

Using the duty of candour as a judicial review caseworker

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1. The duty of candour has become a subject of recent interest. This is largely due to several recent cases in the courts of England and Wales which have involved high-profile engagements (though not necessarily breaches) of the duty.
2. In this piece I want to set out some ways in which the duty can be meaningfully relied on as a caseworker working in judicial review. I will cover only its use from the point of view of a caseworker acting for claimants in judicial review. For the avoidance of doubt, I do not address the myriad ways in which a claimant owes a duty of candour to all parties and the court in judicial review.

Requesting pre-action disclosure of documents from defendants

3. For some time, there has been uncertainty relating to when the duty of candour arises. Does it arise when permission has been granted, i.e. when a court is first engaged on a claim, or does it arise at pre-action stage from when the first pre-action letter is sent?¹
4. Subject to appellate intervention, the position can be said to be fairly clear following the Divisional Court's judgment on the consequences for the Home Office's breach of the duty of candour in the 'mobile phone seizures' case, *R (HM, KH and MA) v Secretary of State for the Home Department*.²
5. There, the Court expressly endorsed the Guidance by the Treasury Solicitors Department in January 2010 ('TSol Guidance') on discharging the duty of candour, which states:

¹ See the Independent Review of Administrative Law's discussion in their 2021 Report at 4.115-4.117, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf, accessed 5 February 2023.

² [2022] EWHC 2729 (Admin).

"The duty of candour applies as soon as the Department 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."³

6. It should be noted that there have been previous judgments in which the courts have cited this aspect of the TSol Guidance. For example, in *R (Maya Evans) v Secretary of State for Defence*, the Divisional Court “respectfully endorsed” the observations by counsel for the claimant that it was “no longer safe to proceed, if it ever was, on the basis that the duty of candour only arises once permission is granted”, in light of the publication of the TSol Guidance.⁴ It is, however, significant, that this position has been explicitly affirmed in as high profile a case as *HM, KH & MA*.
7. Although the Divisional Court’s statement on the timing of the duty of candour is very much focused on its requirement for judicial review defendants to provide an accurate account of the facts, there is another significant implication: defendants should also now be obliged to provide disclosure of relevant documents at pre-action stage, to enable claimants to understand their positions in respect of their cases⁵ This is because compliance with the duty of candour includes disclosure of all relevant information.⁶
8. Claimant caseworkers should thus place reliance on the duty of candour when requesting documents in pre-action correspondence. It is also advisable to draw a defendant’s attention to the cost consequences of non-compliance with the duty. For example, if a claim is issued and the defendant only discloses a relevant document then which, if disclosed earlier, would have meant the claim not proceeding, the claimant may fairly argue that the usual rule that the “costs follow the event” should not apply if they then have to withdraw their claim.

³ *ibid*, §16.

⁴ [2010] EWHC J1027-1, §202.

⁵ Although the duty of candour may apply at pre-action stage, as it does after a claim has been issued and fully pleaded, it is likely that the *contents* of the duty will differ depending on timing. The focus at the former stage is likely to be focused on ensuring claimants understand defendants’ positions on their claims, whereas the duty likely expands to one of assisting the court with a full explanation of the relevant facts after a claim is pleaded.

⁶ See *Administrative Court: Judicial Review Guide 2022*, §7.5.1.

Applications to the court for pre-action or pre-permission disclosure

9. Applications for pre-action disclosure are rare in judicial review. The courts, whilst acknowledging there is no jurisdictional bar to such applications, have considered they will be rarely granted.⁷
10. Perhaps less rare are applications for pre-permission disclosure, i.e. where an application for disclosure is made swiftly after the claim is issued, before the issue of permission is decided.⁸ They are particularly appropriate where requests for information (of the sort described in the above section) have borne little fruit, and disclosure is needed to properly plead a claim and/or mount an arguable case.
11. In *R (National Association of Probation Officers) v Secretary of State for Justice*,⁹ an application for pre-permission disclosure was granted in part. The case concerned a judicial review by a union for probation officers against the proposed selling-off of community rehabilitation companies (CRCs) – which provide rehabilitative courses and supervising offenders of low and medium risk – to third parties. The CRCs had not been sold yet at the time of the application. The claimant sought specific disclosure of details of the proposed sale, so that it could make a “rapid informed application for permission to apply for judicial review” if the defendant's decision was to proceed with the sale.
12. In making the application, lead counsel for the claimant placed emphasis on the fact that the case was “a system challenge and/or a proportionality challenge and one conducted under huge time pressure following consistent requests for information, most of which led to little result”. The points relating to the nature of the

⁷ *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2014] EWHC 43 (Admin), [2014] ACD 69, §32.

⁸ See, for example, *R (K, A and B) v Secretary of State for Defence and others* [2014] EWHC 4343 (Admin) and *R (National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin).

⁹ [2014] EWHC 4349 (Admin).

claim, i.e. being a systems and/or a proportionality challenge, were accepted by the Judge as reasons justifying the grant of the application in part.¹⁰

13. It is suggested that the effect of the Divisional Court's acceptance of the TSol guidance on the timing of the duty of candour in *HM, KH and MA*, is to strengthen the principled argument in favour of applications for pre-action or pre-permission disclosure in judicial review. If the duty of candour – with its constituent need to disclose all relevant information to a claim – applies to every stage of proceedings, by extension failures to disclose said information at pre-action stage can justify applications to court for disclosure.
14. That being said, requests for disclosure, as well as the grounds for judicial review – difficult as it may be, in scenarios e.g. where disclosure is required for the precise reason to plead the grounds – must be properly formulated. Failures to do so will likely lead to such applications being refused.¹¹

Part 18/31 applications

15. Another set of tools to compel defendants' compliance with the duty of candour are applications under parts 18 and 31 of the Civil Procedure Rules 1998 ('CPR').
16. CPR part 18 gives the courts a power to order a party to proceedings to provide further information, where necessary to resolve disputes. Part 18.1 provides that: "*the Court may at any time order a party to – (a) clarify any matter which is in dispute in the proceedings; or (b) give additional information in relation to such matter, whether or the matter is contained or referred to in a statement of case*". PD 18 provides that Part 18 requests should be: "*concise and strictly confined to matters which are reasonably necessary and proportionate to enable the...party to prepare his own case or the case he has to meet*".

¹⁰ *ibid*, §20.

¹¹ This is due to the undesirability of fishing expeditions: see *R (K, A and B) v Secretary of State for Defence and others* [2014] EWHC 4343 (Admin), §13.

17. Such orders are rare in judicial review proceedings. In *R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs*,¹² Dingemans J (at he then was) explained that Part 18 requests fell to be considered in the context of duty of candour:¹³ The test was whether the provision of further information was “necessary in order to resolve the matter fairly and justly”.¹⁴ He considered that such applications “should remain exceptional”.¹⁵
18. However, two recent successful applications demonstrate that CPR 18 can be a powerful tool to compel compliance with the duty of candour. They are *R (KBL) v Secretary of State for the Home Department*¹⁶ and *R (JZ) v Secretary of State for the Home Department*.¹⁷
19. Both cases concerned decisions to refuse to relocate the claimants from Afghanistan to the UK. In *KBL*, the challenge was to a refusal to a purported application for “leave outside the rules”; in *JZ*, the challenge was to a refusal under the Afghan Relocation and Assistance Policy (‘ARAP’). A common element to both cases were alleged irrational differences in treatment of the claimants and those in materially similar positions, in particular those who had been evacuated under “Operation Pitting”. In both cases, the claimants made Part 18 applications to require the Home Office to provide further, extensive information about Operation Pitting.
20. In *KBL*, Lang J noted the following, in light of a canvas on the authorities on the duty of candour on defendants:

“There is no separate procedure under the CPR for enforcing the duty of candour. Applications under Part 18 are one of the ways in which a claimant may seek to give effect to the duty of candour owed by a public authority, along with applications for specific disclosure of documents, where appropriate”.

¹² [2013] EWHC 2480 (Admin), [2013] Lloyd’s Rep FC 690.

¹³ *Ibid*, §16.

¹⁴ *ibid*, §18.

¹⁵ *Ibid*, §20.

¹⁶ [2022] EWHC 1545 (Admin).

¹⁷ [2022] EWHC 1708 (Admin).

21. With that in mind, Lang J turned to consider in turn each of the questions in the Part 18 application. Some were considered too broad or already addressed, but others were considered necessary for the Home Office to answer. In ordering the Home Office to provide the requested information, the judge explicitly held that, in some respects, there had been a failure to comply with the duty of candour.¹⁸
22. In *JZ*, a similar approach occurred, where Hill J considered in turn each of the questions in the claimant's Part 18 application. One stark difference between *KBL* and *JZ* is the timing of the application. In *KBL*, the application was decided prior to the substantive judicial review hearing. However, in *JZ*, largely due to the lateness in the day of the application – one day prior to commencement of the full hearing – the application was decided only at the end of the substantive judicial review hearing. The consequence of this was that, rather than the information being used to inform parties' approach at the substantive hearing, parties were asked to make further submissions on how the answers provided by the Home Office after the Part 18 request was granted impacted the issues in the claim.
23. In both *KBL* and *JZ*, it seems that it was the *nature* of the claims, being largely premised on irrational differences in treatment, which led to the Part 18 requests to be acceded to: without disclosure of the further information relating to Operation Pitting, the respective courts could not come to a reliable conclusion on whether this ground was well-founded. As Hill J said in *JZ*, "*Ultimately I consider that provision of this information is necessary in order to resolve the matter fairly and justly...*". She emphasised the importance of complying with the duty of candour, undertaking a detailed review of the questions that had been included in the Part 18 application and held that some, but not all, should be answered, as Lang J did in *KBL*.
24. In a similar way to how the individual questions in the Part 18 applications were subject to detailed scrutiny by the judges in *KBL* and *JZ*, judges considering specific disclosure applications under Part 31 are also primarily guided by the issue of whether disclosure is needed to resolve the matter fairly and justly.¹⁹ Further, such applications

¹⁸ See [2022] EWHC 1545 (Admin), §65.

¹⁹ *Tweed v Parade Commissioners for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, §3.

are unlikely to be granted unless it can be shown that the defendant will have breached their duty of candour if disclosure is not ordered.²⁰

25. Applications under Part 18 and 31 should thus primarily be guided by whether the information or disclosure sought is required to resolve the matter fairly and justly, and whether they are necessary to compel compliance with the duty of candour. Fishing expeditions are invariably prohibited.
26. In terms of procedure, they are largely contained within the relevant rules and practice directions. Requests for information and/or disclosure should be pursued in correspondence with defendants as far as that can go, as unsuccessful applications will almost certainly come with an adverse costs order, and an unreasonable refusal by a defendant will assist with the costs of any application eventually made.
27. Paragraph 1.1 of PD 18 specifically provides that a party requesting clarification or information should first make a written request to the other party for that clarification or information, giving the other party reasonable time to respond. If and when such a request has been refused, the Part 18 request may then be made to the court by way of application notice and an appropriate draft order attached.²¹ The party making the request would be well-advised to set out their grounds in support to accompany their application, alongside evidence of prior correspondence relating to the defendant's refusal of the request.
28. The timing of Part 18/31 applications should also be the subject of careful consideration. They are, in principle, flexible. Part 18.1(a) stipulates that the court may make the order for further information at any time; Part 31.16 makes provision for requests for specific disclosure to be made before proceedings have been issued.
29. Where an application is contemplated after permission to apply for judicial review has been granted, it is generally unwise to make them to the court until after the defendant has filed their detailed grounds of defence and evidence. This is because the filing of their defence and evidence provides an opportune time for the defendant to comply with

²⁰ *R (Gardner) v Secretary of State for Health and Social Care* [2021] EWHC 2422 (Admin), §23.

²¹ See paragraph 5 of PD 18.

their duty of candour (albeit it is a duty that arises from pre-action stage) and the courts are unlikely to order disclosure in circumstances where the defendant has not fully pleaded their case, unless some specific reason exists.²²

Breach of duty of candour as a ground of review

30. It is not often that the duty of candour can be pleaded as a ground of review, but there are at least two distinct ways. Both can be seen as extensions of the principle of procedural fairness.
31. The first scenario is where the breach of the duty bears directly upon the decision being challenged.²³ In *R (AG) v Secretary of State for the Home Department*,²⁴ Richard Clayton QC, sitting as a Deputy High Court Judge, found that the breach of the duty of candour there “[did] bear upon and was relevant to the decision to detain the Claimant” and consequently detention was unlawful.²⁵
32. In that case, the defendant’s caseworker, who was considering the issue of continued detention under immigration powers, chose not to make further internal enquiries which would have revealed the details of asylum claims made by the Claimant’s mother and other close relatives (whose accounts had been accepted in recognising them as refugees), when the Claimant made his asylum claim whilst in detention. The defendant also did not disclose these details to the Tribunals, to whom the claimant had appealed the refusal of his asylum claim to. These failures to enquire and disclose were found to be breaches of the duty of candour. Given that the Claimant would and/or should have been recognised as a refugee in light of that information, detention had been unnecessarily and unlawfully prolonged.

²² For example, where a written request for information/disclosure has been made, and refused, prior to service of the detailed grounds of defence.

²³ See the discussion in *R (BBC and others) v Steven Sugar and the Information Commissioners* [2007] EWHC 905 (Admin), [2007] 1 WLR 2583, §53.

²⁴ [2015] EWHC 1309 (Admin).

²⁵ *Ibid*, §106.

33. The second scenario is where there is a failure to disclose relevant information, and such failure is serious enough for the courts to draw adverse inferences against the defendant.
34. In *R (Roche Registration Limited) v Secretary of State for Health*,²⁶ the claimant company, Roche, alleged that the way in which the defendant Secretary of State, acting by the Medical Healthcare products Regulatory Agency (“the MHRA”), acquired information from the company and passed it on to the European Medicines Agency (“the EMA”) under the EU pharmacovigilance regime, was unlawful.
35. The duty of candour was relied on as a ground of review. It was said that procedural fairness meant that the MHRA should have told Roche about its engagement with the EMA, which could have affected the frankness and candour with which Roche would approach a public health inspection of it by the MHRA. Although this submission was rejected, the Court of Appeal’s analysis,²⁷ by reference to the classical speech of Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody*,²⁸ shows that a failure to disclose in breach of the duty of candour can amount to a breach of the domestic principle of fairness.

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²⁶ [2015] EWCA Civ 1311, [2016] 4 WLR 46.

²⁷ See §§71-80.

²⁸ [1994] 1 AC 531, 560.