CIVIL JUSTICE COUNCIL CONSULTATION ON PRE-ACTION PROTOCOLS

RESPONSE ON BEHALF OF THE CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION (ALBA)

December 2021

Introduction

1. ALBA is the professional association for barristers in England and Wales practising in public law, which includes administrative law, constitutional law, judicial review, and other areas of practice concerned with regulating the exercise of public powers.

2. ALBA's members are predominantly self-employed barristers in England and Wales, but also include employed barristers working in the UK Government Legal Profession (formerly known as the Government Legal Service), local authorities, businesses, and campaigning organisations and other NGOs. ALBA's wider membership includes (as associate members) judges, solicitors, legal academics, law students, and lawyers in other jurisdictions.

3. One of ALBA's principal objectives is to provide a forum for exchanges, between practising lawyers, judges and academic lawyers, of knowledge and ideas about the development of public law, including developments in public law jurisprudence and practice across the common law world and within the European Union. Every year ALBA responds to a number of consultations about matters affecting public law.

4. This consultation response addresses the section of Chapter 4 of the November 2021 Interim Report which deals with judicial review. This response can be made public.

Questions 60-62

5. As to **Question 62**, ALBA agrees that there should continue to be a separate and bespoke pre-action protocol (PAP) for judicial review (JR). Comments in response to **Question 61** – are there any other factors specific to judicial review that should be considered – are made in relation to particular issues considered below.

6. As to **Question 60**, ALBA generally agrees with the approach set out by the judicial review sub-committee in the Interim Report. The one issue on which there is some disagreement – the good faith principle and the duty of candour at the pre-action stage – is explained below. ALBA agrees with the conclusions of the Interim Report that the nature of judicial review means that bespoke requirements are needed and a higher degree of flexibility than for other pre-action protocols (paras 4.52-4.53). ALBA also agrees that prescriptive pre-action steps should be avoided and that the stocktake duty should not apply (para 4.56).

7. As to the **good faith principle and the duty of candour** at the pre-action stage, the judicial review sub-committee commented that 'one consequence of the enhanced good

faith obligation could be in cementing the recognition of the duty of candour and co-operation as applicable at the pre-action stage' (Appendix 8, para 8).

8. ALBA does not in this response express a view on the point of principle, namely whether the duty of candour should apply to defendants at the pre-action stage, as there are views on either side of that debate. ALBA does not, however, consider that it is appropriate to deal with this difficult point of principle by means of a change to JR PAP. The courts have yet to rule that the duty of candour applies at the pre-action stage, and this point should, if necessary, be addressed by case law. Moreover, the comment quoted above appears to suggest that the 'enhanced good faith obligation' in a new JR PAP might or might not require defendants to discharge the duty of candour at the pre-action stage. Such further lack of clarity about when the duty of candour applies will itself be unhelpful.

9. The report of the judicial review sub-committee cites the Administrative Court Judicial Review Guide at 15.3.2 for the proposition that the 'duty of candour has been recognised as applying at, or even before, the permission stage'.[1] The Guide does say that the duty 'has been recognised as applying at, or even before, the permission stage as well as at the substantive stage', but also notes that 'what is required to discharge the duty at the substantive stage will be more extensive than what is required before permission has been granted' (citing *R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 1933 (Admin), [9], [14]).[2]

10. In *R (Terra Services Ltd) v National Crime Agency*, Singh LJ (in the Divisional Court) said that the duty of candour and co-operation on public authorities is imposed 'particularly after permission to bring a claim for judicial review has been granted' although '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'.[3] It is important to recognise two points about the *Terra Services* case. First, that case was concerned with disclosure after proceedings had been commenced but before permission to apply for judicial review had been granted; it was not concerned with disclosure or the duty of candour at the pre-action stage. Accordingly, anything that Singh LJ said about the applicability of the duty of candour at the pre-action stage was *obiter*. Secondly, perhaps unsurprisingly in that context, there does not appear to have been any argument on the question of whether the duty of candour applies at the pre-action stage. Accordingly, the *Terra Services* case is not authority for the proposition that the duty of candour applies at the pre-action stage.

11. Singh LJ also said that the 'duty of candour and co-operation is, importantly, a duty to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide', with the underlying principle 'being that 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'.[4] There is a common partnership between

[1] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', Appendix 8 [8] p. 153.
[2] The Administrative Court Judicial Review Guide 2021, [15.3.2] p. 81
[3] *R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 1933 (Admin), [14].
[4] *R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 1933 (Admin), [15].

the Court and the public body 'based on a common aim' to maintain 'the highest standards of public administration'.[5]

12. This reflects the fact that, in JR, what the Court is primarily concerned with are questions of issues or law, and not questions of fact. It is for the Court to determine the lawfulness of the decision or action under challenge and, to do so, they need to know what the authority's reasoning or justification was. This is what underpins the duty of candour. Its purpose is to assist the Court. This underlying basis for the duty of candour does not, therefore, obviously support a conclusion that the duty ought to apply at the PAP stage. As recognised in the sub-committee's report, it is only once proceedings have been commenced that there is 'a judicial forum'.[6]

13. A consultation on potential reforms to the approach to the duty of candour and disclosure in judicial review proceedings under the CPR PD 54A was undertaken in 2016 at the request of the Lord Chief Justice. Mr Justice Cranston and Mr Justice Lewis, in their Discussion Paper, identified the following question: does the duty or should the duty apply only after permission is granted, or does or should it apply at the pre-action protocol stage of proceedings or the acknowledgement of service stage?[7] They took the view, however, that 'the Practice Direction should not address the position in relation to the pre-action protocol'.[8]

14. The report of the judicial review sub-committee says that, if the duty of candour is treated as triggered only by proceedings, or the grant of permission, 'resolution at earlier stages is undermined'.[9] It must be recognised, however, that imposition of the duty of candour at the PAP stage would result in a burdensome obligation being placed upon public authorities. Public authorities would have to provide 'full and accurate explanations of all facts relevant' to the issues in all instances where a PAP letter is received,[10] no matter how misguided the proposed claim. ALBA observes that the judicial review sub-committee did not include any current practitioners who habitually represent defendants (such as, for example, a representative from the Government Legal Department), and it is not clear to what extent points such as these have been taken into account.

15. It needs also to be remembered that a significant proportion of judicial review cases in which a PAP letter is sent do not lead to proceedings being commenced. It is not unusual to find JR PAP letters being sent as a campaigning tool, to obtain publicity, or to seek to put pressure on public authorities in relation to the merits of a decision, which could not give rise to an arguable claim for judicial review.

16. It should also be noted that not all judicial reviews will proceed to a full hearing and that many claims are withdrawn even before the permission stage. The permission

[5] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, p. 945.
[6] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', Appendix 8 [38] p. 159.
[7] Cranston and Lewis JJ, 'Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper', April 2016, [37] p. 17.
[8] Cranston and Lewis JJ, 'Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper', April 2016, [11(4)] p. 8.
[9] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', Appendix 8 [40] p. 160.
[10] *R (Quark Fishing Ltd) v SSFCA* [2002] EWCA Civ 1409, [50].

stage allows for an early consideration of claims and ensures that only those claims with an arguable basis proceed.[11]

17. There is a reason why it has generally been recognised that the duty of candour does not bite, at least fully, unless and until permission is granted and a claimant has thereby demonstrated that there is an arguable case which must be answered. If the duty was to apply at the PAP stage, potential claimants would be allowed undertake fishing expeditions as a matter of course and defendants would be subject to a burdensome obligation even where the claim is utterly hopeless.

18. It is worth bearing in mind the comments of Lord Carswell in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 that, in such an expedition, 'an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge'.[12] Extending the duty of candour to the PAP stage would only enable, not discourage, such expeditions.

19. There is, in any event, considerable uncertainty about when the duty does arise. The Treasury Solicitor's 2010 Guidance on Discharging the Duty of Candour in JR proceedings, for example, states that the duty 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 pre-action protocol…'.[13]

20. In the Cranston and Lewis discussion paper, however, it was said that 'the case law tends to be phrased in terms of the duty arising when permission to apply for judicial review has been granted. The courts have not, it seems, given detailed consideration to the position at the stage of the acknowledgement of service'.[14]

21. The Interim Report, and the report of the judicial review sub-committee (Appendix 8, para 8), suggests a way forward which would increase the lack of clarity about when the duty of candour bites.

22. These points are made not to contend that the duty of candour should not apply at the PAP stage, as that is a difficult question on which there are a range of views, but rather to explain (1) that the position on this issue is complex, uncertain and controversial, and (2) as a result, it is not suitable for it to be addressed simply by a change to the JR PAP. It ought to be resolved in an appropriate case by judicial decision-making where the issue has been subject to full argument.

23. Finally in this context, ALBA notes that the report refers to suggestions that there is in judicial review a problem with early disclosure and the duty of candour. These suggestions appear to be based on the comments of respondents to the preliminary survey and the experiences of the members of the judicial review sub-committee.

[11] The Administrative Court Judicial Review Guide 2021, [9.1.3] p. 46.
[12] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [31].
[13] Treasury Solicitor's Department, 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings', [1.2] p. 4.
[14] Cranston and Lewis JJ, 'Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper', April 2016, [31] p. 15.

However, as noted above, the judicial review sub-committee did not include any current practitioners who habitually represent defendants, and it does not appear that the respondents to the preliminary survey included any such respondents (again, for example, there does not appear to have been a response from the Government Legal Department). Accordingly, those suggestions might not be representative of the full range of views on this issue that might be held across the spectrum of public law practitioners.

24. Insofar as ALBA is aware, there is at present little, if any, empirical evidence as to how the duty of candour operates in practice, although ALBA is aware of a proposal for an academic study to evaluate the working of the duty of candour in practice. In ALBA's view, it would be better if any proposals that could potentially have the effect of altering or fixing the duty of candour were to be based on such empirical evidence.

Question 63

25. As to **Question 63** and the proposed General Principles in Chapter 3, ALBA agrees with the approach adopted by the judicial review sub-committee.

26. ALBA does not consider that compliance with the JR PAP should be made **mandatory except in urgent cases** (para 3.13). In judicial review, not only will there be urgent cases and cases which need to be brought promptly where compliance with the JR PAP is not possible, but also cases where following the JR PAP will not be worthwhile. The latter category would include cases where the decision-maker is functus officio and can do nothing to change the decision challenged, or where the issue is one on which there is no scope for compromise and where the Court will have to give a ruling on the alleged error of law. Making compliance with the JR PAP mandatory in such cases will increase costs and delay the resolution of disputes for no significant practical benefit. ALBA agrees with the observations made by the judicial review sub-committee in relation to mandating PAP compliance (Appendix 8, paras 14, 26-27 and 37-38).

27. ALBA agrees with the judicial review sub-committee that there should not be a requirement in all judicial review cases to complete a **formal joint stocktake** (para 3.23). Given the timescales involved in judicial review, there is unlikely to be time to go through the JR PAP process and agree such a report. It is likely to be disproportionate in some cases as well. In judicial review, it is unlikely to be the case that an agreed list of issues could be prepared, meaningfully or at all, at the pre-action stage, or that any disclosure would have taken place.

28. In relation to **sanctions**, the Interim Report suggests that, if the obligations of the PAP are not complied with, 'the court should have a full range of sanctions available to it, including the power to strike out a claim or defence in grave cases of non-compliance'.[15] ALBA does not consider that there should be a power for a judge to strike out a claim for 'grave' non-compliance with a PAP (para 3.26) in judicial review cases. ALBA agrees with the view of the judicial review sub-committee in Appendix 8 at paragraph 36 that, in relation to sanctions and enforcement, this can be adequately addressed at the permission stage using existing mechanisms. Given the lack of clarity

[15] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', [3.26] p. 32.

about when a PAP process should be followed in JR (eg in relation to urgency, promptness, functus officio, etc), it would be too extreme for the strike out of a claim to be an option even for 'grave' (see Appendix 5, para 33) non-compliance with the JR PAP.

29. ALBA does not consider that it would be appropriate for an arguable claim to be struck out for non-compliance with the JR PAP. This would go against the raison d'etre of judicial review, which exists to enforce public law and ensure good governance. This could also not be reconciled with the suggestion that the JR PAP should depart from the General PAP by 'avoiding prescriptive pre-action steps in performance of the good faith duty'.[16] Introducing the power to strike out for non-compliance effectively prescribes mandatory compliance with the JR PAP. This could also not be reconciled with the recognition that, in JR cases, there is 'often a significant imbalance or asymmetry of power and resources' and that this power imbalance 'alone can militate against the appropriateness of mandatory pre-action obligations'.[17]

30. In addition, an imbalance of resources will often mean that 'there may be an inability to afford to take part in third-party facilitated options listed as the proposed 'good faith steps'' and that impecunious claimants 'may be unable to afford mandatory pre-action steps'.[18] The existence of such a power imbalance, in addition to the fact that there is likely to be a significant imbalance of resources, should also weigh against the possibility of strike out for non-compliance with the JR PAP.

31. In *R (Dolan & Ors) v Secretary of State for Health and Social Care & Anor* [2020] EWCA Civ 1605, the Court of Appeal noted the increasing concern of the Courts with the need for appropriate procedural rigour in JR cases and that procedural rigour 'is important in order for justice to be done. It is important that there must be fairness to all concerned, including the wider public as well as the parties'.[19]

32. There are necessary uncertainties about when the JR PAP has to be followed. The JR PAP itself provides that 'claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of the case'.[20] This broad, and correct, statement is inconsistent with a power to strike out for non-compliance.

33. It should also be noted that, pursuant to CPR54.5, a claim should be brought promptly. The Administrative Court Judicial Review Guide accepts that 'if the case is urgent (e.g. where there is an urgent need for an interim order), it may not be possible to follow the Protocol in its entirety' but says that, 'even in urgent cases, the parties should attempt to comply with the Protocol to the fullest extent possible'.[21] This approach should continue.[22] The Guide goes on to say that the 'Court will not apply costs sanctions for non-compliance where it is satisfied that it was not possible to comply because of the urgency of the matter'.[23]

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[16] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', [4.56] p. 44.
[17] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', [4.56] p. 44.
[18] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', Appendix 8 [39] p. 160.
[19] *R (Dolan & Ors) v Secretary of State for Health And Social Care & Anor* [2020] EWCA Civ 1605, [116]-[117].
[20] Pre-Action Protocol for Judicial Review, [7].
[21] The Administrative Court Judicial Review Guide 2021, [6.2.5] p. 21.
[22] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report', [3.13] p. 29.
[23] The Administrative Court Judicial Review Guide 2021, [6.2.5] p. 21.

34. Compliance with the JR PAP may not be appropriate in cases where one of the shorter time limits, such as in a planning judicial review, applies. The JR PAP also does not have to be used where the proposed defendant is functus officio, such that they do not have the legal power to change the impugned decision.

35. It would be preferable to continue to deal with grave non-compliance with the JR PAP using costs sanctions, in appropriate cases, in line with the CPR and the existing JR PAP, rather than introducing the sanction of strike-out.[24] This would be the best way of achieving the fairness and justice with which the Court of Appeal was concerned in *Dolan*, whilst also ensuring procedural rigour.

36. In *R (KR) v Secretary of State for the Home Department* [2012] EWCA Civ 1555, the Court of Appeal found 'that even if there had been meticulous compliance with the pre-action protocol, it would still have been necessary for the appellant to make her application for judicial review and to pursue it to the point of the grant of permission before any likely positive response would have been forthcoming from the Secretary of State' and thus 'the failure to comply with the pre-action protocol in this case…was causally insignificant'.[25] The grave non-compliance was thus neither here nor there. In that case 'there was no compliance whatsoever with the judicial review pre-action protocol'.[26]

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[24] See, inter alia, *R (William Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin), *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468 (Ch) and *R (Bahta) vSSHD* [2011] EWCA Civ 895.
[25] *R (on the application of KR) v Secretary of State for the Home Department* [2012] EWCA Civ 1555, [12].
[26] *R (on the application of KR) v Secretary of State for the Home Department* [2012] EWCA Civ 1555, [10].