

# **Disclosure, Candour and Cross-Examination: digging for truth in judicial review**

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## **Cross Examination and Public Interest Immunity**

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### **Cross-examination**

1. Fordham. *Judicial review handbook* (5<sup>th</sup> edition) at paragraph 17.4 explains

It being generally unnecessary to resolve factual disputes, and given the defendant's duty of candour, Courts will not normally order disclosure, further information or cross-examination. However, such orders can and should be made, where justice requires it, as where it is necessary for the fair disposal of the case.

2. Thus, although CPR Pt 54.16 contains its own provisions allowing for the reliance on written evidence (and disapplying CPR Pt 8.6(1)), CPR Pt 8.6(2) and (3) do apply to judicial review applications<sup>1</sup> and read:-

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<sup>1</sup> Initially, CPR Pt 54.16 excluded the whole of Pt 8.6 leading to a question as to whether the court still had the power to award cross-examination: see *R(G) v London Borough of Ealing* [2002] EWHC 250 (Admin) where the court held to rely on its inherent jurisdiction to allow cross-examination.

(2) The court may require or permit a party to give oral evidence at the hearing.

(3) The court may give directions requiring the attendance for cross-examination<sup>(GL)</sup> of a witness who has given written evidence.

3. In *R. (on the application of Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] H.R.L.R. 2, the Divisional Court explained that

17 ....as is well known, the usual procedure in judicial review cases is first for there to be no oral evidence and secondly, insofar as there are factual disputes between the parties, the court is ordinarily obliged to resolve them in favour of the defendant (see, for example, *R. v Board of Visitors of Hull Prison Ex p. St Germain* (No.2) [1979] 1 W.L.R. 1401 at 1410H, per Geoffrey Lane L.J. (as he then was)).

4. But some cases demand cross-examination. In *R(G) v London Borough of Ealing* [2002] EWHC 250 (Admin) the Court explained

15. In this connection it is important to bear in mind recent developments in the nature of judicial review. In particular, the court is no longer bound in all cases by the ‘*Wednesbury*’ straightjacket. Already before the coming into force of the Human Rights Act 1998 the court had begun in some contexts to apply the heightened scrutiny test which has come to be called the ‘super-*Wednesbury*’ test: see *R v Ministry of Defence ex p Smith* [1996] Q.B. 517 . More recently it has come to be realised that in some contexts even that will not suffice: see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 per Lord Steyn at p 547F (para [27]). Even more recently it has been acknowledged that in some contexts nothing short of a full merits review will suffice even in a judicial review case: *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419 at pp 435E, 447E (paras [36], [83]).

18. ...Wilkinson , as it seems to me, stands as a plain indication (a) that there will be judicial review cases in which cross-examination is appropriate, indeed essential, and (b) that there will be cases in which, such is the intensity of the review demanded by some challenge based on alleged breach of Convention rights, that compliance by the court itself with the Convention will demand that there be cross-examination.

5. The now well known case of *R. (on the application of Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [2010] H.R.L.R. 2 provides a good example and description of where a court will find that cross-examination will be essential. Breaches of Article 2 and 3 were claimed by Iraqis and their families who claimed that deaths and injuries which were said to have occurred on the battlefield had in fact been caused once combatants were in British custody. A judicial review claiming that there had not been Convention compliant investigation into the deaths was faced with a number of factual issues which had to be resolved before it could decide the case. Referring to the normal approach of accepting the Defendant's version of the facts the Court found that

18 If that approach had been adopted in this case, the Secretary of State would have succeeded and it would also have had the more far-reaching consequence that a defendant would always succeed if sued for an infringement of human rights which was disputed. So a different approach was needed because these "hard-edged" questions of fact represented an important exception to the rule precluding the court substituting its own view in judicial review cases. ...

19 In our view, it was necessary to allow cross-examination of makers of witness statements on those "hard-edged" questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its articles.

20 We consider that this conclusion is consistent with the approach adopted by Dyson L.J. when giving the judgment of the Court of Appeal in *R. (on the application of N) v M* [2003] 1 W.L.R. 562 at 574, when he explained that cross-examination in judicial review cases should be ordered only if it is necessary to enable the court to determine factual

issues for itself. A similar conclusion was arrived at by the Court of Appeal in *R. (on the application of Wilkinson) v Broadmoor Hospital* [2002] 1 W.L.R. 419 especially at 442, per Hale L.J.

6. In *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 W.L.R. 419t The claimant was a convicted mental patient compulsorily detained at a secure hospital. His responsible medical officer decided that he should receive anti-psychotic medication, despite his refusal to consent. The claimant sought judicial review of their decision to administer the treatment despite his refusal to consent and the attendant risks to himself, contending that it infringed his rights under articles 2, 3 and 8, and that he should be entitled to require the two doctors concerned, together with his own medical expert, to attend the hearing to give evidence and be cross-examined.
7. The Court decided that it was entitled to reach its own view as to whether the treatment infringed the patient's human rights; and that in such a case the patient was entitled to require the attendance of medical witnesses to give evidence and be cross-examined to determine disputed issues, if necessary. As Hale LJ said

62 In my view, therefore, it cannot and should not matter whether proceedings in respect of forcible treatment of detained patients are brought by way of an ordinary action in tort, an action under section 7(1) of the 1998 Act or judicial review. If there are relevant disputed issues of fact these will have to be determined, by cross-examination if necessary.

8. An order for cross-examination can re-open the issue as to whether there should be more disclosure as there needs to be all the relevant material upon which to cross-examine a witness. Thus in *Al-Sweady* the Court explained that

22 An important consequence of the orders for cross-examination was that disclosure was needed to enable effective and proper cross-examination to take place. This constituted an important exception to the conventional approach in judicial review cases, which is that: “on an application for

judicial review there is usually no [disclosure] because [disclosure] should be unnecessary because it is the obligation of the [defendant] public body in its evidence to make fresh disclosure to the court of the decision-making process” (per Lord Woolf M.R. in *R. v Secretary of State for the Home Department Ex p. Al-Fayed (No.1)* [1998] 1 W.L.R. 763 at 775C). This obligation is a very important one because of the special position of the public authority and indeed it has been said that there is “a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanation of all the facts relevant to the issue the court must decide” (per Laws L.J. in *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign & Commonwealth Affairs (No.1)* [2002] EWCA Civ 1409 at [50]).

9. The difficulty is that, from a Claimant’s point of view, not asking for cross-examination means, applying the above approach, the Court will assume that the Defendant’s version of events is correct. One solution to this can be for the court to order that witnesses be available for cross-examination if necessary at the full hearing if issues arise which mean that the court needs to hear oral evidence to resolve them: see *R (Colman) v GMC* [2009] EWHC 3700 (Admin) where potential allegations of bias against a registrar were In issue (and cross-examination was then ordered at the full hearing: [2010] EWHC 1608.
  
10. Deciding to apply for cross-examination raises the issue of what it is hoped to achieve from a tactical point of view. There will often be the prospect that the public official will present to the court as an honest and reliable witness, simply reinforcing the Defendant’s case. This not always the case however. If there are reasons to believe that the whole truth has not been revealed in the written material or that a witness is not reliable then cross-examination can have a devastating effect. Thus in *Al-Sweady*, a main witness for the Secretary of State was a senior investigator called Colonel Giles who was also responsible for overseeing a large part of the disclosure process. The culmination of several paragraphs of criticisms was as follows

59....it is incumbent on us to record that we are all firmly of the view that he lacked the necessary objectivity, proficiency and reliability which should be the hallmarks of any witness put forward especially by a Secretary of State in judicial review proceedings or relied on by the Secretary of State to make proper disclosure.

60 Accordingly, if Colonel Giles continues to be put forward as a principal or even a significant witness in judicial review proceeding or if he is in any way responsible for disclosure, it is our view that any court seized of those proceedings should approach his evidence with the greatest caution.

11. Other situations in which an application for cross-examination may be successful, outside those situations where “hard-edged” issues are in play might include the following:-

(a) where there is some doubt about the motive of the decision maker: *R v Waltham Forest LBC ex p Baxter* [1998] QB 419 (the issue was the motives of councillors voting for rate increases);

(b) where written records do not support later evidence given in statements: *R (H) v Commissioners of Inland Revenue* [2002] EWHC 2164 (Admin) (police officer accepting that his version of events in his statement was not contained in written records);

(c) The good faith of a decision maker or official is challenged: *Colman v GMC* [2010] (GMC official challenged about nature of pre-prepared documents and his role in closed deliberations)

## **Public Interest immunity**

12. There is a general exception in the case of disclosure in CPR r 31.19 , which provides

“(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.

“(2) Unless the court orders otherwise, an order of the court under paragraph (1)—(a) must not be served on any other person; and (b) must not be open to inspection by any person.

“(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document must state in writing—(a) that he has such a right or duty; and (b) the grounds on which he claims that right or duty.

“(4) The statement referred to in paragraph (3) must be made—(a) in the list in which the document is disclosed; or (b) if there is no list, to the person wishing to inspect the document.

“(5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.

“(6) For the purpose of deciding an application under paragraph (1) (application to withhold disclosure) or paragraph (3) (claim to withhold inspection) the court may—(a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and (b) invite any person, whether or not a party, to make representations.

“(7) An application under paragraph (1) or paragraph (5) must be supported by evidence.

“(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest.”

13. The recent law in relation to public interest immunity in civil proceedings starts with the case of *R v Chief Constable of West Midlands Police, Ex parte Wiley* [1995] 1 A.C. 274, a case which will be familiar to those who are involved in litigation against the police. The case concerned the application of “class” immunity in relation to investigation reports produced in the course of police complaints.

14. At that time the law on public interest immunity had developed to the extent that “class” PII was said to attach even to the statement given by a complainant so that he or she would not be entitled to disclosure of it during civil proceedings. Lord Templeman explained at p281

It has been said that the holder of a confidential document for which public interest immunity may be claimed is under a duty to assert the claim, leaving the court to decide whether the claim is well founded. For my part I consider that when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm. If the holder is in doubt he may refer the matter to the court. If the holder decides that a document should not be disclosed then that decision can be upheld or set aside by the judge. A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate.

15. In *R (Mohamed) v Secretary of State for Foreign Affairs* [2011] QB 218, Lord Neuberger considered the application of PII certificates from the government

131 While the question whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature made by the Foreign Secretary. ...As a matter of principle, decisions in connection with national security are primarily entrusted

to the executive, ultimately to Government ministers, and not to the judiciary.

...

132 None the less, the ultimate decision whether to include the redacted paragraphs into the open version of the first judgment is a matter for judicial, not executive, determination. Ever since the decision of the House of Lords in *Conway Rimmer* [1968] AC 910 it has been clear that the question whether a document should be exempted from disclosure in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court. ...Furthermore, practically any decision of the executive is subject to judicial review, and it would seem to follow that a minister's opinion that a document should not be disclosed in the national interest is in principle reviewable by a court.

16. Although this approach does give a lot of weight to the Ministerial certificate, it is now a long way from Lord Woolf's comment in *Wiley* at 296 in 1994 that

If a Secretary of State on behalf of his department as opposed to any ordinary litigant concludes that any public interest in documents being withheld from production is outweighed by the public interest in the documents being available for purposes of litigation, it is difficult to conceive that unless the documents do not relate to an area for which the Secretary of State was responsible, the court would feel it appropriate to come to any different conclusion from that of the Secretary of State

17. The position in relation to PII has been more recently considered in the other *Al-Sweady* judgment, *R(Al-Sweady) v v The Secretary of State for Defence* [2009] EWHC 1687 (Admin). Not only had a mess been made of disclosure, the Secretary of State had also issued a PII certificate in relation to material (upheld by the Court) which it was later discovered related to information which was already in the public domain. The Court was furious, while reiterating at some length the way that the PII system should work:-

13 ....To state the obvious, the systems for dealing with PII claims in the Courts of England and Wales depend, if a Ministerial Certificate and Schedule are advanced in support of a claim, upon the scrupulous accuracy of the whole of the content of those documents. The more so if

the content of the Schedule is sensitive (as is invariably the case), and cannot therefore be disclosed to the party seeking disclosure of the underlying material, who thus cannot contest its content. Especially so, if (as here) that Schedule deals with issues of national security, in relation to which (in accordance with well-established principles) the Court must accord the Minister's assertions considerable weight in the balancing exercise.

14 The Courts necessarily proceed upon the basis that Ministerial Certificates and Schedules are the product of a scrupulous process of preparation and checking, designed to ensure the complete accuracy of their whole content.

18. The approach to PII should be as follows, the Court said

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19. As to alternatives, Lord Woolf also said in *Wiley* that

“There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non-disclosure of documents is reduced to a minimum.”

20. This can include redaction of documents, and also a process of “gisting” so that the party seeking disclosure has the core irreducible information required to know the case against him.
21. This is especially of importance in cases where a claimant’s Convention rights are being determined. There will come a time when there must be disclosure of some of the information justifying a decision which infringes a person’s fundamental rights or else there cannot be a fair trial for the purposes of Article 6.
22. Thus in *Secretary of State for the Home Department v F* [2009] UKHL 28, [2010] 2 A.C. 26 the Supreme Court had to consider the effect of the Strasbourg Court’s judgment in *A v UK* which said that the Special Advocate procedure was not sufficient to mean that Article 6 was satisfied in some cases. *AF* was a control order case, but it is submitted that its principles apply in all cases where fundamental rights are in issue and PII is applied for. Thus, at paragraph 59, Lord Philips stated

...I am satisfied that the essence of the Grand Chamber's decision lies in para 220 and, in , in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”

65.... The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.”

23. In *BB and BC v SSHD* [2010] 1 WLR 1542 the Secretary of State argued that such an approach was not necessary if the control order requirements interfered not with Art 5 rights but Art 8 rights (such as reporting to a police station). Collins J rejected that argument

55 I have no doubt that the decision in the *AF* (No 3) case [2009] 3 WLR 74 compels me to decide that the approach to disclosure is the same for any control order. Of course, what may be needed to be disclosed in the individual case will vary, but, as I have said, there is the irreducible minimum and so the suggestion that, where the restrictions are said to be light or not severe (however this is to be judged), ...the mere existence of the special advocate will suffice is not to be applied.

24. The option for the Defendant in a case such as this, then is to disclose sufficient to satisfy the decision in *AF* or withdraw the allegations relied upon.

25. However, in *Tariq v Home Office* [2011] UKSC 35 the Supreme Court expressed the view (in the employment law context) that there may be circumstances where fundamental rights were not in issue, where Article 6 may be satisfied even without the disclosure of information to the claimant.

26. However, absent a statutory power to do so it is not open to a Court in the exercise of its inherent jurisdiction to order a closed material procedure for the trial of an ordinary civil claim such as a claim for damages for tort or breach of statutory duty, especially given the well established procedure for the exclusion of material on the grounds of PII: *Al Rawi v Security Service* [2010] 3 WLR 1068

## **Appointment of a special advocate**

27. A special advocate is an advocate chosen from a specialist panel kept by the A-G, in circumstances where there is material which the government (or other public authority) claims should not be disclosed to the individual. The SA will usually meet the litigant to take instructions before being access to the “closed material”, and thereafter will not be able to communicate with the “open” representatives. The SA has two important roles. The first is making representations and submissions as to whether withheld material should be disclosed or “gisted”. The second role is representing the individual in relation to any material which remains undisclosed to the individual. In *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, it was explained that

96 The use of special advocates was first sanctioned by Parliament in the context of national security deportations by the creation of the Special Immigration Appeals Commission (SIAC) to hear immigration appeals in matters with a national security element: see s.2 of the Special Immigration Appeals Commission Act 1997 . The functions of a special advocate in that context are set out in r.35 of the Special Immigration Appeals Commission Rules (SI 2003/1034) (as amended). A special advocate in SIAC proceedings has, broadly speaking, two principal tasks: (i) to test the Secretary of State's objections to disclosure of material to the appellant and see whether more can be moved from the closed to the open part of the proceedings; and (ii) to represent the interests of the appellant in any closed proceedings. Once a special advocate has received closed material, his ability to communicate with the appellant or his representatives is severely curtailed ( r.36 ). The SIAC model has been adopted in various other legislative contexts. It is not necessary to describe these. They do not include applications for production orders under the 2000 Act.

97 There have been cases where, without an applicable statutory scheme, the court has asked the Attorney-General for a special advocate. Examples are *Secretary of State for the Home Department v Rehman* in the Court of Appeal at [2001] UKHL 47 at [31] and [32]; *R. v Shayler (David Michael)* [2002] UKHL 11; [2003] 1 A.C. 247 at [34]; *R v H* [2004] UKHL 3; [2004] 2 A.C. 134 at [22] (in the context of an ordinary criminal trial); and *R. (on the application of Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 A.C. 738 .

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98 In *R. v H* at [22], Lord Bingham, giving the opinion of the Appellate Committee of the House of Lords said, in the context of a discussion about criminal trials, that the court should not be deterred from requesting the appointment of a special advocate to represent a defendant in public interest immunity matters, where the interests of justice are shown to require it. He said:

“But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort.”

...

101 As Mr Nicol points out, even in a procedure which is entirely *ex parte*, the court may consider that the absent party is afforded a sufficient measure of procedural protection by the obligation on the party who is present to lay before the court any material that undermines or qualifies his case or which would assist the absent party. Further, the court itself can be expected to perform a role of testing and probing the case which is presented. All these features may satisfy the court that the procedure is fair and complies with Art.6 , even without a special advocate. We would wish to place particular emphasis on the duty of the court to test and probe the material that is laid before it in the absence of the person who is affected. Judges who conduct criminal trials routinely perform this role when they hold public interest immunity hearings.

102 ....It should always, however, be borne in mind that it is exceptional to appoint a special advocate outside an applicable statutory scheme.

28. In *R (AHK) v Secretary of State for the Home Department* [2009] 1 WLR 2049, the Court of Appeal issued guidance as to when an SA should be appointed in judicial review cases involving refusal of British Citizenship where the Secretary of State was unwilling to disclose information to the claimant. Essentially the less information available to the claimant, the more likely would it be just to appoint an SA. It was open to the judge to consider the documentation first before deciding whether to agree to the appointment of an SA.

29. In the very recent case of *Tariq v Home Office* [2011] UKSC 35 Lord Mance explained as follows:-

57. In relation to the protection of the interests of the person in Mr Tariq's position in relation to disclosure after the closed phase has begun, the Guide amplifies the special advocate's role (in the largely parallel context of his or her role in proceedings before SIAC) as follows (para 103):

“It is now for the special advocate to take a view himself on the material and to decide whether any of what is contained within the closed material should in fact be made open (and therefore be disclosed to the appellant) because its disclosure would not harm the public interest - e.g. the material is already in the public domain or could not be regarded as damaging to national security or other public interests. Sometimes, the special advocate will submit that a summary or gist of the material could be safely disclosed to the appellant. The special advocate has a period after service of the closed material in which to consider and prepare written submissions on what, if any, of the 'closed' material should become open. These are known as rule 38 submissions in SIAC and rule 29 submissions in Control Order proceedings (although they are in fact governed by CPR 76.29). These submissions may also include requests to the Secretary of State for further information or documents to be provided to the special advocate. This period has usually in SIAC been a period of two to three weeks (although no period is specified - see SIAC Rules rule 38(3)). In the CPR, similar provisions specify a period of two weeks for the special advocate to indicate whether he challenges the Secretary of state's assessment of what is open and what is closed (see rule 76.29(3)), though the Court may modify it in appropriate circumstances.”

58. During the closed phase, the special advocate's role was summarised by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] INLR 180 in this way at para 17:

“The ways in which a special advocate will seek to represent the interests of an appellant are, first, to test by cross-examination, evidence and argument the strength of the case for non-disclosure. Secondly, to the extent that non-disclosure is maintained, the special advocate is to do what he or she can to protect the interests of the appellant, a task which has to be carried out without taking instructions on any aspect of the closed material.”

# 'Candour, Disclosure and Cross-Examination digging for truth in judicial review'

## Notes for candour and disclosure

Mark Henderson

### Candour

1. In *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing* [2002] EWCA Civ 1409, Laws LJ held that:

there is no duty of general disclosure in judicial review proceedings. However there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. (para 50)

2. In *MT (Algeria), RB (Algeria) and U (Algeria) v SSHD* [2007] EWCA Civ 808 [2008]

2 WLR 159, the Court of Appeal recorded that:

135 The Secretary of State has adopted a practice of "exculpatory disclosure": that is, he will make available to an applicant any material that might assist the applicant's case or undermine the Secretary of State's case. The claimant said that this approach was too narrow. It did not respect the "cards on the table" principle in public law cases, as set out, for instance, by Donaldson MR in *R v Lancashire County Council, Ex p Huddleston* [1986] 2 All ER 941. It is not easy, as so stated, to see what the difference between the two formulations is supposed to be. However, on exploring the issue it emerged that what is complained of is that by limiting disclosure to matters relevant to the applicant's "case" the Secretary of State could avoid providing material that, although not relevant to a line of argument currently pursued by the applicant, might however suggest a different line of objection that it could be fruitful for him to pursue.

136 The short answer was given by Mr Tam. The applicant's "case" is always going to be that he is at risk of suffering article 3 persecution on return. If the Secretary of State is loyal to his undertaking he will have to disclose anything touching on that general issue, whether or not it affects an argument already put by the applicant.

3. In *R (I) v SSHD* [2010] EWCA Civ 727, the Court of Appeal said:  
50. Whatever may be the position at an earlier stage, once permission has been granted to apply for judicial review there is an obligation on the Secretary of State to make proper disclosure, an obligation which, in my judgment, is not in any way affected by what has very recently been said by the Privy Council in *Marshall & Ors v Deputy Governor of Bermuda & Ors* [2010] UKPC 9 at paras [27]-[29]. It should not be necessary to remind the Secretary of State of what has been said in the past by judges of the highest eminence.

51. I go first to what Sir John Donaldson MR said in *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941 at page 945:

"if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision... [t]hen it becomes the duty of the respondent to make full and fair disclosure... [judicial review] is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands. "

52. I go next to what Lord Walker of Gestingthorpe said in *Belize Alliance of*

*Conservation Non-Governmental Organizations v The Department of the Environment* [2004] UKPC 6, [2004] Env LR 761, at para [86] (the fact that it was in a dissenting judgment deprives it of none of its force):

"proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

53. I should also refer to what Laws LJ said in *Quark*....

54. That, I regret to have to say, describes precisely the state of affairs in which we find ourselves in this case. The Secretary of State cannot complain if, in such circumstances, the court draws adverse inferences. We are, after all, here concerned with liberty. Where liberty is in issue the court should not be left to try and make findings as best it can on inadequate evidence. The court should not be left, as Plender J was left and as we, albeit to a lesser extent, have also been left, having to draw inferences; and if the court is left in this position, some explanation should be forthcoming as to why it is.

55. This is far from being the first occasion when the judges have had to complain about deficiencies in the Secretary of State's response to claims such as the one which is before us. If, despite all this, the court is again left having to draw inferences in such a situation, then the Secretary of State should anticipate that the inferences drawn may well be adverse to him. And that, I have to say, is a very concerning state of affairs; concerning not merely for the reasons I have mentioned but concerning also because it means that on some future occasion an unmeritorious claimant who, in truth, has no legitimate cause for complaint may, because of the way in which the claim is handled by the Secretary of State, recover, and, moreover, recover at the expense of the public, damages and costs to which he is not entitled.

56. In his skeleton argument before us Mr Kovats recited the Secretary of State's acceptance that the documentary evidence about the reviews of the detention was not before Plender J "and that it would have been preferable if it had been", as also the Secretary of State's acceptance that "it is not clear to what, if any, extent the Secretary of State took account of Mrs I's expressed wish to return to Nigeria." I do not criticise Mr Kovats for those words because, no doubt, he was constrained by his instructions. But I have to say that the word "preferable" is entirely inapt to describe what ought to have been done here. Moreover, the candid admission that matters are still not clear, that is, still not clear even in the light of the disclosure which has taken place since Plender J gave judgment, merely emphasises, it might be thought, the need for proper evidence to have been filed.

4. The Treasury Solicitor's Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings is helpful on both candour and disclosure.

#### Entitlement to disclosure in judicial review

5. In *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [2007] 1 AC

650, Lord Carswell explained that:

39. When one takes into account the proportionality factor, the need for disclosure is greater than in judicial review applications where it does not apply. The duty of candour has been fulfilled by adduction of summaries of the police report, authorised officers' reports and other documents, and the appellant's counsel did not suggest that there had been any deficiency in candour in putting that evidence before the court. He submitted, however, that it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that

there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary. I consider that there is force in this view and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents from which the commission received information and advice.

6. Lord Brown observed that:

Under the CPR the guiding principle is that all the rules should be applied "with the overriding objective of enabling the court to deal with cases justly": CPR r 1.1. This includes, so far as is practicable: "(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate..." (para 45)

7. He concluded that:

the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, "a more flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case.

57. On this approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker (a fortiori the main documents underlying decisions challenged on the ground that they violate an unqualified Convention right, for example under article 3). That said, such occasions are likely to remain infrequent: respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should be readier to do so whenever proportionality is in issue). Take this very case. But for the important matter of confidentiality rising in respect of these particular documents, it seems to me almost inevitable that they would have been exhibited, not least because that would have been simpler than summarising them. Without his having seen them, however, one can readily understand the appellant's concern that their effect may have been unwittingly distorted.

8. In *R (Al-Sweady) v SSD* [2009] EWHC 2387 (Admin), the Divisional Court held that "the approach to disclosure should be similar to that in an ordinary Queen's Bench action" where hard edged/ human rights issues are in play. It stated that:

17. The difficulty confronting us was that, as is well known, the usual procedure in judicial review cases is first for there to be no oral evidence and second, in so far as there are factual disputes between the parties, the court is ordinarily obliged to resolve them in favour of the defendant (see, for example, *R v Board of Visitors of Hull Prison ex parte St Germain (No2)* [1979] 1 WLR 1401, 1410 H per Geoffrey Lane LJ (as he then was)).

18. If that approach had been adopted in this case, the Secretary of State would have succeeded and it would also have had the more far-reaching consequence that a defendant would always succeed if sued for an infringement of human rights which was disputed. So a different approach was needed because these "hard-edged" questions of fact represented an important exception to the rule precluding the court substituting its own view in judicial review cases. It is noteworthy that Lord Mustill has distinguished between "a broad judgment whose outcome could be overruled only on grounds of irrationality" and "a hard-edged question [where t]here is no room for legitimate disagreement" (*R v Monopolies & Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32 D-F).

9. The Court explained that orders for disclosure were usually considered unnecessary because there was a general obligation upon a defendant public body to make full

disclosure, and observed that:

This obligation is a very important one because of the special position of the public authority and indeed it has been said that there is "*a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanation of all the facts relevant to the issue the court must decide*" (per Laws LJ in *R (Quark Fishing Limited) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1409 [50]). Sadly, the Secretary of State consistently and repeatedly failed to comply with this obligation. (para 22)

10. It held that:

25. The duty of disclosure on the Secretary of State in a case such as the present one is heightened by the fact that the allegations raised in this case concerned some of the most important and basic rights under the ECHR. For example, Article 2, which protects the right to life, "*must rank among the highest priorities of modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness*" (per Lord Bingham in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 [5]).

26. Similarly, Article 3 of the ECHR, which prevents citizens being subjected to "*torture or inhuman or degrading treatment or punishment*", is also an Article without any exception or reservation. Compliance with it is of vital importance to any civilised state, as is the right to liberty, which is preserved by Article 5. In essence, the claims made in this action related to the most basic human rights and therefore it must be incumbent on this court to consider with great care and to apply intense scrutiny to any claim that any of these three basic human rights have been infringed. This means that the duty of disclosure on the part of the defendant to a claim for an infringement of these rights is even more acute.

27. For there to have been effective cross-examination, it was vital for full disclosure to occur as otherwise the evidence of those witnesses could not be effectively challenged and appraised with the consequence that the truth would not have been discovered. Put in another way, where the court is involved in fact-finding on issues as crucial to the outcome of this case as they were in the present case, the approach to disclosure should be similar to that in an ordinary Queen's Bench action.

28. We concluded that it is vital that when it becomes clear that the outcome of a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination. Rule 12.1 of the Practice Direction to CPR Part 54 provides that "Disclosure is not required unless the court orders otherwise".

29. In our view, the parties and the Court should always scrutinise with care the stance of parties to judicial review applications (and in particular those concerning human rights claims) to ascertain if there is any critical factual issue which requires orders for cross-examination of the makers of witness statements or disclosure as being (in the words of Lord Bingham in the Tweed case which we have quoted in paragraph 23 above) "*necessary in order to resolve the matter fairly and accurately*". Courts should not be reluctant to make such orders in suitable cases, which are especially likely to arise in claims based on the ECHR. As we shall explain, sadly the Secretary of State has consistently failed to comply with these obligations in the present case.

11. It concluded that:

64. As to the case management issues, the parties have a clear obligation in any judicial review case to consider at all times whether there is a crucial issue in the case in the form of a hard-edged issue, of the kind described by Lord Mustill in the passage which we set out in paragraph 18 above, because this will be relevant in determining whether the court should make orders for cross-examination and disclosure. If the parties cannot

reach agreement, an application should be made for the appropriate orders for disclosure and cross-examination in accordance with the principles, which we have set out above.

...

65(ii) the Treasury Solicitor should ensure that those involved in similar cases in the future are fully aware of their duty to ensure that proper disclosure is given where there is to be cross-examination or indeed any case where the court makes findings of fact;

12. In *R (Hussein) v SSHD* [2009] EWHC 2506 (Admin), Sales J said:

5. Since the Claimant has now been released, he does not pursue the claim for a mandatory order. An amended claim form was issued in January 2009. He does maintain his claims for damages for false imprisonment and for declaratory relief. There is no doubt that it was open to the Claimant to include his claim for damages for false imprisonment in these judicial review proceedings, in accordance with CPR Part 54.3(2) and s. 31(4) of the 1981 Act. As it transpires, however, there are certain disputes of fact which are potentially of relevance to the determination of the claim. Both parties assumed that the claim in respect of false imprisonment should be determined in accordance with the usual procedure in judicial review proceedings, without hearing oral evidence from witnesses and without cross-examination. This left the court in an awkward position as to the proper approach it should adopt in resolving relevant disputes of fact. It also prompts the following comments on the procedure which should be followed in this sort of case.

6. Usually, a claim for judicial review involving application of rules of public law will be capable of being resolved on the basis of written witness statements and the documents exhibited to them. The facts in such cases are not substantially in dispute. For this reason, CPR Part 8 as modified by CPR Part 54 applies to such claims. CPR Part 8 provides for a somewhat simplified procedure where the court is required to decide on a question "which is unlikely to involve a substantial dispute of fact": CPR Part 8.1(2). Very often, the factual position so far as concerns liability in relation to a claim in tort for damages which is included in a claim in judicial review will be capable of being established by reference to the same materials, where the facts are not substantially in dispute (if liability is established, a factual inquiry into the damage suffered can be directed).

7. Sometimes, however, a substantial dispute of fact may arise in such cases. Where this occurs, either party may apply to the court for an order under CPR Part 8.1(3) for the claim to continue as if the claimant had not used the Part 8 procedure (i.e. for it to be treated instead as a Part 7 claim), and for directions. Alternatively, either party may apply to the court within the Part 8/Part 54 procedure for directions requiring or permitting the giving of oral evidence or requiring the attendance for cross-examination of a witness who has given written evidence: CPR Part 8.6(2) and (3). In practice, in such a situation, once it becomes clear that a substantial dispute of fact needs to be considered in order for the claim to be determined, the parties should co-operate to seek appropriate directions from the court as to how that dispute of fact may be resolved (see also *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) at [15]-[29], to which Mr Payne properly drew my attention shortly before the handing down of this judgment). The fact that a claim (such as a claim in tort) happens to be brought using the procedure in Part 54 does not mean that ordinary procedures employed by the courts for resolving substantial disputes of fact (including cross-examination) are not to be applied. It is difficult to see why the procedure for resolving a substantial dispute of fact should be any different from that which would be applied if such a claim was brought (as it could have been) using the Part 7 procedure, which is usually the appropriate procedure to be employed where there is or may be a substantial dispute of fact. The reason provision is made in the rules for a claim such as a claim in tort to be included in a Part 54 claim is for convenience and to promote consistency of outcome, by ensuring that all relevant claims (in both public law and private law) arising out of a particular set of facts can be heard and determined in the same proceedings; it is not to provide a passport to avoid the usual procedures which the courts employ to resolve substantial disputes of fact. (There may sometimes be good

reason to proceed on the basis of written evidence alone, for instance if a person is currently detained and a speedy decision about the lawfulness of his detention is required; then the court may simply have to do the best it can on written material – but that is not this case, as it came before me, and even in such a case it would still be desirable for the parties to seek to agree and to inform the court in advance that such a departure from the usual methods of resolving disputes of fact is proposed by them).

8. In the present case, it emerged from the evidence served by each side that there was a substantial dispute of fact as to whether the Claimant failed to co-operate with immigration officials who were seeking information from him in order to give effect to the order for his deportation. As appears below, that was an issue which potentially affected the lawfulness of the Claimant's detention, and hence affected his claim for declaratory relief, for damages for false imprisonment and (while he was still detained) for a mandatory order for his release. But when it emerged that there was a factual issue between the parties on this point neither the Claimant nor the Secretary of State made any application to court for oral evidence to be heard or for cross-examination of witnesses. Instead, at the hearing both Mr Payne, for the Secretary of State, and Miss Dubinsky, for the Claimant, made extensive reference to the contemporaneous documentation in the form of reports of meetings between officials and the Claimant. Miss Dubinsky also relied on witness statements of the Claimant, dealing in general terms with what had happened at those meetings. The Secretary of State did not put in witness statements from the officials who attended the meetings, although the contemporaneous documents recorded their views of what had happened. (At the end of the trial Mr Payne did make an application that the Claimant should be called to give oral evidence; the application was made without prior notice to the Claimant, who by that stage was not in attendance at court; in my view, it was an application made far too late in the day and it fell to be rejected for reasons I gave at the time).

9. Mr Payne submitted that the hearing before me did not constitute a trial. I cannot accept this. The hearing before me clearly was a trial of the Claimant's claims in tort. The usual rules of evidence apply. Changing tack, Mr Payne also submitted, by reference to CPR 32.5, that the onus lay on the Claimant to give evidence orally unless the court ordered otherwise, if he wished to rely on the witness statements served on his side. I do not think that is right either. In proceedings under Part 8 and Part 54 the default position is that written evidence may be relied on if served in accordance with the rules or with the permission of the court, as was the case with all the written evidence in these proceedings (see CPR 8.6 and 54.16). Special directions are required if oral evidence is to be given.

10. In view of the way in which both sides approached the evidence, where no witness was called to give live evidence and be cross-examined, I consider that the proper approach to assessment of the evidence in relation to the question whether the Claimant co-operated or not with immigration officials in relation to the removal process is to treat the evidence in his witness statements with a measure of generosity, since he was not challenged on it by way of cross-examination. However, I think Mr Payne was entitled to make reference to contemporaneous records by immigration officials (as, indeed, Miss Dubinsky also did) as evidence to be taken into account when considering what happened at the Claimant's meetings with them. He was also entitled to invite me to evaluate the Claimant's evidence in his witness statements critically by reference to other contemporaneous records, other statements made by the Claimant and inherent probabilities.

## CPR

13. Standard disclosure does not happen automatically in judicial review but an order can be sought. Standard disclosure (CPR 31.6) includes documents which:

- (i) adversely affect his own case
- (ii) adversely affect another party's case; or

(iii) support another party's case;

14. Issues may arise about the adequacy of the search:

**31.7: Duty of search**

(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).

(2) The factors relevant in deciding the reasonableness of a search include the following

- 
- (a) the number of documents involved;
- (b) the nature and complexity of the proceedings;
- (c) the ease and expense of retrieval of any particular document; and
- (d) the significance of any document which is likely to be located during the search.

(3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.

15. You may wish to request a disclosure statement:

**31.10: Procedure for standard disclosure**

(6) A disclosure statement is a statement made by the party disclosing the documents –

- (a) setting out the extent of the search that has been made to locate documents which he is required to disclose;
- (b) certifying that he understands the duty to disclose documents; and
- (c) certifying that to the best of his knowledge he has carried out that duty.

(7) Where the party making the disclosure statement is a company, firm, association or other organisation, the statement must also –

- (a) identify the person making the statement; and
- (b) explain why he is considered an appropriate person to make the statement.

16. An order for specific disclosure of documents or classes of documents can be requested and can be more effective than an order for standard disclosure:

**31.12: Specific disclosure or inspection**

(1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

- (a) disclose documents or classes of documents specified in the order;
- (b) carry out a search to the extent stated in the order;
- (c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a Document

17. Where a document is referred to in a d

**31.14 Documents referred to in statements of case etc.**

(1) A party may inspect a document mentioned in –

- (a) a statement of case;
- (b) a witness statement;

18. See also Upper Tribunal Procedure Rules (and *EM and Others (Returnees) Zimbabwe* CG [2011] UKUT 98(IAC))

:

5.— Case management powers

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—

...

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;

16.— Summoning or citation of witnesses and orders to answer questions or produce documents

(1) On the application of a party or on its own initiative, the Upper Tribunal may—

(a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation; or

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

Enforcement: contempt of court and indemnity costs

19. In *MSA v LB of Croydon* [2009] EWHC 2474 (Admin), Collins J held that:

8. [N]o penal notice is necessary in orders against any such Government Department or Officer of the Crown within any such department (usually a Secretary of State or minister). Nevertheless, as *M v Home Office* made clear, a finding of contempt could be made if there was a failure to obey an order against the Crown.

At p. 424H in *M*, Lord Woolf said:-

"While contempt proceedings ... against a government department or a minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequester the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of the contempt."

9. The distinction is there drawn between the ability to make a finding of contempt, which will lead to no punitive sanction save for payment of costs, and the ability to punish for contempt as a means of enforcement. It is the latter which would be covered by R.S.C. 0.45. Thus it is only if it is considered that it should be possible to use the powers available to punish for contempt that a penal notice might be needed. The question is whether such a notice is indeed necessary to enable such powers to be used.

...

11. Lord Woolf in *M* made much the same point at p.425D, stating that the courts' ability to make a finding of contempt was of great importance and should suffice since it would demonstrate that a government department had interfered with the administration of justice. The same in my view applies to any public body.

12. Accordingly, I do not think that a penal notice is necessary in orders made against a public body. A failure to comply with an order can be dealt with by an application to the court for a finding of contempt and, if necessary, a further mandatory order which may contain an indication of what might happen should there be any further failure to

comply. Adverse findings coupled with what would probably be an order to pay indemnity costs should suffice since it is to be expected that a public body would not deliberately flout an order of the court. Were that to happen, the contemnor could be brought before the court and, were he to threaten to persist in his refusal, an order could be made which made it clear that if he did he would be liable to imprisonment or a fine.

20. *R (Ahmed) v SSHD* [2010] EWHC 625 (Admin):

46. What happened after landing on the Baghdad tarmac was the subject of oral evidence before me. This was because of the unusual procedural history in this case. On 2 December of last year, Mrs Justice Dobbs made an order for disclosure both of information and of documents. Summarising matters, the defendant took what might seem a surprising stance where there had been the only failed return of this sort ever to have occurred, namely that no reasons had been given by the Iraqi government for the return of the prisoners, and that enquiries had to be made of those involved, which would take some time, to see if any documents existed. The matter subsequently came before Mrs Justice Cox, Mr Justice Coulson and last Friday, Mr Justice Burnett. Disclosure came out in dribs and drabs. Mr Justice Coulson contemplated the possibility of oral evidence, and Mr Justice Burnett ordered that witnesses should be available for cross examination. This was plainly appropriate, as I held giving further directions on Tuesday of this week, because it seemed to me that the witness statements might not reveal fully the events that had taken place and the reasoning behind them, Therefore in order to inform the court fully and properly of what had taken place, with a view to assessing the chances of a further charter flight containing the claimant taking off within the reasonable future, it was necessary to hear what those involved in this abortive flight had to say. In the event, matters have become, in my view, a lot clearer as a result, though not fully clear.

21. Langstaff J awarded costs on an indemnity basis in relation to disclosure in a subsequent judgment. Disclosure will often redact

### Identifying officials

22. *Muuse v SSHD* [2010] EWCA Civ 453:

In the course of the submissions made on behalf of Mr Muuse, the court's attention was drawn to the Home Secretary's policy of according anonymity to officials who deprived a person of his liberty and declining to call them as witnesses to explain their conduct. Arbitrary detention by unidentified persons who have been accorded the cloak of anonymity and immunity from explanation of their unlawful conduct could be considered a further factor in stigmatising the conduct as outrageous. However, I have not found it necessary to consider this. First, although an attempt was made to redact the names on some documents, this was not done on all. It was therefore possible to identify, with the aid of the computer records provided by the Home Office, the officials who had acted in an arbitrary and unlawful manner. Second, it can be inferred that there was no explanation that could be given for their conduct, as the only explanation tendered was characterised by the judge, as set out at paragraph 49, as "assertion, not substance". Nonetheless, it is difficult to understand the policy of attempting to give officials anonymity and of exempting them from giving an explanation, as those who make decisions that deprive a person of his liberty should not be permitted to claim anonymity and be shielded from explaining their conduct to a court. It is moreover difficult to see how such a policy is consistent with the rule of law in a democracy.

### Alternatives to Disclosure

23. Subject Access Request; Freedom of Information request; Parliamentary questions

Example:

24. *R (Limbu) v SSHD* [2008] EWHC 2261 (Admin):

9. To make their claim good the appellants before the AIT sought an order for discovery of documents that were in the possession of the relevant Ministries that might throw light on the purposes behind the Rule changes in 2004 and thus the ambit of the discretionary policy under the DSP. In due course the Deputy President of the AIT ruled in June 2008 that the AIT had no power to make orders for the wide ranging disclosure sought. The Claimants sought judicial review of the AIT's ruling still hoping at this stage that the long listed hearing date for the appeals in July could be maintained. On the 15th July 2008 after an oral hearing on the permission application Sullivan J. decided that the question of the lawfulness of the policy relating to Gurkha veterans compared to other foreign nationals could be examined on judicial review, with consequential obligations of voluntary disclosure of relevant material pursuant to judicial review principles. Permission was granted, an expedited hearing date fixed and the proceedings before the AIT were stayed pending the outcome of this application. In due course in early September three volumes of material comprising some 1247 pages were made available to the Claimants by way of voluntary disclosure that also discharged Freedom of Information Act obligations. The material ranges in date from 1947 to December 2006, and provides an extensive picture of governmental thinking relating to the immigration position and material Terms and Conditions of Service (TACOS) of the Brigade of Gurkhas.

10. Of considerable importance to the Claimants' case as finally argued was the exchange of correspondence between the Secretaries of State for Defence and the Home Department leading up to the change of immigration policy towards the Gurkhas in 2004...

Warning

25. It is not our job to help Tsol and Treasury counsel get better papers. Seeking disclosure is seldom a risk free exercise in judicial review. If you have a decision for which there is currently no understandable justification on the face of D's case, then by seeking disclosure, you run the risk of D providing the documents on which their legal team can present an explanation that is adequate to defend a public law challenge.