





What is the latest thinking on anonymity orders and disputes of fact in JR, and where will you find a tactical advantage for your cases?

White Paper - Judicial Review Conference

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GARDEN COURT CHAMBERS



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The general position? *Scott v Scott* [1913] AC463

- Open justice, the principle that trials are held in public with the possibility of public scrutiny of everything that happens in the trial, is a **foundation of our legal system**.
- Lord Atkinson explained at 463 that “it is felt that in public trial is to found, on the whole, the **best security for the pure, impartial, and efficient administration of justice**, the best means for winning for it public confidence and respect’, and ‘that was **generally sufficient to justify the inconveniences and occasional humiliations** to which public trials may give rise.”



Open justice and freedom of expression

- The fundamental principle of open justice is closely allied to the principle allowing fair, accurate and complete press reporting of court proceedings.
- “The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held **in open court to which the press and public are admitted** and that, in criminal cases at any rate, all **evidence** communicated to the court is **communicated publicly**. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.”

Lord Diplock *Attorney-General v Levenson* [1979] AC 440 at 450

General applicable principles

- The guiding principle is open justice – *Scott v Scott* [1913], *R (Mohammed) v SSFCA* [2010] QB 218 [38]; Administrative Court Guide 2024 [7.12].
- The administration of justice takes place in public *CVB v MGN Ltd* [2012] EWHC 1148 (QB) [2012] *Lupu v Rakoff* [2019] EWHC 2525 (QB); CPR 39.2.
- The public have the right to attend all court hearings; the media is able to report those proceedings fully and contemporaneously.
- Generally, the names of parties are made public when matters come before the court, in judgments and orders. [CPR 16 PD claim form full name and address]
- Unless a court makes a different order, statements of case become available for inspection by a non-party [CPR 5.4C].



Exceptions

- Exceptions are prescribed by statute and arise from the inherent jurisdiction of courts to control their own procedure.
- So that publicity does not interfere with the administration of justice: -
 - directly (eg making public something to be kept confidential until a later date/later trial)
 - indirectly (eg by discouraging involvement in the process, or by marking those involved, particularly children, in a way that might affect their future).
- Exceptions include: national security; cases with confidential information; where privacy is necessary to protect the interests of any child or protected person, and other automatic reporting restrictions, including victims of sexual offences and family law proceedings.



What types of orders?

- **Withholding order** – permits claim form to be issued w/o C's name or address
- **Restricted reporting order** - prevents disclosure of identity of C or other person, **only if** non-disclosure **necessary** to secure the proper administration of justice and **to protect** the interests of that person [CPR 39.2 (4)]
- Where the court has permitted a name or other matter to be withheld from the public, it can impose reporting restrictions under s.11 Contempt of Court Act 1981 prohibiting the publication of that name in connection with the proceedings.
- **Access to court file order** - prevents or restricts public access to documents on the court file, including statements of case [CPR 5.4C (4)]



Derogation from open justice

- Any derogation from open justice – **only when exceptional and based on necessity**.
- Party seeking to restrict the operation of the open justice principle **bears the burden** of establishing that the restriction is necessary on the basis of **clear and cogent evidence** *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin), [16].



Derogation from open justice

- 1) General rule – parties’ names included in orders and judgments of the court
- 2) No general exception where **private matters in issue**/ parties are **public figures**.
- 3) An anonymity order/ other order restraining the publication of the normally reportable details = **a derogation from the principle of open justice**.
- 4) An order will **not** be made simply because the **parties consent**: in all cases any derogation from the open justice principle is a **decision for the court**.
- 5) Orders that derogate from open justice are **exceptional**, require **clear justification** and should be made only when they are **strictly necessary** to secure the proper administration of justice. The need for derogation must be established by clear and cogent evidence. Where the court is asked, it will only do so on **close scrutiny** of the application and consideration of whether, assuming any restraint on publication is necessary, there is **any less restrictive or more acceptable alternative** than the order sought.



Principles continued

6) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, **the question** is whether there is **sufficient general, public interest** in publishing a report of the proceedings which identifies a party and/or the normally reportable details to **justify any resulting curtailment** of his right and his family's right to respect for their private and family life.

JIH v News Group [2011] EWCA Civ 42 [21]; *British Broadcasting Corporation (R v Sarker)* [2018] EWCA Crim 1341; *R (Duke of Sussex) v SSHD* [2022] EWHC 682 [7]



Principles continued

In the often-cited passage, Lord Neuberger of Abbotsbury said at [22]:

'Where, as here, the basis for any claimed restriction ultimately rests on a judicial assessment, it is therefore essential that .. the judge is first satisfied that the **facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice** rule ...'

JIH v News Group [2011] EWCA 42, cited in *PMC v A Local Health Board* [2024] 2969



R (ota AAM) v LB Bromley [2025] EWHC 1565

- Issue - whether D reached a lawful decision as to what assistance it should provide C, young adult and asylum seeker, under ss 24 and 24A of the Children Act 1989.
- For a brief period prior to his 18th birthday, C provided with accommodation by D.
- D required C to leave that accommodation very shortly after he turned 18. He moved to NASS accommodation by SSHD s 95 Immigration and Asylum Act 1999.
- 16 August 2024, D finalised a pathway plan setting out assistance it would provide C, without accommodation. C argued that not to accommodate was unlawful.
- What was relationship between D's functions under 1989 Act and SS's functions s 95 of the 1999 Act.



R (ota AAM) v LB Bromley [2025] EWHC 1565

- Jonathan Moffett KC, sitting as a DHCJ, granted withholding order (anonymity), a restricted reporting order under s 11 of the Contempt of Court Act 1981, and an order restricting access to documents on the Court's file under CPR 5.4C(4).
- Granted on grounds of C's age and vulnerability, and as an asylum-seeker whose claim is based on his sexuality.
- Court referred to the guidance of Nicklin J in *PMC v LHB* [2024]
- Highlighted this constituted a departure from the important constitutional principle of open justice.



R (ota PMC by his mother as LF) v Local Health Board [2024] EWHC 2969

- C born in 2012 at one of D's hospitals. After his birth, he developed several problems, including a large intraventricular haemorrhage ("IVH"). As a foetus, he claimed he was subject to a period of prolonged partial asphyxia prior to birth, probably followed by a period of acute asphyxia during the second stage of labour. He claimed that the IVH led directly to him developing cerebral palsy. In 2016, D admitted liability for negligence in its care of C and his mother. Damages of more than £10m sought. Some previous media coverage making C "*readily identifiable*" in his local area "*as a very high-profile victim of medical negligence*".
- Judgment by Nicklin J, anonymity application as breach of C's Art 8 rights refused.



R (ota) PMC v Local Health Board [2024] EWHC 2969

[26] “The starting point is open justice; that the administration of justice takes place in public, and the public have the right to attend all hearings held in open court. Allied to this is the corresponding right to publish reports of those proceedings. Historically that role that was discharged by the press, but is now one **embraced by many others who publish reports of proceedings in many different forms, e.g. articles published on blogs, academic commentary, and on social media.**”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[29] “Any order the effect of which is to withhold the name of a party in court proceedings (or otherwise restricts the publication of what would be the normally reportable details of a case) is a **derogation from the principle of open justice and an interference with the Article 10 rights of the public at large**: *JIH -v- News Group Newspapers Ltd* [2011] 1 WLR 1645 [21]; *In re Guardian and Media Ltd* [2010] 2 AC 697 [63].”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[30] “Any derogation from, or restriction upon, **open justice is exceptional and must be based on necessity**. Any restriction on the public's right to attend court proceedings, and the corresponding ability to report them, must be shown, by "*clear and cogent evidence*" **to fulfil a legitimate aim, be necessary and proportionate**: *R (Marandi) –v Westminster Magistrates Court* [2023] 2Cr App R 15 [16]; *R -v- Sarker* [2018] 1WLR 6023 [29]; *JIH* [21]. These principles apply "*across the board*" (i.e. in all Courts and Tribunals), including in cases where rights under Article 8 of the Convention are engaged: *Marandi* [17]. In civil proceedings, except in cases where statute grants automatic restrictions, there is no presumption of anonymity for any category of case or litigant; **in each case the order must be shown to be necessary.**”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[31] “In cases where the derogation from open justice is sought on the basis of an argued **interference with another qualified Convention right**, the **task of the Court** was stated by Lord Steyn in *In re S* [2005] 1AC 593 [17]: “First, **neither article has as such precedence over the other**. Secondly, where the values under the two articles are in conflict, **an intense focus** on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the **justifications** for interfering with or restricting each right must be taken into account. Finally, the **proportionality test** must be applied to each. For convenience I will call this the ultimate balancing test...” (emphasis in original)”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[32] “When deciding whether the applicant has satisfied the burden of demonstrating that the relevant derogation from open justice is necessary, the Court must **carefully scrutinise the evidence and ascertain the facts** (if necessary, by resolving any relevant factual dispute).”

“Intense focus of particular facts on assessment of convention rights”

Griffiths -v- Tickle [2022] EMLR 11, *Re S* ‘not a mechanical exercise’

Not an assessment of “rival generalities” *Marandi*

Not a question of discretion, matter of obligation *M v W* [2010] EWHC 2457”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[41] “Whilst, in a very broad sense, in assessing the engaged convention rights on any application for a derogation from open justice, the Court is carrying out a 'balance' between them, **the scales do not start evenly balanced**. The Court must start from the position that very substantial weight must be accorded to open justice. Any balance starts with a **very clear presumption in favour of open justice unless and until that is displaced and outweighed by a sufficiently countervailing justification**. That is not to give a presumptive priority to Article 10 (or open justice), it is simply a recognition of the context in which the *Re S* 'balance' is being carried out.”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[44] “Reflecting these principles, it is always **important to remember** that it is not for the media, or the public, to justify why the name of someone involved in legal proceedings should be freely available (and able to be published); it is **for those seeking the derogation** from open justice that would prevent it **to show why** it must be withheld.”



R (ota) PMC v Local Health Board [2024] EWHC 2969

[45-59] Anonymity Orders: **distinct elements** of w/holding identity (general court powers to regulate *Khuja v Times* [2019] AC161) & prohibiting publication of information (found in legislation) requiring court to **identify statutory basis** for the order.

[60-66] s11 Contempt of Court 1981, **not free-standing power** – contingent on court independently exercising power to withhold information. An ancillary statutory power.

[67-77] CPR 39.2(4) – **not the statutory basis** for an order.

[78-84] S6 HRA 1998 – a duty to act compatibly not a statutory power to make an order

[84-93] **s37 Senior Courts Act 1981**, may **exceptionally** provide the statutory basis by an injunction [in *PMC Nicklin J* relied on s39 Children & Young Persons Act 1933]



(1) SSHD (2)SS Levelling Up, Housing & Communities v R (ota IAB & Others) **[2024] EWCA Civ 66**

- JR challenge to the lawfulness of regulations removing the requirement for houses in multiple occupation to be licensed if asylum seekers are to be placed there.
- Appeal concerned the evidence put forward by the Secretaries of State.
- Documents with most of the names of civil servants below Senior Civil Service redacted.
- Swift J ruled Claimants entitled to disclosure of the documents **without redactions**.
- Defendants disclosed four tranches of documents to more than 500 pages, with redacted documents and no explanation why the passages redacted.
- Ds referred to redaction of the names of "junior civil servants" in their grading. Argued that the civil service currently employs about half a million people, of whom approximately 2% are in the SCS. Ds sought to assert the right for the other 98% to remain anonymous, save in exceptional cases.



IAB continued

- Referred to *Quark Fishing Ltd and the* “... very high duty on public authority respondents”
- Referred to Lewis LJ textbook *Judicial Remedies in Public Law* (6th Ed, 2021), cited by Swift J, the duty of candour is **an obligation of explanation**, in witness statements, or by the disclosure of relevant documents, or both.
- Referred to the “most authoritative statements” in *Tweed* on specific disclosure
- Referred to the Treasury Solicitor’s Department “*Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*”, dated January 2010 “*but (we were told) still in force*”
- Referred to Administrative Court Guide 2023 “*The Guide is not itself a source of law but is intended to reflect what its authors understand to be the present state of the law.*”
- Referred to Swift J’s similar observations in *FMA v SSHD* [2023] EWHC 1579



IAB continued

“I accept the submission on behalf of the Respondents to this appeal that defendants in judicial review proceedings **do not fulfil their duty of candour** if (save for good and specific reasons) they disclose documents **with redactions of the names of civil servants**. I am struck by the robustness with which both Swift J, a judge of almost unparalleled experience of public law litigation both as Treasury Counsel and later as a judge of the Administrative Court, and Fordham J, another judge with an encyclopaedic knowledge of judicial review, have rejected the arguments for routine redaction. I entirely agree with them. **The practice is inimical to open government and unsupported by authority**. If Parliament takes the view that members of the Civil Service have a general right to anonymity in judicial review litigation then it should enact a primary statute to that effect.” Bean LJ



Points to bear in mind (rather than tactical advantage)

- Apply promptly, if any order is sought.
- Timing is material – not *after the horse has bolted*, ‘too late’ *PMC, Khuja*
- Extent of information already in the public domain “highly material factor” *PMC*
- Clear and cogent evidence is essential - cannot rely on generalisations (exploitation in *PMC, Alnoor* [2025] EWHC 922, refugee, potential VoT, insufficient evidence)
- Consent of the parties is not determinative - the court must scrutinize the individual facts/ competing interests for itself.
- Be aware of jigsaw identification - ensure the draft order is clear in who it extends to *RWU* [2024] EWHC 2828 school exclusion/ child criminal exploitation, anonymity of C, mother, school, brother.



Disputes of fact in Judicial Review - when?

- *R v SSHD, Ex p Khawaja* [1984] AC 74 - courts' jurisdiction to determine questions of precedent fact in JR claims. Concerned the existence of the power of removal, which depended upon the determination of a precedent factual question, whether C an "illegal entrant". "*In such cases the courts decide whether the precedent fact is established*" (Lord Scarman [110]).
- Material error of fact - *E v SSHD* [2004] EWCA Civ 49, mistake as to an existing fact, the fact '*established*', *uncontentious and objectively verifiable*, C not responsible for the mistake; mistake must have played a material (not necessarily decisive) part.
- HR Convention rights requiring objective evaluation - *Begum v SSHD* [2023] HRLR 6, *R (Daly) v SSHD* [2001] UKHL 26, court may have to establish disputed facts *McAleenon (Northern Ireland)* [2024] UKSC 31.



Disputes of fact in Judicial Review

“If, therefore, there is a **dispute as to whether a person has the legal right under the 1981 Act to the status of a British citizen**, that dispute is something which can be **resolved in the courts**. Such a person can bring proceedings for a declaration that he is entitled as of right under that Act to British citizenship ... In determining that matter the **court will itself resolve any issues of fact** as well as any issues of law. This is not, in truth, judicial review of a decision taken by any administrative body or person, but the more conventional resolution of a dispute with which the courts are very familiar. That being so, the **court would not afford to the Secretary of State any margin of appreciation or degree of deference where the resolution of issues of fact is concerned**. It will find the facts for itself **according to the evidence** before it.”

Harrison v SSHD [2003] EWCA Civ 432 at [34] Keene LJ



Disputes of fact in Judicial Review

R (Matthews) v SSHD [2018] EWHC 2026 (Admin) in which live evidence was heard in court to determine the issues of fact as to British nationality on which the legal issue of whether the claimant was entitled to a passport turned.

A v Croydon [2009] 1 WLR 2557 SC held that the question whether a person was a child was a fact precedent to the exercise of a local authority's powers to accommodate a "child in need" under the Children Act 1989. Such questions are proper matters for the court. Baroness Hale [27] [33]



Inquisitorial Role

Where the issue before the court was the precedent fact issue whether C was a child for the purposes of the Children Act 1989, the High Court exercised a supervisory jurisdiction and its inquiry under the Act was inquisitorial. *R (CJ) v Cardiff City Council* [2012] P.T.S.R. 1235 CA.

Inquisitorial role adopted on questions of nationality on an application for judicial review *R (Miah) v SSHD* [2017] EWHC 2925 (Admin).



R (ota) NB & Others v SSHD [2021] EWHC 1489

“The process of finding the facts has been more difficult in this case than in typical judicial review proceedings because there are a number of points of detail and the facts are not clear in various respects and/or are in dispute, although there are areas of agreement between the parties. In relation to a number of points the evidence is vague or inconsistent and/or the documentation is incomplete or unexplained. There was also no application by any of the parties for any witness to be called for the purposes of cross examination which might have clarified the factual position. “ [23] Linden J



R (ota) NB & Others v SSHD [2021] EWHC 1489

[33] “Where there is a specific or direct conflict of evidence, the applicable legal principles are those set out in *R (McVey and Others) v Secretary of State for Health* [2010] EWHC 437 (Admin) at [35] where Silber J stated: “In my view, the proper approach to disputed evidence is that: - **i)** The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross examination, the facts in the **defendants' evidence** must be **assumed to be correct;** **ii)** An exception to this rule arises where the documents show that the defendant's evidence **cannot be correct;** and that **iii)** The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a **critical factual finding** is **to apply to cross-examine** the maker of the witness statement on which the defendant relies.”



R (ota) NB & Others v SSHD [2021] EWHC 1489

[37] “This is the **approach which I have adopted**. With respect, essentially it requires a common-sense approach to the evaluation of the evidence as a whole, applying the burden of proof and taking into account the fact that there has been no “live” evidence or cross examination. In my view, as part of this exercise it is permissible to take into account the **quality of the evidence on a given point**, and whether that evidence is within **the knowledge of the deponent** and, if not, the **source of their information**. In the case of exhibits, it is permissible to consider such evidence as the deponent provides to explain its contents and as to the source and reliability of the information which it contains.”



R (F) v Surrey County Council [2023] EWHC 980 (Admin)

C was a recovering alcoholic. April 2021, his mother was very concerned about him, telephoned i-access, a drug and alcohol service by Surrey and Borders Partnership NHS Foundation Trust on behalf of Surrey CC. She says that they refused to provide treatment unless he first undertook an alcohol reduction programme, but it was not safe for him to undertake that programme.

She arranged for him to be admitted as an in-patient to a private facility, to receive medically assisted alcohol detoxification treatment, at a cost of £19,650 (paid with a loan from C's father). After 15 days, the treatment was successful and C sober ever since.

November 2021, his mother asked D to reimburse the cost of the treatment. D refused. C challenged "blanket policy" not to offer residential detox to patients who have not undertaken an alcohol reduction programme and the refusal to reimburse.



R (F) v Surrey CC [2023]

[46] “In general, a court hearing a judicial review claim **does not resolve disputes** about primary fact. There are, however, situations in which a genuine public law ground of challenge requires resolution of a **dispute about a primary fact**. ...often claimed that there is a general principle that the defendant’s written evidence is to be preferred, unless exceptionally the court permits cross-examination or the evidence “**cannot be correct**”: see e.g. *R (Safeer) v SSHD* [2018] EWCA Civ 2518, [16]-[19] (Nicola Davies LJ); *R (Singh) v SSHD* [2018] EWCA Civ 2861, [16] (Underhill LJ). “
Chamberlain J



R (F) v Surrey CC [2023]

[47] “The scope of the “cannot be correct” exception was explained by Stanley Burnton J in *S v Airedale NHS Trust* [2002] EWHC 1780 (Admin), at [18]: “*There may be an exception where there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away (in other words, the witness’s testimony is manifestly wrong)...*”



R (F) v Surrey CC [2023]

[48] “There are, however, other equally authoritative statements which put the **principle more neutrally and do not refer to any presumption in favour of the defendant**. In *R (Talpada) v SSHD* [2018] EWCA Civ 841, Hallett LJ said this at [2]: “If there is a dispute of fact, and it is relevant to the legal issues which arise in a claim for judicial review, the court usually proceeds on written evidence. Since the burden of proof is usually on the person who asserts a fact to be true, if that burden is not discharged, the court will proceed on the basis that the fact has not been proved. **It would be an exceptional case in which oral evidence was needed by the Administrative Court** – or the Upper Tribunal when exercising its judicial review jurisdiction.” ...”



R (F) v Surrey County Council [2023] EWHC 980

[50] “In my judgment, the correct approach is as follows: **(a)** If invited to resolve a dispute of primary fact, the court should consider carefully **whether any pleaded ground of challenge really requires resolution of the dispute**. In most cases, the answer will be that the resolution of the dispute was for the decision-maker, not the court: the court’s supervisory function does not require it to step into the shoes of the decision-maker and therefore does not require it to resolve the issue for itself. **(b)** Where the resolution of a dispute of primary fact is **necessary**, the court usually proceeds on written evidence: see e.g. Talpada, [2]. The court will generally do so if – as here – no application to cross-examine has been made before the start of the substantive hearing.”



R (F) v Surrey County Council [2023] EWHC 1787

(c) There is no absolute rule that the court must accept in full every part of the statement of a witness who has not been cross-examined, whether the statement is adduced for the claimant or the defendant. The court **can reject evidence** in a witness statement if it “**cannot be correct**” (*Safeer*, [16]-[19] and *Singh*, [16]). That might be so if it is contradicted by “**undisputed objective evidence... that cannot sensibly be explained away**”: *S v Airedale*, [18]. But there are also examples of courts rejecting evidence given in witness statements as, on balance, **inconsistent with other written evidence**: see e.g. *Talpada*, [48].



R (F) v Surrey County Council [2023] EWHC 1787

“(d) In some cases, the court may **be unable to resolve a conflict of written evidence** on a question of primary fact. In that situation, “**the court will proceed on the basis that the fact has not been proved**”: *Talpada*, [2]. This will be to the disadvantage of whichever party asserts the fact. That will generally be the claimant, because in judicial review the claimant generally bears the burden of proving all facts necessary to show that the decision challenged is unlawful. Thus, the principle that the defendant’s evidence is to be preferred, save where it “cannot be correct”, arises because of the difficulty of satisfying the burden of proof where there is a conflict in written evidence, not because evidence adduced on behalf of a defendant is inherently more likely to be true than that adduced on behalf of a claimant. “



*In the matter of an application by Noeleen McAleenon for Judicial Review
(Northern Ireland) [2024] UKSC 31*

Ms McAleenon lived close to a landfill site. She complained that her family's health and home life were being harmed by escaping gases and smells from the site. She applied for judicial review, arguing that several regulatory bodies had breached their public law obligations by failing to set appropriate emissions limits for the site in breach of her Article 8 rights.

Her claim was dismissed at first instance, then by the NI Court of Appeal on different grounds: (i) (expert) evidence would need to be tested by cross-examination (not normally permitted, no application made); (ii) Ms M had suitable alternative remedies (private prosecution/ civil claim for nuisance against/ complaint to the Ombudsman). Supreme Court allowed the appeal; the CA's reasoning misunderstood the JR jurisdiction.



Noeleen McAleenon for Judicial Review

- “40. Judicial review is directed to examination of whether a public authority has acted lawfully or not... the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it... may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B (Lord Diplock). .. The court has a **supervisory role** only. (We leave aside cases where public law powers are conditional upon **the existence of a fact which is to be determined objectively** by the court itself, ie what is called a precedent fact). ”



Noeleen McAleenon

[42] “Given the nature of the **legal question** to be determined by the court and **the duty of candour**, the usual position is that a judicial review claim can and should be determined **without the need to resort to procedures, such as cross-examination of witnesses..** (This is not to say that such procedures are not available in judicial review: cross-examination is available and will be allowed “**whenever the justice of the particular case so requires**”: *O’Reilly v Mackman* [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it).” [emphasis added]



Noeleen McAleenon

[45] “The addition of the claim based on article 8 does not change this basic picture regarding the role of the reviewing court, even though the test for the lawfulness of the conduct of the defendants under section 6 of the HRA taken with article 8 is different from the test under general domestic principles of public law. In human rights cases brought against public authorities the court’s role remains essentially one of review: *R (Daly) v SSHD* [2001] UKHL 26; [2001] 2 AC 532, paras 27-28. Although sometimes there may be a requirement for the court to establish disputed facts for itself in order to determine the legal issue before it, **this will not usually be the case and even when it is oral evidence and cross-examination will not necessarily be appropriate:** cf *R (N) v M* [2002] EWCA Civ 1789; [2003] 1 WLR 562, a case concerning the forcible treatment of a mentally ill patient, at paras 36 and 39.”



Tactical advantages on disputes of fact

- Early and prompt action to ascertain whether and what evidence is needed.
- Use Part 18 requests to obtain necessary information
- Duty of candour is essential tool, ongoing duty to litigate with ‘cards face up’
- Witness evidence -
 - but beware of ‘retro reasons’ as a decision makers
 - as claimants, putting new evidence not seen before by the decision maker – relevant on precedent fact cases but be aware of any implications on costs?
- Subject access requests – multiple versions may disclose concerns
- Redactions - be aware of the basis to redact / challenge redactions if concerns arise



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