

DUTY OF CANDOUR

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QUESTION

- Where are the limits of the Duty of Candour for defendants, claimants and interested parties...
- ... supported by caselaw and practical examples?

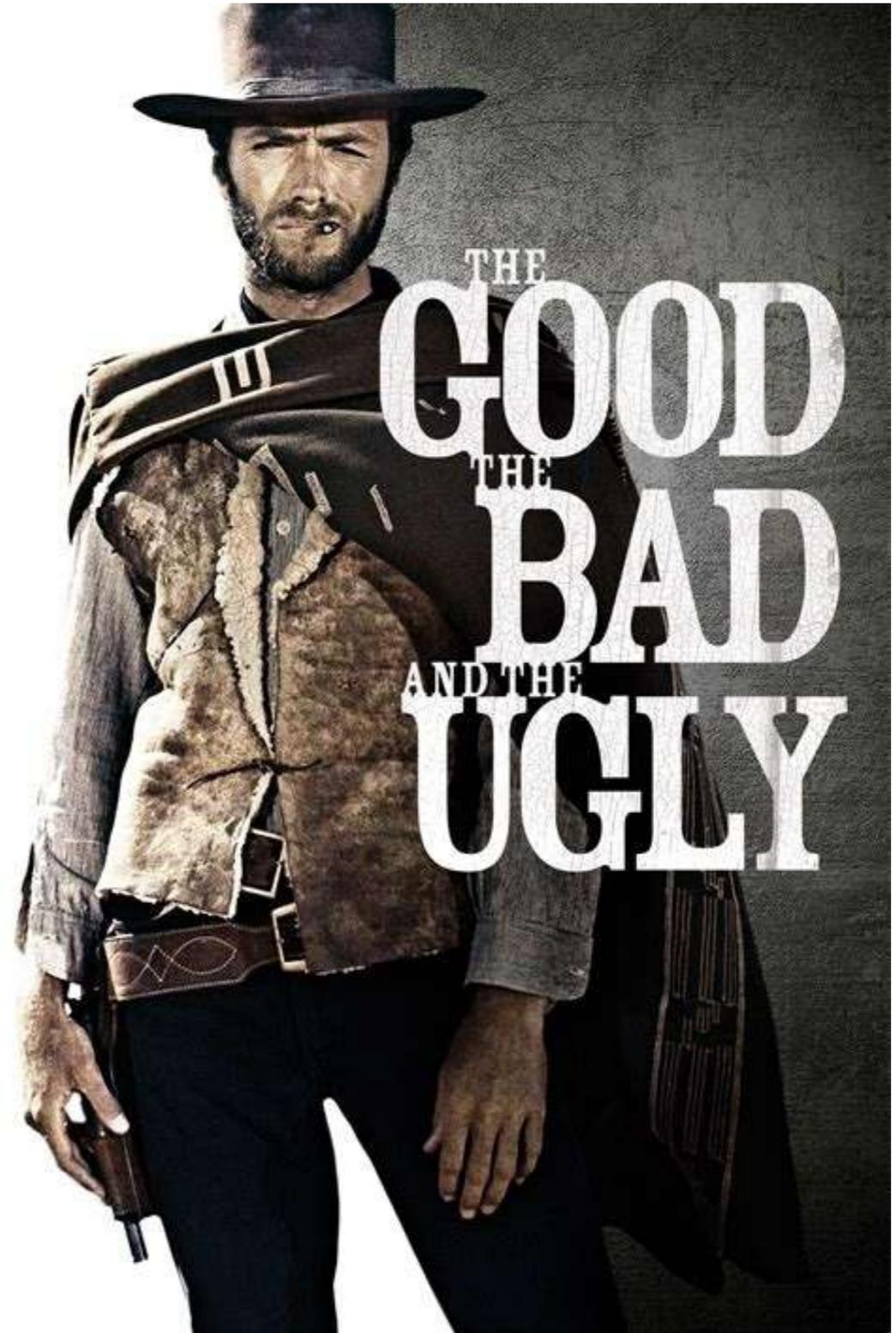
ANSWER

- What?
- Why?
- When?
- Who?
- Examples
- So what?



WHAT?

- The duty on the parties is to identify



WHAT IS THE DUTY?

- In summary

....“*the duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.*”

(Singh LJ, *Citizens UK v SSHD* [2018] 4 WLR 123 at [106(5)])

- Key sources:

- CPR PD54A 6.2(2) (AoS); 10.1 and 10.2 (Evidence)
- Admin Court Guide 2022, Chapter 15
- Key cases: *Khan v SSHD* [2016] EWCA Civ 416; *Citizens UK* (above); *HM, MA, KH v SSHD* [2022] EWHC 2729 (Admin)
- Treasury Solicitors Guidance on the duty

NATURE OF THE DUTY

4 step summary (see Admin Court Guide 15.3 and *HM* [16]):

- 1) Standard disclosure usually applies in civil claims- CPR Part 31. In judicial review claims, disclosure is not required unless the Court orders otherwise (CPR PD54A para 10.2)
- 2) Instead, the duty of candour applying to all parties “*requires the parties to assist the Court by ensuring that information relevant to the issues in the claim is drawn to the Court’s attention, whether it supports or undermines their case.*”
- 3) Good practice to disclose a document relied on it rather than merely summarise it, because the document is the best evidence of what it says (*Tweed* [2006] UKHL 53). Same is true in other situations where the precise terms of a document are relevant to an issue in the case. In practice difficult to comply with the duty without disclosing document.
- 4) However, disclosure alone may not be enough. The duty may also require the party in its statements of case to identify and explain the significance of information and/or documents adverse to that party’s case

WHY?

- 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 so that Court can proceed on basis that it has all material facts before it.”* (Singh LJ in *Citizens UK*)
- “Cards face upwards”... with Defendant holding the “*vast majority*” of the cards (*ex parte Huddleston per Sir John Donaldson MR at p945*)
- In the absence of disclosure, it is incumbent on claimants too to bring to the Court’s attention the material facts and issues at stake. And relatedly JR is not a forum to test factual disputes.
- A “self-policing” duty placing a high burden on solicitors and barristers acting for public authorities... but increasingly also there is a focus on the duty on claimants’ lawyers

WHEN DOES IT KICK IN?

- Debate about this... Now largely settled:

“The duty of candour has been recognised as applying at, or even before, the permission stage as well as at the substantive stage. However, what is required to discharge the duty at the substantive stage will be more extensive than what is required before permission has been granted.” (Admin Court Guide 15.3.2; cf *R (Terra Services Ltd) v NCA* [2019] EWHC 1933 (Admin), [9], [14].

- T Sol Guidance recently approved by Div Court in *HM* at [16]:

– *“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 [PAP], summary grounds [..], detailed grounds [...], witness statements, [...] written and oral submissions.”*

CONTEXT DEPENDENT

- What is required will differ depending on the stage and/or issues
- Proportionality - see JR Pre-Action Protocol (13):

“Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so.” If not, may impose costs sanctions (and may lead to further applications – see later)

CONTEXT

- At Summary Grounds stage “*The Grounds should 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.*”

CPR PD54A – 6.2 (2).

- Ongoing duty – *HM*:
 - “*The duty of candour continues to apply throughout the proceedings. For example, if after the service of evidence, further relevant information comes to light, that information must be disclosed to the other parties to the proceedings and put before the Court at the earliest possible opportunity.*”

WHO?

- Duty applies to all parties:
 - Claimants
 - Defendants
 - Interested parties
 - Other parties involved...
- Look at each in turn

CLAIMANTS' DUTY

- Overview – 3 key points:
- 1) **Key facts**.... And known impediments e.g. delay, alternative remedy
- 2) Particularly important where **urgent applications** are being made and/or where the **defendant does not have an opportunity to respond** (or in detail)
- 3) Also extends to **a duty to review “viability and propriety” of continuing** with a challenge at each stage – after pleadings and evidence, and in light of any other circumstances or developments (e.g. if becomes academic)

CLAIMANTS' DUTY – 3 KEY EXAMPLES

1) *Khan (above)* – Application for ILR on grounds of long residence (14 years); failure to refer to earlier work permit application which stated A had been in Pakistan during that period. Permit disclosed but its **significance** – i.e. adverse - not explained.

- CA set aside its grant of PTA on basis of this failure.
- Duty is to “*explain material in a disclosed document that is adverse to the claim*” (Beatson LJ [46]). Pile of undigested documents not enough.

2) *R (DVP) v SSHD [2021] 4 WLR 75* – Accommodating asylum seekers at military barracks. Div Ct found “significant abuse” of the urgent procedure. In seeking interim relief, Cs’ solicitors had failed to ensure all material facts were before the Court (including GLD correspondence).

3) *R (BG) v Hackney LBC [2022] UKUT 00338 (IAC)* – in age assessment proceedings (precedent fact), duty on solicitors to make reasonable enquiries to identify such (adverse) facts including the applicant’s social media accounts. Tribunal entitled to seek a disclosure statement to that effect

DEFENDANTS' DUTY

- 4 key points:
 - 1) **The good, the bad, and the ugly** - process of disclosure must be “*with all the cards face upwards on the table*” and not selective
 - 2) Evidence must not contain “**spin**”, nor be ambiguous or economical with the truth, nor deliberately or unintentionally obscure areas of central relevance
 - 3) Pleadings and evidence must **not mislead by omission** (e.g. non disclosure of a material document or fact or by failing to identify the significance of a document or fact)
 - 4) **Ongoing duty** to consider whether defence remains viable, esp after permission

DEFENDANTS' DUTY – *HM*

- 1) *HM* – mobile phone seizure case. Blanket policy of seizing phones of all migrants arriving by small boat.
- Div Ct identified a “*failure of governance which allowed an unlawful policy to operate for an unknown length of time prior to November 2020.*” A failure by all those involved in claims and policies “*to prioritise the need to ensure that everything that was done was lawful.*” Damning with faint criticism.
- Very close scrutiny of GLD and Home Office lawyers’ actions including judgements made as to litigation response e.g. instead of admitting existence of policy which they thought had ceased, they simply denied it existed. Approach taken was “*excessively robust*” and prolonged the (continuing) operation of the unlawful policy.



2 FURTHER EXAMPLES

- 2) *TP & AR v SSWP* [2020] EWCA Civ 37; Art 14 ECHR / Universal Credit
 - Witness statement in first JR had failed to reveal that SSWP had (by the date of hearing) decided to introduce transitional protection for the severely disabled, which was precisely the focus of the claim. Instead SSWP actively denied that it was appropriate and/or necessary. Evidence of ministerial decision was revealed in second claim (about amounts). CA found a breach of DoC and indicated that evidence in JR1 should have been candid. Evidence from JR2 supported Claimants' case on appeal.
 - Ironic because judge in first claim had found against SSWP on the basis of absence of evidence of any consideration of the issue.
- 3) *Dean v Mitchell & Secretary of State for Levelling Up, Housing & Communities* [2023] EWHC 1479 (KB); mobile homes / Art 8 ECHR
 - Court complimented the Secretary of State for producing detailed DoC bundle containing various pre-legislative documents and memos, disclosed for completeness, because they were documents that only D would have.

INTERESTED PARTIES?

- Yes, the duty does apply to interested parties to the proceedings (cf Admin Court Guide 2022 paragraph 15.4.1), although little case law on this
- See e.g. in *Belize Alliance of Conservation Non-Government Organisations v Department of the Environment* [2004] UKPC 6, the interested party developer which was in effect the defendant's partner in the relevant public works project was under "*a duty to make candid disclosure to the court*" ([87]).
- See also *R (Qualter) v Preston Crown Court* [2019] EWHC 906 (Admin), [32]: Court refused an application for disclosure against the interested party on the basis that there was no basis to consider that it had failed to comply with the duty of candour to which it was subject

NON-PARTICIPATING DEFENDANTS?

- Even where a defendant decides not to take an active part in the proceedings, e.g. where it considers that an interested party is able to defend the claim, it nevertheless owes a duty to assist the court.
- E.g. *R (Midcounties Co-Operative Ltd) v Forest of Dean DC* [2015] EWHC 1251 (Admin)
 - D's grant of planning permission was challenged and it informed the court that while it would not defend the claim due to financial constraints, it did not concede it and supported the developer's opposition to it.
 - Singh J = D at least needed to consider whether it had complied with its duty of candour by:
 - disclosing all relevant documents,
 - filing a witness statement to assist the court, and/or an AoS / summary grounds even if only in outline form to explain the gist of why it maintained that its decision was lawful,
 - considering whether a representative (not necessarily a lawyer) should be in court so the authority knew what was going on and could deal with any points that arose.

SO WHAT?

- What are the consequences of a breach?
 - Many and varied! Recent examples:
 - **Case management** – adjournments, costs, **specific disclosure** (e.g. *HA & SXK v SSHD* [2023] EWHC (forthcoming, Swift J))
 - **Adverse inferences** (*R (Das) v SSHD* [2014] 1 WLR 3358 at [80]; see *Gardner v SSHSC* [2021] EWHC 2422 (Admin) re care homes – absence of material => negative finding)
 - **Disclosure statements required** – e.g. *BG, Gardner, HA*
 - **Referral to professional regulator** – e.g. *DVP; R (Sathivel) v SSHD* [2018] 4 WLR 89
 - **Setting aside permission** - e.g. *Khan*

CONCLUDING THOUGHTS

- Duty of candour:
 - Principles and practice clarified; Admin Guide – practical codification
 - Growing importance and focus by Courts – as a protection for the rule of law e.g. SSHD / migrant policy
 - Claimants equally in firing line – procedural rigour and openness
 - A serious duty. Best to err on side of caution especially from permission stage onwards
 - Consequences and risks if do not comply are significant

QUESTIONS & ANSWERS?



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