



Public Sector Insights: Judicial Review/Commercial Litigation

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Meet today's team



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Judicial Review

Duty of Candour and Standing

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Rule change

- CPR 54.8A – Replies
- The IRAL report recommended a formal provision allowing a Claimant to file a Reply to the Defendant's Acknowledgement of Service
- As of 6 April 2024, this has been implemented by CPR 54.8A –
 - right to file a reply where the Defendant has filed an AoS: 54.8A(1)
 - time limit is 7 days after service of the AoS: 54.8A(2)
 - time cannot be extended by agreement of the parties: 54.8A (3)

Duty of Candour

- What is it?
- Practice Direction 54A
 - 11.1 In accordance with the duty of candour, the 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.
 - 11.2 Disclosure is not required unless the court orders otherwise

Additional guidance

- Administrative Court Guide (2023) [7.5, 7.6, 15]
- “There is a special duty – the duty of candour and cooperation with the Court – which applies to all parties to judicial review claims. Parties are obliged to ensure that all relevant information and all material facts are put before the Court. This means that parties must disclose relevant information or material facts which either support or undermine their case. The duty of candour may require a party to disclose a document rather than simply summarising it.”
- 7.5.2 It is very important that parties comply with the duty of candour.

Confirmation in caselaw

- “A vital duty” – R(oao Bancoult (No2)) v SoS for Foreign and Commonwealth Affairs [2016] – “A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so”
- “A very high duty” – R (oao Quark Fishing Limited) v SoS F&CA – “full and accurate explanations of all the facts relevant to the issue”
- “It is the function of the public authority itself to draw the court's attention to relevant matters ... to identify "the good, the bad and the ugly"” – Hoareau case 2018

Recent Caselaw

- R (Police Superintendents' Association) v The Police Remuneration Review Body & SSHD [2023]
- Ten principles:
 - **1. Standard disclosure** Standard disclosure (CPR 31) does not apply. Offloading lots of documents unnecessary and inappropriate.
 - **2. Just disclosure** Test for specific disclosure is “necessity to resolve the matter fairly and justly”
 - **3. Candid disclosure** Cards face up on the table meaning “full and fair disclosure of all relevant material”
 - **4. Information too** Relevant facts must be identified in a witness statement if unapparent from disclosed documents.
 - **5. Relevant material** Candid disclosure required of (a) materials reasonably required for an accurate decision, (b) full and accurate explanations relevant facts and (c) true and comprehensive account of decision-making and underlying reasoning
 - **6. Non-selectivity** Must include the unwelcome with the helpful
 - **7. Best evidence** Documents should be produced not gisted or a secondary account given.
 - **8. Redaction** Documents can be redacted for PII, confidentiality, LPP or statutory restriction.
 - **9. Permission Stage** Duty of candour applies prior to and at permission stage, though less extensive.
 - **10. Unpleaded grounds** Duty of candour extends to documents which assist C or might give rise to new grounds.

R (IAB) V SSHD

- “The respondent to a judicial review claim has a duty to explain the reasoning process underlying the decision under challenge. The explanation may be given in witness statements, or by the disclosure of relevant documents, or both.”
- “it has generally been accepted for decades that the most authoritative statements are those in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650”
 - “disclosure of documents has usually been regarded as unnecessary and that remains the position.”
 - In minority of cases “the precise facts are significant” “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.”
 - 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
- Tweed remains the touchstone?

Standing

- Duff v Causeway Coast and Glens Borough Council [2023] NICA 56
- Challenge to Council's refusal to take enforcement action in relation to quarrying activities
- Brought by a “prolific” litigant in person
- Principles to be applied to standing summarised by NI Court of Appeal

Standing test

- Judgement lists 14 factors including:
 - Test is “sufficient interest”
 - Test is context specific – issues raised, merits, how purpose of JR best served
 - Interest may be (a) personal (directly affected); or (b) legitimate or reasonable concern (public interest)
 - Nature and weight of interest to be determined by the Court objectively
 - Sufficient interest may not be sufficient if acquired for purpose of standing
 - If interest is not personal, the litigant must have (a) genuine interest in the aspects of environment wish to protect and (b) sufficient knowledge to act in representative capacity.
 - Are there better placed challengers? NGOs/environmental organisations
 - Public interest in projects being implemented
 - Standing goes to jurisdiction/permission and to remedy.

This case...

- Accepted claimant had “genuine concern” for environment but did not have standing
 - No private law rights affected
 - Did not participate in planning process
 - Cannot acquire standing by writing letters raising concerns
 - Other suitable challengers
 - Unsuitable having regard to knowledge, ability and resources – litigant in person lacking specialist knowledge
- Delay point – alleged in effect a continuing act because every day carried out quarrying activities was illegal. Court held time ran from date of disputed planning permission in 2014.

- JR challenge to development permit for construction of an airstrip on the island of Barbuda
- Claimants:
 - were residents who lived about 2km from the airport
 - C1 trained marine biologist & recently retired head teacher; C2 a retired teacher
- Concerns - breeding area for the red footed tortoise and Barbuda Warbler
- Court of Appeal in Barbuda found Cs did not have standing to bring the claim
- Overturned by Privy Council

Test confirmed

- Test the same: “sufficient interest”.
- Reiterated two main types of case – (a) individual rights affected, or (b) general public concern.
- Held that (b) is a form of representative interest.
- Claimants with standing may be:
 - persons adversely affected or a body or group representative of persons adversely affected; and
 - in a public interest case, a body or group with sufficient knowledge.
- Approved summary in *Duff* and held Cs had sufficient interest:
 - They lived near the runway and were affected by noise and disturbance, there had been a failure to follow statutory consultation process – Cs had sufficient interest to challenge that failure and C1 had knowledge and concern about the subject



Judicial Review

Consultation and PSED

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18 July 2024



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Consultation v Engagement

- **Consultation and Engagement – Key Principles**
 - Inclusive engagement
 - Understanding potential/actual impact
 - Effective consultation
 - Gunning Principles
 - Formative stage
 - Sufficient reasons
 - Adequate time
 - Conscientious consideration
 - Remember the PSED!
 - Audit trail/transparency

Public Sector Equality Duty

- **s.149 Equality Act 2010 – Public Sector Equality Duty**
- **Three aims:**
 - Eliminate unlawful discrimination, harassment, victimisation
 - Advance equality of opportunity
 - Foster good relations
- **Specific duties**
 - **England:** Equality objectives; Engagement; Equality Information (publish employee info if 150 employees or more); Gender pay gap (250 employees or more)
 - **Wales:** Equality objectives or Equality Information (gender pay/employees); Involving representatives; Strategic Equality Plan; Annual Reporting; General duty in Procurement

Recent JR cases

- **R. (on the app. of Smith) v SoS for the Home Department [2024]**
 - SoS – not implement 3/30 recommendations -‘Windrush Lessons Learned Review’ – subject to plan
 - Breach of procedural legitimate expectation/conspicuous unfairness – HO would not decline without first consulting
 - PSED breach – not considering benefits/impact for 2 - unlawful
- **R. (on the app. of DXK) v SoS for the Home Department [2024]**
 - SoS failed to monitor the provision of accommodation under the Immigration and Asylum Act 1999 to pregnant and new mother asylum seekers
 - Breach of second aim of PSED (no statistical data/remove disadvantage)

- Duty to give reasons
 - no general common law duty
 - sometimes a statutory duty/expectation?
- Duty of Candour – relevant facts/reasoning
- Documents justifying decision must be:
 - Clear and comprehensive record of decision-making
 - Well-documented and accessible
- Regularly review and update practices



Judicial Review

Relief and Remedies (Mandatory Orders)

R (Imam) v Croydon LBC
[2023] UKSC 45, [2023] 3 WLR 1178

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R (Imam) v Croydon LBC

- Issue: what approach should a court adopt to granting a mandatory order as a remedy against a local housing authority in breach of a statutory duty s.193(3) Housing Act 1996?

R (Imam) v Croydon LBC: Facts

- C was a full-time wheelchair user with three children
- Applied to Croydon LBC (“CLBC”) for homelessness assistance in February 2014
- CLBC accepted she was in priority need and not homeless intentionally and that it owed her a duty under s.193(2)
- In September 2014 it offered her temporary accommodation, which she accepted but sought a review of its suitability
- In June 2015 CLBC accepted it was unsuitable – it lacked a level access toilet on the first floor suitable for her to use at night
- It failed to provide suitable accommodation

R (Imam) v Croydon LBC: Facts

- C issued JR claim in March 2020
- It was accepted by CLBC that from June 2015 onwards it had been in breach of its duty under s.193(2) which provides “*unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant*”
- However, CLBC resisted mandatory relief.
- Its position?
 - “*The defendant faces significant difficulties as a result of acute budgetary pressures, very high demand for housing in the Borough and a limited pool of properties available to meet this demand.*”

R (Imam) v Croydon LBC: First Instance

- The judge declined to make a mandatory order. His reasoning included:
 - Her position at the property was not “intolerable” and it could not be said that the situation had been going on for so long that “enough is enough”
 - CLBC had considered the C across all the potential pools of properties available to it and was doing all it reasonably could, consistently with its policies and limited resources, to fulfil its statutory duty
 - Court should consider the wider context regarding CLBC’s resources
 - Granting a mandatory order requiring CLBC to provide a property would involve the court *“requiring the defendant to spend money which on the evidence it does not have or to reallocate money from the provision of other public services in order to provide accommodation to the Claimant”*

R (Imam) v Croydon LBC: Court of Appeal

- C appealed to the Court of Appeal
- R (Elkundi) v Birmingham CC – “public law remedies, including a mandatory order, are discretionary remedies”
- Lack of resources / budgetary constraints were not relevant
- Correct approach was to consider whether the local housing authority has taken all reasonable steps to perform the duty
- If it has done so, and still not been able to secure suitable accommodation, *“that may be a good indication that it may not be appropriate to grant a mandatory order as it may not be possible to secure suitable accommodation with a specified time”*
- Having found errors in the judge’s reasoning, the Court of Appeal decided the appropriate course was to remit the case to the High Court for further consideration with the benefit of additional evidence
- CLBC appealed to the Supreme Court

R (Imam) v Croydon LBC: Supreme Court

- CLBC had failed to fulfil its duty over almost six years
- Starting point was that the duty was a public law one imposed by Parliament and not qualified in any relevant way by reference to resources
- *“where it is established that there has been a breach of such a duty, it is not for a court to modify or moderate its substance to routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament’s legislative instruction”*

R (Imam) v Croydon LBC: Supreme Court

- Public law remedies are discretionary, and it is incumbent on a court to exercise its discretion in accordance with principles and to avoid arbitrariness
- Where a breach of the law is established, the ordinary position is that a remedy should be granted
- Court should proceed cautiously in exercising its discretion to refuse to make an order – should do so only where that course is clearly justified
- But it may be that due enforcement of the law can be sufficiently vindicated by an order other than a mandatory one

R (Imam) v Croydon LBC: Supreme Court

- A quashing order is the usual remedy in public law
- A mandatory order takes the matter out of the hands of the authority and to that extent makes the court the primary actor – the court must have regard to whether such an order might undermine to unjustified degree the ability of the authority to fulfil functions conferred by Parliament
- Where a court issues a mandatory order, that order produces legal consequences of its own over and above those inherent in the duty – the court should consider whether it is right to create those additional effects in all the circumstances of the case

Impossibility?

- The limitation on issuing a mandatory order with which it is impossible to comply is well established, but the court held that this gives rise to the question of what qualifies as impossibility of performance in the present context and the relevance of resources
- Starting point in the requirements that effect be given to the will of Parliament and that the law be enforced in an appropriate manner
- Onus on the authority to explain why a mandatory order should not be made and this requires a detailed explanation of its situation and why it would be impossible to comply
- Question of whether authority has taken all reasonable steps is an objective one, not a *Wednesbury* matter

Impossibility?

- A public authority is obliged to give priority to using its resources to meet its duties (see *Tandy*)
- For constitutional reasons to do with the authority of Parliament, the general position is that Parliament imposes a statutory duty on the footing that the authority must be taken to have the resources to comply
- Not for the court to dilute a clear statutory duty by reference to its own view of the available resources
- When assessing claim of impossibility, court should usually refer to the authority's position at the time of the proceedings

Exercise of discretion in Imam

- 5 comments relevant to the exercise of the court's discretion:
- (1) the authority may have a general contingency fund to deal with unexpected calls for expenditure – if so, it should consider its use
- (2) relevant if the authority was on notice in the past of a problem relating to non-performance of its duty and failed to take opportunity to react in good time – the longer it has sat on its hands, the more important it may be to enforce the law by mandatory order – an inquiry may be necessary to examine when the authority became aware of the problem “at council level” and if unaware, why?
- (3) the extent of the impact on the individual is relevant and the individual should normally adduce evidence of that impact

Exercise of discretion in Imam

- (4) if there is no sign that the authority is moving to rectify the situation, that is a factor pointing in favour of the making of a mandatory order
- (5) the court should take care not to create a situation which is unfair to others, by giving a claim undue priority over others who are also dependent on the authority and may have an equal or better claim
- Court dismissed the appeal and agreed with the Court of Appeal that it should be remitted to the High Court for further consideration
- High Court decision?

Questions / need support ?

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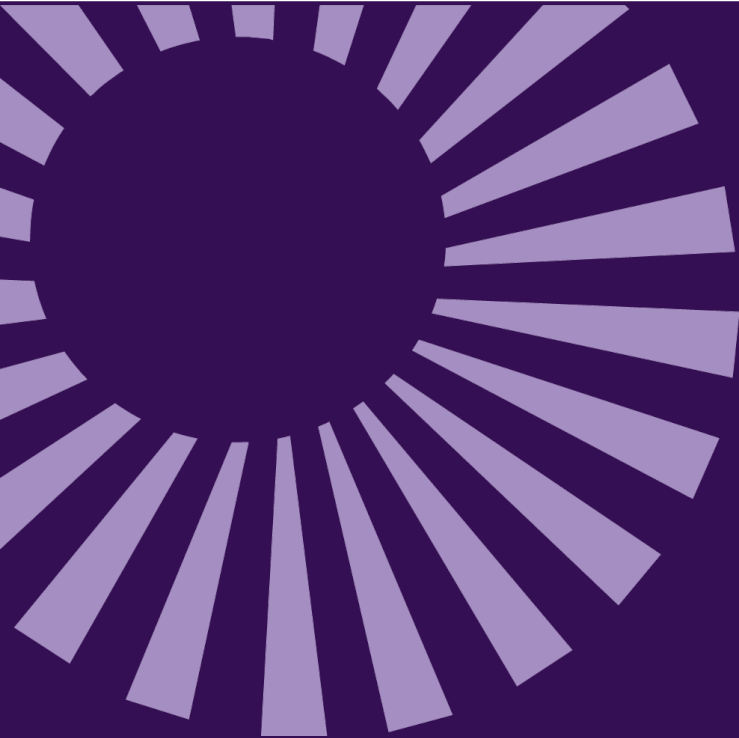


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