

Cards Face Up: Candour and Disclosure in Judicial Review



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Introduction

What are we covering?

- What is the Duty of Candour ('the duty')?
- Principles & extent of the duty
- Recent developments in the law
- Practical guidance



What is the duty of candour?



What is the Duty of Candour?

- Disclosure not required in Judicial Review ('JR') unless Court orders (CPR 54A PD 10.1)
- Heightened duty in urgent applications
- All parties are subject to the the duty
- Applies throughout JR proceedings – continuing duty
- All relevant material & all material facts must be disclosed
- Guidance
 - Section 15, Judicial Review Guide 2023
 - Treasury Solicitor's Department Guidance 2010

CPR

CPR Part 54

Evidence

54.16

- (1) Rule 8.6 (1) does not apply.
- (2) No written evidence may be relied on unless –
 - (a) it has been served in accordance with any –
 - (i) rule under this Section; or
 - (ii) direction of the court; or
 - (b) the court gives permission.

8.6

- (1) No written evidence may be relied on at the hearing of the claim unless –*
 - (a) it has been served in accordance with rule 8.5;*
 - or*
 - (b) the court gives permission.*

PD 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.

11.3 It will rarely be necessary in judicial review proceedings for the court to hear oral evidence. Any application under rule 8.6(2) for permission to adduce oral evidence or to cross-examine any witness must be made promptly, in accordance with the requirements of Part 23, and be supported by an explanation of why the evidence is necessary for the fair determination of the claim.

Duty on Claimants

- **R (I) v SSHD** [2007] EWHC 3103 (Admin) at paragraph 8 per Collins J:
 - *“It is essential that those who bring judicial review proceedings appreciate that there is a duty of candour. That means that they must put before the judge all relevant material, and in particular any material which may be adverse, or may appear to be adverse. They must not leave the situation that the judge does not have the full picture in order to make the relevant decision.”*

High Duty on Public Authorities

- Although duty applies to all parties, there is a high duty on public authority respondents
- **R (Quark) v SSFCA** [2002] EWCA Civ 1409 at paragraph 50 per Laws LJ:
 - *“...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.”*
- **R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs** [2018] EWHC 1508 (Admin) at paragraph 20 per Singh LJ:
 - *“Public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law”.*

Duty on Interested Parties

- ***Belize Alliance of Conservation NGOs v DoE*** [2004] UKPC 6 at paragraph 87 per Lord Hoffman:
 - *“In this case that duty certainly rested on the first respondent, the Department of the Environment of Belize (“the DoE”)...But for present purposes its most important consequence is that BECOL was also, in my opinion, under a duty to make candid disclosure to the court.”*





Principles & extent of the duty



Principles (1)

*The
'Standard
Disclosure'
Principle*

*The 'Just
Disposal'
Principle*

*The
'Candid
Disclosure'
Principle*

*The
'Informati
on-Too'
Principle*

*The
'Relevant
Material'
Principle*

*The 'Non-
Selectivity'
Principle*

Principles (2)

***The 'Best
Evidence'
Principle***

***The
'Redaction'
Principle***

***The
'Permission
-Stage'
Principle***

***The
'Unpleaded-
Grounds'
Principle***



Key takeaways



- The duty is multi-faceted
- Relatively onerous
- Requires:
 - Proactive case management and
 - Internal organisation by all parties

When does it apply?

- *'As soon as the department is aware that someone is likely to test a decision or action affecting them'* (Treasury Solicitor's Department Guidance 2010, section 1.2)
- Every stage of the proceedings:
 - Pre-action letters
 - Summary grounds of resistance
 - Detailed grounds of resistance
 - Witness statements, and
 - Counsel's written and oral submissions.

How is the DoC Discharged?



Clients

**Instructing
solicitor**

Counsel



Recent Case Law Developments



R (BG) v LB Hackney [2022] UKUT 338 (IAC)

- 1. All material facts should be disclosed, including those which are adverse to his case*
- 2. Reasonable enquiries must be made, so that the Judge has the full picture*
- 3. In Age Assessment JR proceedings, DoC will require:*
 - (i) Ascertain what social media and other methods of communication are used by the applicant;*
 - (ii) Consider the relevant accounts with a view to ascertaining whether they contain any material which potentially undermines the applicant's case; and*
 - (iii) Disclose any material which might be relevant to the case, including any material adverse to the applicant.*
- 4. The duty is a self-policing one, but the Upper Tribunal might legitimately require a 'disclosure statement' from an applicant's solicitor*

IAB & Ors, R (On the Application of) v Secretary of State for the Home Department & Anor [2023] EWHC 2930 (Admin) **(‘IAB’)**

- Claimants challenged a decision made by the Secretary of State for the Home Department for Levelling Up, Housing and Communities, to create the Houses in Multiple Occupation (Asylum-Seeker Accommodation) (England) Regulations 2023 (‘the Regulations’)
- Two key issues:
 - Is it permissible for the Secretaries of State to routinely redact the names of civil servants outside the Senior Civil Service from disclosed documents?
 - Should the redaction claimed for Legal Professional Privilege (LPP) be maintained?

Montano, R (On the Application Of) v London Borough of Lambeth [2024] EWHC 249 (Admin) ('Montono').

- Claimant requested the LA to backdate her entry on the housing register
- Claimant brought a JR of the LA's refusal to do so
- Court allowed the JR and considered the DoC:
 - Defendants must co-operate with requests for information
 - Defendants must reflect on what is required in particular contexts
- Scarce resources is not an excuse for a breach of duty
- Compliance with the duty is paramount, and practitioners should be aware of the wider legal and reputational risks associated with potential non-compliance.



Practical Guidance



Practical Guidance (1)

01

Assumption that the duty is discharged

- Must comply with the *extent* of the duty
- Disclosure of a document often not sufficient
- Clear explanation of the document
- The duty extends to evidence/information

02

It is never too early to prepare

- Obtain detailed instructions at an early stage
- Identify the factual disputes/proportionality issues
- Carry out searches of relevant information early

Practical Guidance (2)

01

Type of disclosure

- Provision of relevant information as important, as the provision of relevant documents

02

Disclosure statements

- Not mandatory
- Voluntary statements often helpful in complex cases

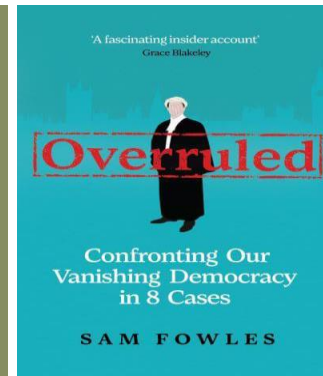
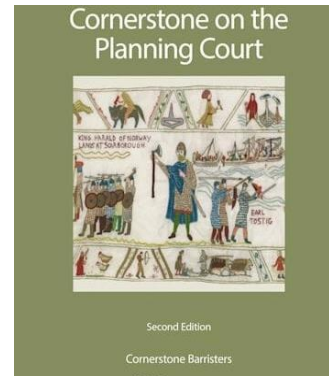
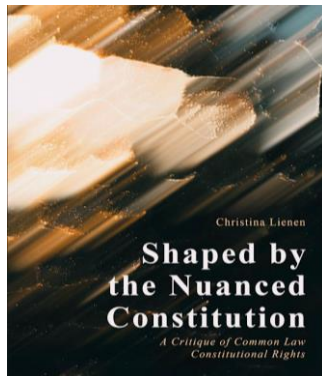
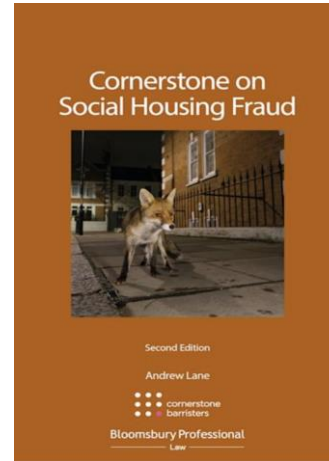
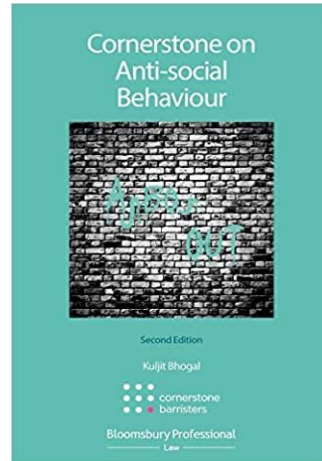
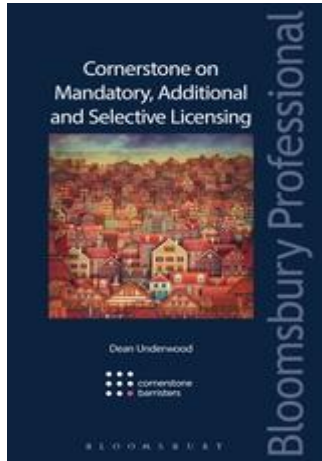
03

Redactions & confidentiality

- Redactions should not routinely be made
- Notify third parties to whom the information relates, prior to the disclosure

Any
Questions

Cornerstone Books





Thanks!

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