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LORD CHIEF JUSTICE
OF ENGLAND AND WALES

**DEFENDANT'S DUTY OF CANDOUR
AND
DISCLOSURE IN JUDICIAL REVIEW
PROCEEDINGS**

A DISCUSSION PAPER

(28 April 2016)

FOREWORD

- (1) This Discussion Paper concerns the defendant's duty of candour and disclosure in Judicial Review proceedings. It was prepared for the Lord Chief Justice by Mr Justice Cranston and Mr Justice Lewis. Responses are invited in relation to the recommendations set out herein. In particular, the Lord Chief Justice seeks views on the merits of each of the recommendations.

- (2) Following the consultation, consideration will be given by the Lord Chief Justice as to what, if any, steps need to be taken to implement the recommendations.

- (3) Consultation responses may be submitted by email to dutyofcandour@judiciary.gsi.gov.uk or by post to: Duty of Candour Consultation, Master of the Rolls' Private Office, Royal Courts of Justice, Strand, London WC2A 2LL.

- (4) The contents of this paper should not be considered to reflect the final views of the Lord Chief Justice.

- (5) The consultation opens on 28 April 2016 and closes on 21 July 2016.

INTRODUCTION AND SUMMARY

1. The Lord Chief Justice, the Rt. Hon Lord Thomas of Cwmgiedd, has asked us to consider the duty of candour and disclosure in judicial review proceedings. This is against a background of the recommendations made in relation to disclosure in general civil litigation in the Jackson Report (*Review of Civil Litigation Costs: Final Report 2009*) and in criminal proceedings in the report prepared by Lord Justice Gross, *Disclosure in Criminal Proceedings*, September 2011.

2. This paper sets out a provisional view on the position relating to what has become known as the duty of candour owed by a defendant in judicial review proceedings. In essence, the duty is a duty owed by the defendant to give a full and accurate explanation of its decision-making process, identifying the relevant facts and the reasoning underlying the measure being challenged. The paper also covers the situation where there are applications to the court for specific disclosure by a defendant in judicial review proceedings.

3. In our view:

(6) There is merit in providing some clarification of the general position governing the defendant's duty of candour in judicial review proceedings. This can be achieved principally by amending paragraph 12 of Practice Direction 54A-Judicial Review, to provide the following:

“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”;

The suggested wording reflects existing case law.

(2) We also consider that it would be sensible to set out a procedure in the Practice Direction whereby, after the provision of detailed grounds and evidence, a party can apply to the court for specific directions. This would cover the small minority of cases requiring specific directions in addition to the normal provision of information or voluntary disclosure by the defendant. These cases are relatively rare and are where either (a) there are disputed facts which need to be resolved by the court or (b) specific issues, such as consideration of the proportionality of action taken, may require further specific disclosure of particular documents.

(3) We envisage that under the procedure mentioned in (2)

(a) the application would identify the factual issues alleged to be in dispute.

The applicant would need to state why those facts are said to be relevant to the issues in the claim, and why the information already provided is not adequate to enable the court to resolve the issues which arise, or identifying what specific disclosure is said to be necessary. The specific directions sought would need to be set out in the application;

(b) the other parties would respond to the application; and

(c) the court would determine the application in the light of what was fair and just for resolving the issues which arise in the case.

(4) We also consider that there is a strong case for amending paragraph 7 of Practice Direction 54A, dealing with acknowledgements of service, to add the following:

“If a defendant chooses to file an acknowledgement of service, the summary grounds of resistance referred to in CPR 54.8(4)(a) should identify succinctly any relevant facts, and provide a brief summary of the reasoning, underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information”

3. We consider that these proposals would:

- (1) deal fairly, efficiently and effectively with the provision of the information necessary for the court to perform its role of reviewing the legality of action taken, or a failure to act, in the exercise of a public function;
- (2) have the result that compliance with the specific amendment set out above, clarifying the scope of the duty of candour where permission to apply for judicial has been granted, would be likely to result in the necessary information being provided in the overwhelming majority of judicial review claims without any further order from the court being required;
- (3) in the small minority of cases where further orders may be necessary, provide a procedure to enable such cases to be identified, and for the court to provide effective case management of the issues, ensuring that the court is provided with the information necessary for it to perform its task while ensuring that

the parties know specifically what information, and in what form, is to be provided;

- (4) assist in the task of deciding whether permission to apply for judicial review should or should not be granted.

STRUCTURE OF THE PAPER

(7) This discussion paper considers in brief:

- (1) the origin, and context, of the duty of candour;
- (2) the scope of the duty and the consequences of failing to comply;
- (3) cases where disputes of fact arise or where specific issues in a claim require specific directions in relation to disclosure;
- (4) the acknowledgement of service and summary grounds; and
- (5) claimants and the duty of candour.

ORIGIN AND CONTEXT OF DEFENDANT'S DUTY OF CANDOUR

(8) Judicial review is generally concerned with a review of the legality of a decision, measure, or failure to act in relation to the exercise of a public function (see CPR 54.1(2)). Generally, the issues that arise are issues of law. Facts are either not in dispute or provide the background to the decision under challenge. There are only a small minority of cases where factual issues arise (for example, questions of jurisdictional fact or disputed facts in the context of alleged violations of a right when the European Convention on Human Rights applies). For these reasons, disclosure of documents is not required unless specifically ordered (paragraph 12.1 of Practice Direction 54A and see the explanation in *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53; [2007] 1 A.C. 650).

(9) The courts have recognised, however, that once permission to apply for judicial review had been granted, they need to know what the reasoning of the decision-maker was and what, if any, facts are relevant to be able to review the lawfulness of the decision under challenge. Thus, in *R v Lancashire County Council ex p. Huddleston* [1986] 2 All E.R. 941 the Court of Appeal considered that the defendant would need to provide some explanation of what it had done and the reasons, so far as necessary to deal with the claim. The precise scope of this duty was variously expressed, with Lord Donaldson M.R. referring to the “duty to make full and fair disclosure” (at p. 94) and Parker L.J. stating that the defendant “should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge” (at p. 947).

(10) The underlying concept, however, is that the courts need to be placed in a position where they can carry out their role of ensuring the lawfulness of the decision under challenge, itself an element of the maintenance of the rule of law.

SCOPE OF THE DUTY OF CANDOUR AND CONSEQUENCES OF NON-COMPLIANCE

(11) The precise scope of the duty of candour has not been the subject of detailed analysis by the courts. The following issues arise:

(1) what is the scope of the duty?

(2) what are the consequences of non-compliance?

(3) does or should the duty extend to the provision of documents as well as information?

(4) does the duty or should the duty apply only after permission is granted, or does or should it apply at the pre-action protocol stage of proceedings or the acknowledgement of service stage?

Scope of duty

(12) The following represents the most recent and authoritative description of the scope of the duty:

(1) the obligation is to make candid disclosure of the decision-making-process, laying before the court the relevant facts and the reasoning behind the decision challenged (per Lord Carswell and Lord Brown in *Tweed v. Parades Commission for Northern Ireland (Northern Ireland)* [2006] UKHL 53, [2007] 1 A.C. 650 at para. 31 and 54 respectively); and

- (2) the duty is to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide (per Laws L.J. in *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs* (No. 1) [2002] EWCA Civ 1409 at para. 50).
- (13) From the decided cases, it is relatively clear that, in the majority of cases, the minimum necessary is that the defendant: (1) identify the facts relevant to the particular decision-making process under challenge; and (2) set out the reasoning underlying the decision.

Consequences of Non-Compliance

- (14) The current case law in relation to a failure on the part of the defendant to comply with the duty of candour is that the court may, in appropriate circumstances, draw inferences. If there is no adequate identification of the reasoning underlying the decision, the court may infer that no adequate or valid reason exists (see, e.g., observations of Laws L.J. in *Quark* [2002] EWCA Civ 1409 at para. 50, and *R v Secretary of State for Trade and Industry ex p. Lonrho* [1989] 1 W.L.R. 525).
- (15) Furthermore, the absence of an adequate explanation of the decision-making process may result in applications being made, and granted, for specific disclosure of particular documents to enable the court to identify the basis of the decision under challenge (see *R v Secretary of State for the Home Department ex p. Al Fayed* [1998] 1 W.L.R. 763 at p. 775).

Proposed Amendment

(16) We consider that, on balance, it would be sensible to reflect the existing case law by way of an amendment to paragraph 12 of the Practice Direction to CPR 54A. That would provide a degree of clarity as to the minimum scope of the obligation. We consider that an appropriate amendment would be:

“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”.

Documents

(17) There is less clarity as to whether the duty of candour requires the disclosure of documents (as opposed to the provision of information). In that regard, the following principles are relevant. First, paragraph 12 of Practice Direction 54A provides that disclosure is not required unless the court orders otherwise. Secondly, the case law recognises that disclosure of documents will not be required in most cases and, when it is, it will be limited to those documents necessary for fairly and justly disposing of a specific issue. Thirdly, the courts will not order disclosure by way of a fishing expedition (i.e. simply in order to see if something emerges which might form the basis of a challenge).

(18) In addition, however, public bodies may choose voluntarily to provide disclosure of relevant documents, and may choose to discharge their duty of candour by means of voluntary disclosure. The courts have encouraged the disclosure of relevant, significant documents as good practice (absent some good reason, such as confidentiality, for not disclosing the document): see, *Tweed*

[2006] UKHL 53; [2007] 1 A.C. 650 per Lord Bingham, at para. 4. On some occasions, the courts have referred to the duty of candour as involving the defendant in explaining the relevant facts and also disclosing relevant documents, even though the issue did not need to be decided (see, e.g. *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) at para. 22 and see the decision of Privy Council in *Graham v Police Services Commission* [2011] UKPC 46 at para. 18).

(19) In our view, the better approach at present is to express the content of the duty of candour simply by reference to the wording of existing case law dealing with the identification of relevant facts and the reasoning process. That would leave the public body free to continue with the practice of voluntarily providing disclosure of relevant documents. If it is said that the disclosure of a particular document is necessarily for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure. We would not, at present, consider it appropriate to particularise (and in our view, extend) the scope of the duty of candour on a defendant by incorporating specific disclosure obligations into the Practice Direction.

(20) If, however, a different view is taken, and if an obligation to disclose documents were to be introduced by amendment to the Practice Direction, we would not regard the duty of candour as including any obligation to provide documents in circumstances where such documents would not be disclosable in judicial review. If any obligation to provide documents were to be recognised, there is a strong case for ensuring that the obligation is limited to the disclosure of

documents that are (1) significant and (2) are specifically relevant to the fair disposal of the issues in a case.

DISPUTED FACTS/ISSUES CALLING FOR SPECIFIC DIRECTIONS

(21) In most cases, the defendant may need to identify the facts, or considerations, that it took into account as part of the decision-making process, but the existence of those facts (as opposed to their legal relevance) will not be in dispute.

(22) There are, however, a relatively small number of cases where facts may be in dispute between the claimant and the defendant and where the court may need to determine what the relevant facts are. Examples include jurisdictional fact (such as whether a person is a child for the purposes of entitlement to services under the Children Act 1989). Other examples may be disputes under the Human Rights Act 1998 and the European Convention on Human Rights (for example, whether individuals were killed on a battlefield or were subjected to torture or ill-treatment: see *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 2.

(23) It is also right to note that there are cases where judicial review involves assessing the proportionality of administrative or other action and where it may be necessary for the courts to consider the underlying documentation, rather than a summary of the documents: see *Tweed* [2007] 1 A.C. 650.

(24) In our view the better approach at present is to deal with these cases by the court making specific orders in the context of the particular case. We do not consider that it would assist to elaborate the scope of the duty of candour to deal

with these specific cases. That is for the following reasons. First, these are very much the minority of cases. It is not, in our view, necessary to go beyond the duty of candour described above to deal with the great majority of cases. Attempts to describe the scope of the defendant's duty of candour in a way that deals with unusual or exceptional cases may, inadvertently, result in the imposition of inappropriate or excessive obligations in the usual run of cases. Secondly, the cases where disclosure of documents (or cross-examination) may be necessary are likely to involve specific factual and legal issues. Orders relating to disclosure of particular documents or categories of documents, or other interlocutory orders, are better dealt with by making specific orders relevant to the factual and legal issues that arise in those cases rather than seeking to anticipate every possible scenario and then describing the duty of candour in a way covering all such possible scenarios.

(25) In our view, the better approach is for the parties in particular cases to consider whether there are disputed issues of fact or other issues that may require such orders. If they consider that there are, they should apply for orders from the court, as envisaged by the Divisional Court in *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [2010] HRLR 2, at paragraph 64.

(26) We consider that it would be sensible to set out a procedure in section 12 of Practice Direction 54A by which such matters may be considered. In our view, the sensible procedure is for the claimant to make his claim. If permission is granted, detailed grounds and evidence will be filed and served. That will enable the parties to know (1) what facts the defendant says are relevant, (2) what the reasons for the decisions are said to be and (3) what documents the defendant has disclosed.

(27) In the light of that the parties can consider whether further directions are necessary and, if so, they should make an application to the court for specific directions, following the service of the defendant's detailed grounds and evidence. We suggest that an adequate time be allowed for consideration of the detailed grounds before such an application can be made. A period of 35 days would appear to be adequate. An application would enable the court to determine the need for further directions in accordance with the established case law governing disclosure and interlocutory orders in judicial review. A judge may be assigned to ensure proportionate case management of the claim.

(28) In particular, the claimant will need to identify:

(1) (a) what facts are said to be in dispute (as opposed to arguments as to the legal relevance of undisputed facts); (b) why those facts are said to be relevant to the issues in the claim and why they need to be resolved by the court in a judicial review claim; (c) why the information provided is not adequate to enable the court to resolve the issues that arise; and (d) the specific directions sought; or

(2) (a) what specific issues in the claim are alleged to require further specific disclosure of particular documents; (b) why those issues are relevant; (c) why it is contended that the information provided by the defendant is not adequate to enable the court to resolve the specific issues that arise in the claim; and (d) the specific directions sought.

(29) The other parties would then have a suitable opportunity to respond. We envisage a period of 21 days would be adequate. Thereafter, if the parties are still not agreed about the disclosure necessary, the court would determine the matter, applying established case law.

(30) In our view, this procedure would ensure effective case management of the small minority of cases where the general approach to the provision of information and disclosure of documents may not be adequate. It would enable the court to ensure that disclosure is ordered in those cases where, and to the extent, it is necessary to resolve specific issues fairly and justly. It would ensure that applications for disclosure are not used routinely, inappropriately or excessively.

ACKNOWLEDGEMENT OF SERVICE/SUMMARY GROUNDS OF RESISTANCE

(31) The case law dealing with the development of the defendant's duty of candour began at a time when there was no provision for a defendant to provide an acknowledgement of service and summary grounds of resistance. Consequently, the case law tends to be phrased in terms of the duty arising when permission to apply for judicial review has been granted. The courts have not, it seems, given detailed consideration to the position at the stage of the acknowledgement of service.

(32) The following principles are, in our view, relevant. First, the CPRs do not require the defendant to file and serve an acknowledgement of service or summary grounds. Rather, the rules provide that, if the defendant does not do so,

it can only take part in an oral permission hearing with the leave of the court: see CPR 54.8 and 54.9. It would be inconsistent with the specific provisions of the CPRs to amend the Practice Direction and, in effect, to require a defendant to put in summary grounds in every case.

(33) Secondly, the defendant may (and usually does) put in an acknowledgement of service and summary grounds of resistance. We recognise that these are intended to be a brief summary of grounds upon which the grant of permission is resisted. In our view, however, there would be an advantage (and it would place no undue burden on a defendant) to provide a brief summary of the decision-making process, identifying the principal relevant facts and the principal reasons underlying its decision. That would assist the court in deciding whether or not there is an arguable case that the decision or measure under challenge is unlawful.

(34) Thirdly, there may be cases where the defendant is seeking to rely upon a ground for resisting permission which does not directly relate to the lawfulness of a measure under challenge, such as the fact that there is an alternative remedy to judicial review, or that the decision has become academic.

(35) In our view, the sensible course which take these points into account is to amend paragraph 7.1 of Practice Direction 54A by adding the following:

“If a defendant chooses to file an acknowledgement of service, the summary grounds of resistance referred to in CPR 54.8(4)(a) should identify succinctly any relevant facts, and provide a brief summary of the reasoning, underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information”.

(36) We recognise the possibility that, even prior to or at the permission stage, it is possible that a claimant will contend that the facts set out by the defendant are disputed or disclosure needs to be ordered. We consider that that course of action is likely to arise, if ever, only in exceptional circumstances. We would not consider it necessary or proportionate to seek to amend the CPR or the Practice Direction to deal with this exceptional situation. Rather, the position should be left to be dealt with on the facts of a particular case as happened, for example, in *R (K, A, and B) v Secretary of State for Defence* [2014] EWHC 4343 (Admin.).

(37) In our view, the Practice Direction should not address the position in relation to the pre-action protocol.

CLAIMANTS AND THE DUTY OF CANDOUR

(38) Finally, it appears sensible to amend Practice Direction 54A – Judicial Review to include specific reference to the duty of candour on claimants seeking permission to apply for judicial review or making an application, including an application for urgent consideration or interim relief. This appears sensible for three reasons:

- (1) first, it will highlight the importance of the duty of candour;
- (2) secondly, it will ensure that claimants applying for interim or other relief without notice are aware of their obligations, something which at present is not always the case; and
- (3) thirdly, if reference is to be made in Practice Direction 54A – Judicial Review to a defendant’s duty of candour, it would appear both sensible and fair to refer to a claimant’s duty.

The law

- (39) The duty of candour requires a claimant to set out all relevant facts. Those include material facts known to the claimant and those he or she would have known about had proper and necessary inquiries been made: see, e.g. *R (Lloyds) Corporation ex p. Briggs* [1993] 1 Lloyd's L. Rep. 176; and *R v Jockey Club Licensing Committee ex p. Wright (Barrie John)* [1996] C.O.D. 306.
- (40) In addition to stating material facts, claimants are required to disclose any rights of appeal that exist, and whether they have been used, and any relevant statutory provision that appears to exclude the jurisdiction of the court: see *R Humberside CC ex p. Bodgal* (1992) 5 Admin. L.R. 405 and *R v Cornwall CC ex p. Huntington* [1992] 3 All E.R. 566 (aff. By the Court of Appeal [1994] 1 All E.R. 694).
- (41) These duties, in our opinion, apply to the claim for judicial review, any application for urgent consideration and any application for interim relief.

Recommendation

- (42) We recommend that the section 5 of Practice Direction 54 – Judicial Review is amended to include the following sub-subsection:

“Duty of Candour on Claimants and Applicants

5.11 Claimants seeking permission to apply for judicial review, urgent consideration or interim relief (whether by a claim included in the in the claim form itself or by a separate application notice) are under a duty of candour. That duty requires a claimant to ensure that the claim form, or any application notice, sets out all material facts, that

is all those facts that are relevant to the claim or application relief being sought. A claimant is under a duty to make proper and necessary inquiries before seeking permission to apply for judicial review or seeking interim relief to ensure so far as reasonably possible that all relevant facts are known.

“5.12 The duty of candour also requires claimants to refer to any relevant statutory provision, including any which may exclude the jurisdiction of the court to entertain the claim or application, or to grant the relief sought, and also to refer to any alternative appeal mechanism that exists, or could have been used prior to seeking judicial review.”

CONCLUSION

(43) In our view, the process of clarifying the requirements of the defendant’s duty of candour, and as indicated above claimant’s responsibilities, should be dealt with by means of some amendments to Practice Direction 54A. Those would be made in accordance with section 5 of the Civil Procedure Act 1997 and Part 1 of Schedule 2 to the Constitutional Reform Act 2005, and having regard to the observations of the Court of Appeal regarding practice directions in *Bovale Ltd v Secretary of State for Communities and Local Government* [2007] EWCA (Civ) 171; [2009] 1 W.L.R. 2274. We have also suggested a procedure to deal with the small minority of cases where additional directions may need to be given in relation to the disclosure of specific documents to deal with particular issues raised in a claim for judicial review.

Cranston J

Lewis J