frontage of the Orange hall, which the members regarded as very little different to a complete ban on parading.

27. The Claimant sought specific disclosure of certain documents which had been summarized by the Chairman of the Commission, arguing that disclosure was necessary for fairly determining the proportionality issues. In particular disclosure was sought of five documents mentioned and summarized in Sir Anthony Holland's affidavit, most importantly two situation reports from the

Commission's authorized officers recording the views of a variety of people in the community about the proposed march.

28. At first instance Girvan J had held that disclosure of the five documents was necessary, because proportionality was at issue.

29. However the Court of Appeal in Northern Ireland allowed the appeal on the ground that it was premature to require disclosure until the validity of the relevant rule of procedure[1] being challenged had been determined.

30. The test for proportionality is the familiar *de Freitas* test approved in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, ie whether:

(1) The legislative objective is sufficiently important to justify limiting a fundamental right;

(2) The measures designed to meet the legislative objective are rationally connected to it; and

(3) The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

31. Lord Carswell noted that "[a]long with the concept of proportionality goes that of a margin of discretion, frequently referred to as deference, or, perhaps more aptly, latitude". He went on to approve the following statement of principle:

[1] Rule 3.3 stated "All evidence provided to the commission, both oral and written, will be treated as confidential and only for the use of the commission, those employed by the commission and authorised officers. The commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision."

> "Hand in hand with proportionality principles is a concept of 'latitude' which recognizes that the court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi-principle'. The latitude connotes the degree of deference by [a] court to [a] public body."

32. The House of Lords held that disclosure, initially to a judge, was necessary. He would hear submissions on redaction, if relevant. If there were issues of public interest immunity remaining, they would be ventilated at that point.

33. Lord Carswell was persuaded by the argument that, although the duty of candour had been fulfilled by the adduction of summaries of the police report and other documents,

> "it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary" [39]

34. The previous rule only required disclosure where there is a *prima facie* case for suggesting that the material relied upon by the deciding authority was in some respects incorrect or inadequate. Lord Carswell stated that:

> "…it would now be desirable to substitute for the rules hitherto **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." (emphasis added)

35. Lord Brown opined that:

> "disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge…I share Lord Carswell's… view that **the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered**…" (emphasis added)

<u>How often will disclosure be ordered?</u>

36. Lord Bingham expressed the following view:

> "2… [Applications for judicial review] characteristically, raise an issue of law, the facts being common ground or relevant only to how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> 3 In the minority of judicial review applications in which the precise facts are significant, procedures exist… 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 the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly**." [2] - [3] (emphasis added)

37. Lord Carswell stated that:

> "[The need for disclosure] 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." [32] (emphasis added)

38. Lord Brown commented as follows:

> "In my judgment **disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases**, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge…
>
> On this approach **the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality challenges, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker** (a fortiori the main documents underlying decisions challenged on the ground that they violate an *unqualified* Convention right, for example under article 3.) " [56] – [57] (emphasis added)

39. Thus the rule that disclosure would only be ordered when there was a prima facie case of inaccuracy against the Defendant's evidence no longer exists; but courts still regard orders for disclosure as unusual.

29 October, 2007

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