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Recent Judicial Perspectives on the Duty of Candour

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1. The duty of candour – the common law duty that governs the evidence base in judicial reviews – has long been a feature of the public law landscape. The duty requires the parties before a court to provide all the facts and information needed for a fair determination of the issue at hand.[1] The last few years have seen an increasing degree of judicial attention being paid to the duty. This article explores recent cases on the duty of candour which demonstrate contemporary judicial thinking. It identifies four themes which are discernible from recent case law. These themes are (i) elucidation on when the duty is engaged; (ii) demonstration of the range of consequences of non-compliance; (iii) emphasis on the interrelationship between the duty of candour and record-keeping practices; and (iv) proactivity in checking for compliance.

When is the duty of candour engaged?

2. Several cases over the last few years have held that the duty of candour is engaged long before the parties to a judicial review appear in court. As the *Independent Review of Administrative Law* (IRAL) Report noted, it is 'incorrect to suggest that the duty of candour might only apply when permission for judicial review has been granted'.[2] The duty of candour applies to applicants 'throughout the proceedings' and 'is of particular importance at the permission stage'.[3] The *Pre-Action Protocol for Judicial Review* requires the potential applicant to include a 'clear summary of the facts' in the letter before claim,[4] while the application for permission to bring judicial review proceedings requires that certain documents must be filed with the Claim Form, including written evidence in support of the claim, a copy of the relevant decision letter or order that the applicant seeks to challenge, and copies of any

[1]This is not novel, and has been recognised in, for example, the Privy Council case of *Belize Alliance of Conservation Non-Government Organisations v Department of the Environment* [2004] UKPC 6, [2004] Env LR 38 [86]. For recent cases reaffirming that the duty is owed by claimants, defendants and interested parties, see: *National Crime Agency v Westminster Magistrates' Court* [2022] EWHC 2631 (Admin), [2023] ACD 8; *R (Alina Joseph) v Director of Public Prosecutions* [2022] EWHC 131 (Admin), [2022] 1 Crim LR 414; *Jonathan Edward Peter Tipper and others v Crown Court at Birmingham* [2022] EWHC 2615 (Admin); and *Alexander De Mercur v Croydon Magistrates' Court* [2021] EWHC 2874 (Admin).
[2]*The Independent Review of Administrative Law* (CP 407, 2021) para 4.116.
[3]*R (Mahmood) v Secretary of State for the Home Department* [2014] UKUT 439 (IAC), [2014] Imm AR 193 [15].
[4]Ministry of Justice, *Pre-Action Protocol for Judicial Review*, para 16.

documents upon which the applicant seeks to rely.[5] In *R (Mahmood) v Secretary of State for the Home Department*, an application for judicial review in the Upper Tribunal, Mr Justice McCloskey confirmed that, where relevant documentary evidence to support the material facts in the Claim Form is omitted, 'the evidence will be incomplete and the Applicant's duty of candour owed to the Tribunal will not be fulfilled without a thorough and candid witness statement'.[6]

3. The question of when the duty of candour applies to defendants has received greater judicial attention, given that 'the vast majority of the cards will start in the authority's hands'.[7] The Treasury Solicitor (TSOL) Guidance – internal government guidance on how to approach the duty of candour and disclosure – requires government departments and lawyers to treat the duty as engaged 'as soon as the Department is aware that someone is likely to test a decision or action affecting them'.[8] This position was endorsed last year by a Divisional Court in *R (HM, MA and KH) v Secretary of State for the Home Department*.[9] In this case, Lord Justice Edis and Mr Justice Lane emphasised that:

> We proceed on the basis that that guidance accurately reflects the law. It is an obligation which the executive has assumed on the advice of the Treasury Solicitor, as it was, and the court operates on the basis that that is what is expected of Government defendants when dealing with judicial review proceedings.[10]

4. The decision in *HM, MA and KH* therefore suggests that the duty of candour, at least to a certain degree, applies to public bodies at the earliest possible opportunity. This is notable because the duty of candour had previously been framed as a duty 'to assist the Court',[11] giving rise to questions about whether, and if so how, the duty can arise if a court is not engaged.[12] In practice, it is the case that information-sharing occurs sooner, in large part due to the operation of other procedural rules that apply pre-permission,[13] but also because, as Edis LJ and Lane J in *HM* suggest,

[5]Ministry of Justice, *Practice Direction 54A – Judicial Review*, para 4.4. Corresponding requirements for filing an application for permission to bring judicial review proceedings in the Upper Tribunal can be found in the Tribunal Procedure (Upper Tribunal) Rules (SI 2008/2698) r 28.

[6]*Mahmood* (n 3) [20].

[7]*R v Lancashire CC ex p Huddleston* [1986] All ER 941, 945.

[8]Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010) para 1.2.

[9][2022] EWHC 2729 (Admin). The TSOL Guidance advises central government departments and litigation case handlers on how to discharge their duty of candour. There is therefore an argument that the position in the TSOL Guidance – as endorsed in this case – only applies to central government departments. Nonetheless, no case authority exists to suggest that the application of the duty of candour varies according to the type of public authority defendant.

[10]ibid [16].

[11]For a recent reiteration of this, see *R (Shirko Ismail) v Secretary of State for the Home Department* [2019] EWHC 3192 (Admin), [2020] ACD 18 [6].

[12]The IRAL panel drew attention to this: 'the duty of candour is owed to a court, so it is hard to see how the duty can arise before a court is engaged.' See IRAL Report (n 2) para 4.117.

[13]See *Pre-Action Protocol for Judicial Review* (n 4) para 3(a), setting out good practice requiring the defendant to explain the facts related to a proposed claim, and share 'relevant information and documents' in pre-action correspondence; and *Practice Direction 54A* (n 5) para 6.2, requiring that any defendant that chooses to file an Acknowledgement of Service should include Summary Grounds of Defence which 'identify succinctly any relevant facts … 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'.

the duty applies as soon as there is awareness of a potential challenge, and claimants and other parties should be able to rely upon this.[14]

5. While *HM* offers a clear judicial statement that the duty of candour applies to public authorities at the earliest point, the recent case of *R (British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* has cast doubt on this position.[15] In this Divisional Court judgment, Singh LJ and Foxton J asserted that 'it is usually the grant of permission which is the trigger for the duty of candour and cooperation with the Court to arise'.[16] The discussion arose in relation to a wider procedural issue in the case regarding a delay in instituting proceedings 'promptly', the claimants having held off issuing the claim until further information had been disclosed in pre-action correspondence in order to flesh out their grounds. It is therefore likely that this is what prompted the more traditional position on when the duty of candour is triggered.[17] Nonetheless, the comment in *British Gas Trading* is out of step with the direction of recent case law. For example, it has been held elsewhere that the duty of candour applies prior to grant of permission,[18] and there have been instances where a court has directly recognised that a primary document is required to be disclosed 'soon after the pre-action protocol letter'.[19] Further, while it is accepted that what is required to meet the duty will not be as extensive pre-permission, it is not always clear whether disclosure of documents should be expected at pre-action stage.[20] The position in *British Gas Trading* was taken by a Divisional Court – comprising a Lord Justice of Appeal and High Court Judge – suggesting that this may not be the last word on the issue. However, the Administrative Court Guide section on the duty of candour was recently updated to reflect the prevailing case law,[21] suggesting that authorities supporting the view that the duty is only engaged at permission stage are 'increasingly less persuasive'.[22]

[14]On this point, see Gabriel Tan, 'Using the Duty of Candour as a Judicial Review Caseworker' [2023] JR 78, 79.
[15][2023] EWHC 737 (Admin).
[16]ibid [145].
[17]For a more detailed discussion on this point, see Elizabeth A. O'Loughlin, Cassandra Somers-Joce and Gabriel Tan, 'Fordham's Ten Principles of the Duty of Candour in Judicial Review' (Essex CAJI Blog, 16 August 2023) <https://essexcaji.org/2023/08/16/fordhams-ten-principles-of-the-duty-of-candour-in-judicial-review/> accessed 12 September 2023.
[18]*Mahmood* (n 3) [17]: 'it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the Court all the relevant facts and reasoning underlying the decision under challenge … I add … the qualification that this duty applies fully at the Acknowledgment of Service stage also'; *R (Terra Services Ltd) v National Crime Agency and others* [2019] EWHC 1933 (Admin) [14]: 'it seems to be common ground it is not confined exclusively to cases in which permission has been granted and may well be applicable, depending on the context, at or even before the permission stage'; *R (Police Superintendents' Association) v Police Remuneration Review Body and Secretary of State for the Home Department* [2023] EWHC 1838 (Admin) [15]: 'The duty of candour applies prior to – and for – the Court's consideration of whether to grant permission for judicial review, though what is required to discharge the duty at the substantive stage will be more extensive.'
[19]*R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin) [53].
[20]For further discussion on this point, see O'Loughlin, Somers-Joce and Tan (n 17).
[21]Court and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2023* (October 2023) para.15.3.2: 'The duty of candour has been recognised as applying at all stages of judicial review proceedings, including when responding to the pre-action letter, in Summary Grounds, Detailed Grounds, witness statements and in counsel's written and oral arguments.'
[22]Simon Kiely and Jonathan Blunden, 'Key Updates to the Administrative Court Guide' (Sharpe Pritchard Blog, 7 September 2023) <https://www.sharpepritchard.co.uk/latest-news/key-updates-to-the-administrative-court-guide> accessed 12 September 2023. See also Gabriel Tan, 'Updates to the Administrative Court Judicial Review Guide' (Administrative Court Blog, 8 September 2023) <https://administrativecourtblog.wordpress.com/2023/09/08/updates-to-the-administrative-court-judicial-review-guide/> accessed 12 September 2023.

What are the consequences of non-compliance with the duty of candour?

6. Recent cases on the duty of candour demonstrate a range of consequences which might apply where a party is in breach of the duty of candour. In *Mahmood*, the Tribunal provided an inexhaustive list of the potential consequences for an applicant if they fail to discharge their duty of candour.[23] This included: refusal of permission, a finding that the Upper Tribunal process had been misused,[24] adverse costs implications, which can extend to implicated practitioners, the convening of a *Hamid* hearing,[25] and the referral of practitioners to the relevant professional body.[26] The TSOL Guidance also contains a list of potential consequences for defendants for failure to properly discharge the duty of candour.[27]

7. In *R (Saha and another) v Secretary of State for the Home Department*[28] an adverse costs order was made against the Secretary of State for the Home Department who had failed to disclose evidence until a very late stage. The court explained that a failure to comply with the duty of candour can be reflected in 'how the judicial exercise of discretion in the matter of costs is performed'.[29] This case was one of a series of challenges related to the Home Office response to the discovery of organised cheating at certain testing centres for the 'Test of English for International Communication' (TOEIC) required for overseas students to study in the UK. The respondent served a raft of new evidence, without an application to the Tribunal to have the new evidence admitted and with no explanation, after the completion of the hearing.[30] In what appeared to be a breakdown of candour between the respondent department and their lawyers,[31] the Tribunal chastised the conduct of the Home Office in these proceedings, underlining the serious impact such a breach has on the overriding objective: 'the so-called

[23] *Mahmood* (n 3).

[24] In this case, the applicant's failure to provide evidence of certain important documents referred to in the application for permission was not subsequently addressed, and no explanation for the failure or statement of evidence from the applicant or solicitors was provided. Mr Justice McCloskey considered this a breach of the duty of candour, and emphasised that such a breach 'will normally be tantamount to a misuse of the Tribunal's process': ibid [17]. The application for permission was refused, the applicant was ordered to pay the respondent's costs, and the applicant's legal representatives were directed to explain the failures in writing to the President of the Upper Tribunal, Immigration and Asylum Chamber: ibid [27]–[29].

[25] A *Hamid* hearing is a disciplinary hearing convened by the High Court in which: lawyers are asked to explain themselves; it may be formally recorded in a court order that a lawyer has acted improperly; they may be referred to the relevant professional body; and/or the court may consider a wasted costs order against the legal professional(s). See *The Administrative Court Judicial Review Guide 2023* (n 21) section 18.

[26] *Mahmood* (n 3) [24].

[27] TSOL Guidance (n 8) para 1.6: 'material if subsequently produced may not be relied on without permission of the court; a formal order of disclosure; the drawing of adverse evidential inferences; an adverse costs order; proceedings for contempt of court; reputational damage; allegations of deliberate concealment affecting the outcome of the litigation.'

[28] [2017] UKUT 17 (IAC).

[29] ibid. See also *R (AM and others) v Secretary of State for the Home Department* [2017] UKUT 372 (IAC) in which an adverse costs order was made.

[30] *Saha* (n 28) [6(f)].

[31] It was noted that 'The Tribunal, with its intimate insight into the conduct of these proceedings, entertains not the slightest doubt that all members of the Secretary of State's legal team discharged their professional and ethical duties conscientiously throughout these unnecessarily protracted proceedings. That they did so is highly creditable to all concerned, given the obvious and persistent difficulties they were clearly experiencing vis-à-vis their client. Their continuing struggles and travails were unmistakable': ibid [26]. For another example of the withholding of information between policy client and government lawyers, see *Gokhan Yilmaz v Secretary of State for the Home Department* [2022] EWCA Civ 300 [7], [9], [13].

"unholy trinity" of increased cost, excessive delay and multiple complexity, all pre-eminently avoidable'.[32]

8. There have been some recent examples of adverse inferences being drawn against the relevant party who breaches their duty of candour. In the case of *R (Police Superintendents' Association) v Her Majesty's Treasury*, Mrs Justice Heather Williams held that 'where gaps remain, the Defendant does indeed take the risk that inferences will be drawn'.[33] She continued to note that this process will not be mechanistic, and any inferences will be guided by the material which is already before the court. In this case, an adverse inference was drawn against the defendant, as a result of 'the Defendant's fragmented and incomplete disclosure'.[34] Similarly, in *R (AM (A Child by his Litigation Friend OA and OA)) v Secretary of State for the Home Department (Dublin – Unaccompanied Children – Procedural Safeguards)* – an individual challenge by a minor displaced in the closing of the Calais jungle who had been refused transfer to the UK – very little information was given about how this decision-making process worked.[35] The respondent failed to provide records or documentation of how decisions were taken, in spite of repeated requests for disclosure, and the lack of information was not rectified by way of witness statement. While the Tribunal did not frame this as a breach of the duty of candour as such, the lack of explanation and information on the decision-making process led to drawing of adverse inferences of fact against the Home Office in accordance with the duty of candour. This led the court to find that there were serious procedural irregularities in the way the applicant had been treated.[36]

9. In contrast, in *R (Cathy Gardner and Fay Harris) v Secretary of State for Health and Social Care*, an order for specific disclosure was made.[37] The court emphasised that, for a specific disclosure order to be made, the party requesting disclosure must be able to show that there had been a failure to comply with the duty of candour.[38] Although non-compliance will not be assumed, in that case the fact that 'no account [had] been provided of the steps taken by these defendants to ensure compliance' justified the making of the disclosure order.[39]

10. In some cases where a failure to disclose does not place a party in breach of the duty of candour, the courts have nonetheless been critical of the approach taken to disclosure. In *R (TP, AR and SXC) v Secretary of State for Work and Pensions*, the Court

[32] *Saha* (n 28) [50].
[33] [2021] EWHC 3389 (Admin) [160].
[34] ibid [163].
[35] [2017] UKUT 262 (IAC). For a wider policy challenge highlighting the inadequacies of decision-making record-keeping in the context of the Calais jungle closure, see *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123.
[36] *AM* (n 35) [92], [128].
[37] [2021] EWHC 2422 (Admin) [39].
[38] ibid [38].
[39] ibid [39].

of Appeal criticised the failure to disclose material in a witness statement, despite this not amounting to a breach of the duty of candour.[40] By contrast, in instances where there is a breach of the duty, the courts can demonstrate understanding and acceptance of unintentional breaches. In *R (Lawal) v Secretary of State for the Home Department*, concerning a challenge to the role of witnesses in immigration detention in investigations of deaths in custody, the Upper Tribunal accepted that it was an oversight that a relevant document, raised in the defendant skeleton argument, had not been disclosed.[41] The Tribunal found there had been a breach of the duty, but 'its gravity [was] tempered by the fact that the case … was raised by the respondent'.[42] No direct consequences for this failure of candid disclosure were meted by the Tribunal, though it was noted that it may 'sound in costs' at a later stage.[43]

11. Finally, cases from the last few years have emphasised that a failure to comply with the duty of candour need not be deliberate for a breach to be found.[44] For instance, breaches of the duty of candour have been found in cases where the non-disclosure was 'a documentary oversight … at worst a muddle'.[45] Finding a breach of the duty in cases where the breach has not been deliberate, particularly where consequences result from the breach, underscores the importance of the duty of candour. Further, even in cases of unintentional failure, the consequences enforced by a court will not necessarily be less severe. For example, in *R (Abdul Aziz Jalil) v Secretary of State for Justice*, the court made 'no finding of bad faith or any deliberate flouting of the duty of candour, but in the circumstances … what has actually transpired as being a "bad case of procedural default"'.[46] Late disclosure of the decision-making process in this case ultimately caused the defendant to concede that the process was unlawful. Had the defendant disclosed the relevant email chain much sooner, 'the concession that the decisions were unlawful might well have been made at the very outset, soon after the pre-action protocol letter'.[47] Given the impact that the issues of candour had on the case – and on the applicant, who erroneously spent further time in enclosed conditions as a prisoner – the court made an order for indemnity costs in the applicant's favour.[48]

12. While this recent case law demonstrates the range of tools that the courts use to police and enforce the duty of candour, there are no recent cases where the courts have reached for the most severe forms of reprimand, such as wasted costs orders,[49] or referrals to professional bodies. In a recent high-profile example of a

[40][2020] EWCA Civ 37, [2020] PTSR 1785.
[41][2021] UKUT 114 (IAC), [2021] Imm AR 1126.
[42]ibid [60].
[43]ibid.
[44]*Citizens UK* (n 35).
[45]*Shirko Ismail* (n 11) [7].
[46]*Abdul Aziz Jalil* (n 19) [54].
[47]ibid [53].
[48]ibid [55].
[49]It was noted in *Saha* that a wasted costs order may well be appropriate, given the conduct of the defendant authority, though this was not ultimately pursued by the Tribunal: *Saha* (n 28) [29].

'serious' problem with a public authority approach to candour, the court did go as far as convening a separate consequential hearing of the 'candour issue'.[50] This perhaps demonstrates a preference for mechanisms that uncover what went wrong in respect of compliance with the duty, so that lessons can be learned and recorded by way of judgment.

Emphasis on the interrelationship between the duty of candour and record-keeping practices

13. It is evident that record-keeping practices are closely connected to compliance with public law frameworks such as the Public Records Act 1958, the Freedom of Information Act 2000, and the common law duty of candour.[51] There is a clear link between the ability of a defendant to comply with the duty of candour and the quality of the underlying record keeping practices. Where records are simply not available (for instance, due to a policy mandating the automatic erasure of certain types of official messages after a set time period),[52] it may be the case that the duty of candour cannot be fulfilled as fully as it might otherwise be. The duty of candour can only be an effective safeguard on the court having the material relevant to its determination in cases where that material is collected and retained.

14. The relationship between the duty of candour and the record-keeping practices which underpin compliance has been brought to the fore in several recent cases.[53] In *HM, MA and KH*the consequential judgment highlighted the link between the breach of the duty of candour and the failure to clearly record the policies which were being applied. The result of this failure to accurately keep records of policy usage and application made it 'more difficult than it should have been to communicate accurately and quickly what exactly those policies were'.[54] In *R (SA) v Secretary of State for the Home Department*, there was a direct connection between the 'complete absence of any record-keeping or decision-making or evaluative assessment documentation, its implications for compliance with the duty of candour, and the finding that the Home Secretary had breached the statutory duty to provide adequate accommodation to a pregnant asylum seeker and her children'.[55] In *MD v Secretary of State for the Home Department*, counsel for the Secretary of State drew to the court's attention that they did not have 'complete confidence' in their evidence.[56] In a challenge to the difference in treatment between lone parent asylum-seeking victims

[50] *HM, MA, and KH* (n 9). For further discussion of this judgment, see Elizabeth A. O'Loughlin, Gabriel Tan and Cassandra Somers-Joce, 'The Duty of Candour in Judicial Review: The Case of the Lost Policy' (UKCLA Blog, 7 December 2022) <https://ukconstitutionallaw.org/2022/12/07/elizabeth-a-oloughlin-gabriel-tan-and-cassandra-somers-joce-the-duty-of-candour-in-judicial-review-the-case-of-the-lost-policy/> accessed 12 September 2023.
[51] Joe Tomlinson and Cassandra Somers-Joce, 'For the Record: self-deleting messaging systems and compliance with public law duties' [2022] PL 368.
[52] Cabinet Office, *Information and Records Retention & Destruction Policy* (undated).
[53] Most notably, *HM, MA and KH* (n 9); *Police Superintendents' Association* (n 18).
[54] *HM, MA and KH* (n 9) [13].
[55] [2023] EWHC 1787 (Admin) [26].
[56] [2021] EWHC 1370 (Admin), [2021] PTSR 1680 [73].

of trafficking (who could not access dependent child trafficking support) and lone parent trafficking victims who were not asylum claimants (who could), counsel for the Secretary of State conceded that, in the absence of a 'satisfactory institutional record' explaining the rationale for the difference in treatment, the difference must have been an anomaly or error.[57]

15. The courts have even gone as far as to question whether record-keeping practices are 'harmonious with Government policy, procedure and guidance'.[58] In one of several challenges related to the closing of the Calais jungle, the Tribunal lamented the lack of notetaking on material verbal communications with French counterparts, and found 'reluctantly, that the Secretary of State's conduct in all of these cases has been inappropriate'.[59]

Proactivity in checking for compliance with the duty of candour

16. Cases from the last few years demonstrate a tendency for judges to monitor compliance with the duty of candour even in cases where there is no candour challenge.[60] For instance, in some cases judges flag compliance and good practice even if this is uncontested by the other side.[61] *R (Katherine Rowley) v Minister for the Cabinet Office* was one such case.[62] The case dealt with the provision of British Sign Language interpreters in Government live briefings to the public about the Covid-19 pandemic. The claimant alleged that there was a breach of two statutory duties arising under the Equality Act 2010: first, a breach of the duty to make reasonable adjustments for disabled persons,[63] and second, a breach of the public sector equality duty.[64] When assessing the merits of the claim, Mr Justice Fordham emphasised that:

> If any material or information existed of that kind it would have to be disclosed under the duty of candour and cooperation, one feature of the relationship of trust between Court and public authority which is so central to the rule of law and access to justice. The Court has been presented with the PSED Assessment as an objective and open-minded consideration of the issues.[65]

17. Judicial signposting of when the duty of candour has been complied with, even where compliance has not been challenged, is indicative of a high level of monitoring

[57]ibid [42]. The Court found a violation of art 14 of the ECHR, although this was reversed by the Court of Appeal in *R (MD) v Secretary of State for the Home Department* [2022] EWCA Civ 336, [2022] PTSR 1182 on the basis that the difference in treatment between the claimant and their correct comparator was nominal.
[58]*AM* (n 29) [26].
[59]ibid [33].
[60]See, for example, *R (Philip Austin) v Parole Board for England and Wales* [2022] EWHC 63 (Admin), [2022] 1 WLR 2489; *R (Alina Joseph) v Director of Public Prosecutions* [2022] EWHC 131 (Admin), [2022] Crim LR 414; *R (Liberty) v Secretary of State for the Home Department and another* [2019] EWHC 2057 (Admin), [2020] 1 WLR 243; *Alexander De Mercur v Croydon Magistrates' Court* [2021] EWHC 2874 (Admin).
[61]See, for example, *Keith Connell v Director of Legal Aid Casework (Legal Aid Agency)* [2019] EWHC 3050 (Admin).
[62][2021] EWHC 2108 (Admin), [2022] 1 WLR 1179.
[63]Equality Act 2010 s 29 (7)(a).
[64]Equality Act 2010 s 149(1).
[65]*Katherine Rowley* (n 62) [43] (Mr Justice Fordham).

and enforcement. Not only does the recent case law demonstrate that judges do go to lengths to note and comment upon compliance, it also contains examples of judges flagging the continuing application of the duty of candour. *R (Tabbasum Hussain) v Secretary of State for Health and Social Care* is one such case, where Mr Justice Fordham provided that 'the Defendant would need to think carefully about what position it takes in the proceedings – given the duty of (candour and) cooperation'.[66]

Conclusion

18. The duty of candour is a live consideration in any public law litigation. This article has underlined four recent trends in judicial approaches to monitoring and enforcing the duty. First, there have been several cases clarifying that the duty of candour applies at pre-action stage. Second, the bench has a wide toolkit at its disposal to enforce consequences for breaches of the duty of candour, but most commonly reaches for costs implications, the drawing of adverse inferences, and orders for specific disclosure. Third, the accurate keeping of records on the formation and application of policies and decision-making is essential to the operation of the duty of candour, and indeed the overriding objective of enabling the court to deal with cases justly and at proportionate cost. Fourth, it is common for judges to use 'soft' messages of enforcement, recognising the appropriate discharging of the duty of candour, and commonly reminding parties of its application.

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[66][2022] EWHC 82 (Admin) [33].