Feast or famine?

How do you approach the practical and legal implications of variable standards of disclosure in the Administrative Court?

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Introduction

A. The traditional approach to disclosure in JR ("*famine*")

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Key Sources

- *Tweed v Parades Commision for Northern Ireland* [2006] UKHL 53
- *R (Al-Sweady) v SSte for Defence* [2009] EWHC 2387
- Lord Chief Justice's Discussion Paper on Candour and Disclosure (2016) (drafted by Cranston and Lewis JJ)
- *R (Hoareau) v SSte for FCO* [2018] EWHC 1508
- *R (Citizens UK) v Home Secretary* [2018] EWCA Civ 1812
- *R (M) v CC of Sussex Police* [2019] EWHC 975 (Admin)

A. The traditional approach (famine)

- No general duty to disclose documents.
- Reflected in CPR PD 54A, ¶12.1: "*Disclosure is not required unless the court orders otherwise*."
- Such orders were rarely made.
- Contrast this with standard disclosure under Part 7: all "*relevant*" documents, meaning all documents which either support or adversely affect any party's case.

Rationale for this approach

(i) The nature of judicial review disputes

- Supervisory jurisdiction not merits review.
- Concentrated on disputes of law, not fact

  (See Lord Bingham in Tweed, ¶2: "*[JR] applications characteristically raise an issue of law, the facts being common ground or relevant only to show how the issue arises*")

- Factual error had to be patent

  (See Wednesbury*: "a decision … so unreasonable that no reasonable authority could ever have come to it.")*

(ii) The duty of candour

- ***Content of the duty:*** "*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.*" (LCJ DP, p.3).

- ***Justification:*** public bodies are not defending private interests: "*they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law*": Hoareau (2018), ¶20.

- ***Resulting limitation on disclosure:*** prior to Tweed, disclosure would only be ordered if grounds for thinking that D's evidence was materially inaccurate, misleading or incomplete.

B. Impact of the early cases on Human Rights

Tweed v Parades Commission [2007] 2 WLR 1

- Challenge to the Parades Commission's decision to impose conditions on a parade by "Orange men" through a predominantly Catholic area.
- C alleged that the conditions were a disproportionate interference with rights under ECHR Art. 9 (conscience), 10 (expression), and 11 (assembly).
- *Issue*: whether to order disclosure of documents summarised in D's witness evidence (*viz.* police reports, internal memos, and situation reports).

Key reasoning in Tweed

(1) The HRA brought a new dimension to JR, in the form of proportionality review of interferences with qualified rights.

(2) Proportionality challenges required a more sophisticated and intensive form of factual review. (Brown ¶¶54-55); and

> "*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*" (Bingham ¶3)

(3) To address this "*a more flexible and less prescriptive principle*" was required which would:

> "*judge the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances*." (Carswell ¶32; Brown ¶56)

(4) The ultimate test was:

> "*whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly*." (Bingham ¶3).

(5) On the facts of Tweed itself, mere summaries of documents would not provide the "*full flavour*" of their content or "*nuances of meaning*" – these were relevant to determining the "*difficult issues of proportionality*" (Carswell ¶39).

In summary, Tweed:

(a) established an over-arching (and very general) test; and

(b) was specifically addressed to proportionality review, not primary fact-finding.

R (Al-Sweady) v SSte for Defence [2010] H.R.L.R. 2 (Div. Court)

- Claim relating to treatment of Iraqi nationals by UK military in Iraq following an ambush known as the "Danny Boy" incident.
- Started as a challenge to decisions made by SSte in the aftermath of that incident;
- But evolved into the consideration of substantive allegations of breaches of ECHR Art. 2 (right to life); Art. 3 (torture; inhuman or degrading treatment); Art 5 (right to liberty).

- These turned on "hard-edged" questions of fact, such as whether individuals were killed, or wrongfully detained, or tortured (para. 18)
- *Contrast Tweed* – Al-Sweady raised issues of primary fact (cf tort).
- Procedure: 20 day hearing with 10 live witnesses.
- C made repeated requests for documents – SSte's disclosure was inadequate.
- Culminated in a stay of the hearing after SSte informed the Ct that it could not reassure it that all material documents had been disclosed.

Two key points in Al-Sweady

1. Orders for disclosure and cross-examination should be urgently considered: "*when it becomes clear that the outcome of a judicial review application might depend on the determination of a factual dispute*" (¶28)

   (NB this principle is not contingent on human rights being in issue).

2. Disclosure obligations are heightened when fundamental human rights are engaged:

   The duty of disclosure on the Secretary of State in a case such as the present one is heightened by the fact that the allegations raised in this case concerned some of the most important and basic rights under the ECHR. […] it must be incumbent on this court to consider with great care and to apply intense scrutiny to any claim that any of these three basic human rights [viz. ECHR Article 2, 3 and 5] have been infringed. This means that the duty of disclosure on the part of the defendant to a claim for an infringement of these rights is even more acute. (¶26)

C. A general duty of "full and fair disclosure" (feast)?

1. ***R v Lancashire County Council, ex p Huddleston*** **[1986] 2 All ER 941**, 945 *per* Sir John Donaldson M.R., when permission is granted: "*Then it becomes the duty of the respondent to make full and fair disclosure.*"

   NB "disclosure" here used pre-CPR context, when provision of documents was "discovery". Nevertheless, see subsequent cases.

2. ***AHK v SSte for Home Dept*** **[2012] EWHC 1117 (Admin)** (Ouseley J.): duty of candour is "*the duty on the defendant public authority to explain the full facts and reasoning underlying the decision challenged, and to disclose the relevant documents*" (¶22)

3. *R (Bancoult) v SSte for Foreign and Commonwealth Affairs* [2017] AC 300

- Lord Kerr JSC adopted the formulation in Fordham's JR Handbook that:

  "A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted." (¶183)

- Baronness Hale JSC:

  "It is a proud feature of the law of judicial review of administrative action in this country that the public authority whose actions or decisions are under challenge has a duty to make full and fair disclosure of all the relevant material. Only if this is done can the court perform its vital role of deciding whether or not those actions or decisions were lawful." (¶192)

4. *R (M) v Chief Constable of Sussex Police* [2019] EWHC 975 (Admin)

- Lieven J. adopted and applied Lord Kerr's formulation in Bancoult, *viz.* "*full and fair disclosure of the relevant material*" (¶8).
- But, two significant 2018 decisions were not cited to Judge.
  - *R (Hoareau) v SSte for FCO* [2018] EWHC 1508 (Div. Ct)
  - *R (Citizens UK) v Home Secretary* [2018] EWCA Civ 1812 (Court of Appeal).

5. *R (Hoareau) v SSte for FCO* [2018] EWHC 1508 (Div. Ct)

- Very useful summary by Singh LJ.
- Cites passage from *Huddlestone,* and notes:

> *"[…] this may explain why in some of the more recent authorities there is a reference made to a duty on the respondent "to make full and fair disclosure". Of course since Huddleston was decided the Civil Procedure Rules have replaced the Rules of the Supreme Court. What we used to call "discovery" is now called "disclosure". It is important therefore to understand that what the court was referring to in Huddleston was not disclosure in the modern sense."* (¶15).

- Singh LJ reinforces that disclosure in JR is not automatic (¶9), and
- restates test in Tweed, viz. whether disclosure is necessary in order to resolve the matter fairly and justly.

***6. R (Citizens UK) v Home Secretary* [2018] EWCA Civ 1812** (Court of Appeal).

- Singh LJ sitting in CA:
  - adopted the reasoning in *Hoareau* into his judgment (with which Asplin LJ agreed); and
  - repeated that must provide "*full and accurate explanations*" (as distinct from disclosure). (¶¶105-106).

D. A structured approach to the variable standard

• Approach the issue through a series of cumulative questions:

(1) What rights or interests are in play (accordingly, what is the intensity of review)?

(2) What are the issues in the case (including grounds/issues of which C is unaware)?

(3) Do any of those issues raise questions of fact? If so, are they issues of primary fact or the evaluation of facts?

(4) How will the relevant issues be determined and what (if any) additional documents are necessary to permit this to occur?

(5) Are those documents already to hand? If not, what (if any) searches are proportionate and necessary to locate those documents?

(6) Are there justifications for withholding or redacting documents (LPP, PII)? If so, what further steps may be required to permit fair adjudication (a right to withhold is not right to mislead)?

(7) Is “mere” disclosure sufficient?

(1) What rights or interests?

(a) First, human rights do not impose a single standard

- See *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532: "'[…] *the intensity of review in a public law case will depend on the subject matter in hand. That is so even in cases involving Convention rights. In law context is everything*".

- A hierarchy of norms:

(i) Rights of liberty and bodily integrity: Art. 2 (life); 3 (torture); 5 (liberty)

(ii) Core dignity rights: Art. 8 (private life) 10 (expression)

(iii) Economic rights: A1P1 (possessions)

(b) Other protected rights or interests?

- *Substantive legitimate expectations?*
  - Test is one of proportionality – viz. the existence of an overriding public interest which can justify breaking a promise: *R (Coughlan) v North East Devon Health Authority, ex p. Coughlan* [2001] Q.B. 213.
- *Other statutory regimes:*
  - Ones which require balancing and, therefore, factual assessment?
  - e.g. *R (M) v CC of Sussex Police* [2019] EWHC 975 (PTO)

R (M) v CC of Sussex Police [2019] EWHC 975 (Admin)

- A challenge to the lawfulness of a policy of sharing sensitive personal data concerning C (including her past convictions) with a "*Business Crime Reduction Partnership*".
- The core issue was whether the policies had "appropriate safeguards" such as to make the processing lawful (ss. 40, 42, 56 Data Protection Act 2018).
- C also contended that the policies breached her Art. 8 ECHR rights because the absence of appropriate safeguards made the processing a disproportionate interference with her private life.

- Lieven J. held that Art. 8 ECHR added nothing to the analysis:
  - the test of whether safeguards were "appropriate" itself involved a balancing exercise between private and public interests;
  - "*the statute itself incorporates the concept of safeguards, and an element of proportionality will apply when determining whether the safeguards are sufficient to achieve compliance with the 2018 Act*" (para. 87).
- So, Lieven J. extracted a test of proportionality from a threshold of "appropriateness". This provides a hook for engaging principles in Tweed for disclosure under proportionality review.

(2) What are the issues in the case?

- Always a case specific analysis. What issues must the Court resolve in order to dispose of the challenge?
- Two considerations which are frequently overlooked:

  (1) Issues include potential grounds of which C is unaware (duty of Candour).

  (2) Issues (at least arguably) exclude matters relating to compensation, rather than unlawfulness (PTO).

***Graham v Police Service Commission and the Attorney General of Trinidad & Tobago* [2011] UKPC 46**, ¶19:

Privy Council rejected submission that the duty of candour extended to disclosing docs relevant to compensatory damages:

> *"[...] Its purpose is to engage the authority's assistance in supervising the legality of its decisions: to uphold those which are lawful, and correct those which are not. That exercise is logically prior to the assessment of compensation, a task which presumes that the pleaded wrong has been (or will be) established. The public authority's duty of candour is the servant of the first, but not the second, of these judicial functions."*

- ***Is this the correct approach?***

(1) The exclusion of compensatory issues is questionable in principle:

  - the rule of law includes remediating, as well as identifying, wrongs (and the duty of candour is said to stem from public bodies' duty to cooperate in ensuring the rule of law);
  - PC conflated the duty of candour with the burden of proof?

(2) Also of questionable utility: not a burdensome duty: re. legality most docs are held by the public body; re. loss most rests with C.

(3) What happens in practice? disclosure orders are made and (potentially) can transfer out of Admin Ct: e.g. *Bank Mellat.*

(3) Do the issues raise questions of fact?

- Carefully distinguish between evaluations of fact (e.g. proportion.) and questions of primary fact.
- Not confined to the HRs context. Consider issues of "jurisdictional" or "precedent" fact, namely.
  - facts which must be established before a statutory jurisdiction is engaged; the Court (not the decision-maker) is the primary fact finder; identifying them is a matter of statutory construction.
  - E.g. *R (A) v London Borough of Croydon* [2009] UKSC 8 ("child"); *R (Bluefin) v FOS* [2015] Bus. L.R. 656 ("consumer")

(4) How will the issues be determined and what docs will this require?

- (1) If there are issues of primary fact and (in particular) if cross-examination is required, disclosure usually inevitable; consider "*standard disclosure*" threshold and CPR Pt 31 (cf. *Al-Sweady* ¶28)
- (2) Where proportionality is in issue:
  - disclosure is not automatic; consider whether "*nuance*" and "*flavour*" is significant (*Tweed* ¶39);
  - even in HR cases, JR is "review" not "reconsideration", post-decision material generally inadmissible: *R (A) v CC of Kent Constabulary* [2013] EWCA Civ 1706, ¶61, 91 (Court may remit).

- (3) The fact that a document is referred to in a witness statement does not make it disclosable: CPR r. 31.2 does not apply: *R (Sustainable Development Capital LLP) v SSte for BEIS* [2017] EWHC 771 (Admin).

- (4) However, the "best evidence rule" is still good law (*viz.* a document is the best evidence of its own contents):

  "The best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead."

  R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154, para. 49 (*per* Sedley LJ)

- (5) Disclosure should be focused and not excessive: see *Hoareau*, ¶¶19:
  - *[…] Simple disclosure of documents might suggest that all that the public authority has to do is give a lot of documents to the claimant's representatives but this may, in truth, overwhelm them and obfuscate what the true issues are.*
  - *The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack".*

- (6) Disclosure must not be selective: see *Hoareau*, ¶¶21; *R (National Association of Health Stores) v SSte for Health* [2005] EWCA Civ 154, ¶47

(5) What (if any) searches are proportionate and necessary?

- Proportionality of search has to be determined on a case by case basis.
- A structured approach:

  (1) What are the prospects of a particular search finding relevant material?

  (2) What is the likely probative significance of that material, if discovered?

  (3) What are the costs of undertaking that search?

  (4) Are those costs proportionate, having regard to the importance of the rights and interests at stake?

- See guidance in TSOL's "*Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*" (2010).

(6) Are there any justifications for withholding or redacting documents?

- E.g. legal professional privilege, or public interest immunity?
- NB. confidentiality is not a bar to disclosure, but may, depending on relevance, justify redaction: see *Tweed,* ¶5.
- Even if documents can be legitimately withheld:
  - any positive case cannot be inconsistent with them: a right to withhold is not a right to mislead;
  - therefore consider what, if any, modifications are required to the way the case is put.

(7) Is "mere" disclosure sufficient?

- The duty of candour may is to provide a "*full and fair explanation*";
- *T*his may include the duty to identify the significance of the documents disclosed.
- See *R (Khan) v SSte for the Home Department* [2016] EWCA Civ 416, *per* Beatson LJ:

> *"I do not consider that it suffices to provide a pile of undigested documents, particularly in a document heavy case, or where the claimant has knowledge which enables him or her to explain the full significance of a document."* (And PTO)

- And Ryder LJ (at para. 23):

> *"[…] the duty of candour which is a duty to disclose all material facts known to a party in judicial review proceedings applies to all parties in the proceedings. The duty is not to mislead the court which can occur by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact."*

- This passage was endorsed by Singh LJ in Hoareau at para. 23.

E. Consequences of failing to disclose

(1) *Inadmissibility* (if disclosed late)

(2) *Adverse inferences*: both as to the existence of other probative material and on the merits of the dispute: see *M v Chief Constable of Sussex Police* [2019] EWHC 975 (Admin)

(3) *Adverse costs*;

(4) *Contempt* (for wilful breach of order)

(5) *Perverting the course of justice* (deliberate concealment)

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