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# Judicial Review: procedure & case law update

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# Overview

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- General Principles and Scope
- Remedies
- Grounds
- Consultation
- Public Sector Equality Duty
- Human Rights Act 1998
- Disclosure and the duty of candour
- Procedural issues

# General Principles and Scope

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- Senior Courts Act 1981 and Part 54 Civil Procedure Rules
- Founded on statute, but defined by constantly evolving case law

*“[It is a remedy] invented by the judges to restrain the excess or abuse of power” (R v Secretary of State for the Home Department ex parte Brind (1991))*

# General Principles and Scope

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- Judicial Review is the process by which the courts supervise those who exercise public functions to ensure they act lawfully and fairly
- Allows for the decision, action or failure of a public body, such as a Government Department or Local Authority, to be challenged

# General Principles and Scope

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- Judicial Review is not an appeal

*“Judicial Review as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.” (Lord Brightman, Chief Constable of the North Wales Police v Evans (1982))*

- Judicial Review is a remedy of last resort
  - Alternative mechanisms for redress (e.g. appeal procedure) should generally be exhausted first

# Challengeable decisions

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- Decisions of private organisations challengeable?
- Focus on nature of decision, rather than identity of decision-maker
- Consider:
  - Public importance of function being performed
  - Source of power being exercised
  - Consequences of the decision
  - Existence of private law right to challenge

# Challengeable decisions

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## *R (Holmcroft Properties Ltd) v KPMG LLP* (2016)

- KPMG oversaw the implementation and application of a scheme to provide redress to customers who had been wrongly sold a financial product
- Under the scheme, KPMG approved all offers of compensation made by Barclays to customers
- Holmcroft said KPMG had acted unfairly in approving an inadequate offer, and claimed its role as independent reviewer had ‘public flavour’ so as to give rise to public law duties

# Challengeable decisions

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## *R (Holmcroft Properties Ltd) v KPMG LLP* (2016)

- Held: Claim dismissed.
- Court accepted that KPMG had a regulatory function
- However, there was no direct public law element in KPMG's role:
  - KPMG's powers were conferred by contract
  - KPMG had not been appointed by FCA
  - FCA had no obligation to carry out role played by KPMG



# Challengeable decisions

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## *R (on the application of MacLeod v Peabody Trust Governors [2016] EWHC 737 (Admin)*

- D acquired the freehold of a number of properties owned by the Crown Estate Commissioners
- Finance for acquisition raised from a bond issue
- C wanted to exchange his intermediate rent tenancy (fixed at 60% market value) with a Council tenant in Edinburgh
- D refused

# Challengeable decisions

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*R (on the application of MacLeod v Peabody Trust Governors [2016] EWHC 737 (Admin)*

- Held – claim dismissed
- D was not exercising a public function as it had used private funds to purchase the stock
- Also tenancy was not a social housing tenancy as defined by Housing and Regeneration Act 2008 s69 and so the rents were not subject to the same level of statutory control

# Standing

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- An applicant must have sufficient interest in the matter to which the application relates (s. 31(3), SCA 1981)
- Direct effect on rights, obligations, benefits
- Those with a wider connection or interest in the decision sought

# Standing

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## *David Wylde v Waverley BC [2017] EWHC 466*

- Council had entered into a development agreement following a procurement process. Agreement included a viability clause seeking a minimum development value for the LA
- Agreement varied to remove viability clause following an assessment of the development
- C challenged to argue variation breached procurement rules

# Standing

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- *David Wylde v Waverley BC [2017] EWHC 466*
- Held – C's did not have standing
- Key issue was context of legislative framework, and procurement legislation was more restrictive in its purpose than most
- C's were not directly affected by decision i.e. were not economic operators in competition with winning bidder
- Being taxpayers in the area was insufficient interest.

# Timing

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- Application must be made promptly and in any event within 3 months from the date when grounds for the application first arose (CPR 54.5(1))
- The time limits may **not** be extended by agreement between the parties (CPR 54.5(2))
- Requirement for promptness: *“it is in the public interest that the legality of the formal acts of a public authority should be established without delay”* (Trim v North Dorset District Council (2010))

# Timing

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- Note planning and procurement timing tighter still (since 2010).
- Planning JR's must be brought "no later than 6 weeks after the grounds to make the claim first arose (CPR 54.5(5))
- Procurement JR's within the timescales set down in the Public Contract Regulations 2015 (CPR 54.5(6))

# Timing

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- *R v Independent Television Commission ex parte TVNI* (1991)
  - Permission for judicial review refused despite claim being brought within 3 months. Promptness was important as so many third parties affected by decision.
- *R (007 Stratford Taxis Ltd) Stratford on Avon District Council* (2011)
  - Claim brought out of time was allowed to proceed at permission stage, but the Court of Appeal refused to grant relief because of the undue delay



# Timing

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*R (on the application of Jewish Rights Watch v Leicester City Council, Gwynedd Council and Swansea [2016] EWHC 1512 (Admin)*

- Although there had been delay beyond 3 months in the Leicester and Gwynedd matters, relief would not have been refused on this basis.
- In the case of Swansea where there had been 5 years delay, and still no PAP letter, relief would have been refused.

# Timing – compliance with rules

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*R (on the application of Kigen) v SoS for Home Dept*  
*[2015] EWCA Civ 1286*

- Following Mitchell and Denton cases confirmed that in principle no reason for a different approach to be taken in JR
- If anything, there were reasons to be even stricter about timely compliance with rules in a JR

# Remedies

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- All remedies are discretionary
- Remedies specific to judicial review:
  - Quashing order
  - Prohibiting order
  - Mandatory order
- Other remedies available:
  - Declaration
  - Injunction
  - Damages

# Grounds

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- Illegality
- Irrationality
- Procedural impropriety
- Legitimate expectation

# Grounds: Illegality

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- Excess of Power (*vires*)
  - Outside the limits of jurisdiction or otherwise outside its powers (i.e. *ultra vires*)
- Abuse of Power
  - Pursuing an objective other than that for which the power to make the decision was conferred
- Error of Law
- Human Rights Act 1998
- Equality Act 2010

# Grounds: Illegality

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- Unauthorised delegation
  - Where a power is given to someone by statute, it cannot be delegated to someone else unless there are express or implied powers to do so
  - Carltona Ltd v Commissioners of Works (1943)
- Acting:
  - In bad faith (dishonestly or maliciously);
  - For an improper purpose (Porter v Magill (2002))

# Grounds: Irrationality

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- Fettered discretion/over-rigid adherence to policy
  - *R v London County Council ex parte Corrie* (1918)
- Relevant/irrelevant considerations
  - Relevant considerations are sometimes set out in governing statute
  - It is for the decision-maker to attribute such weight to the relevant considerations as he sees fit (*Tesco Stores v SoS for the Environment* (1995))
- Wednesbury unreasonableness

# Grounds: Irrationality

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## Wednesbury unreasonableness

- A decision “so unreasonable that no reasonable authority could ever have come to it” (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947))
- Very difficult to establish
- Courts are reluctant to find Wednesbury unreasonableness, particularly where decision-maker has expertise



# Grounds : Irrationality

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- R (on the application of JF) v Merton LBC [2017] EWHC 1519
- Decision to move an adult with learning difficulties and autism to alternative provision
- Court found that assessment of need had not reached a conclusion on whether or not the C required on site access to a co-ordinated multi-disciplinary team, so decision was irrational (in the Wednesbury sense) and unlawful

# Grounds: Procedural Impropriety

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- Consultation
- Statutory provisions or procedural rules
- Natural Justice
- Bias (actual or perceived)
- Pre-determination
- Reasons for decisions

# Grounds: Legitimate Expectation

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- A public authority may, by practice or policy, confer on a person a legitimate expectation that it will act in a certain way
- Legitimate expectation can arise from an express or implied representation, consistent past practice or from a policy
  - Representation must be clear, unambiguous and unqualified

# Grounds: Legitimate Expectation

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- Procedural legitimate expectation
  - Arises where a public authority has “*provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy*” (*R (Bhatt Murphy) v Secretary of State for the Home Department* (2008))

# Grounds: Legitimate Expectation

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- Substantive legitimate expectation
  - “A substantive legitimate expectation constitutes a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured.” Withdrawal would be “conduct equivalent to a breach of contract or representation” (Bhatt Murphy)

# Grounds: Legitimate Expectation

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- Small number of cases: Courts acknowledge that it must be open to a public body to change its policies, unless to do so would amount to abuse of power
- Substantive procedural expectation recognised in exceptional cases only:
  - E.g. *R v North and East Devon Health Authority ex parte Coughlan* (2001): Successful JR brought by chronically ill tetraplegic who had been promised a residential care home was her home for life

# Consultation

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- Common ground for judicial review
- Express duty to consult:
  - Legislation, e.g. s.5D of the Childcare Act 2006 requires consultation before making changes to provision of children's centres
  - Statutory guidance may require consultation: must be followed unless good reason to depart (*R v London Borough of Islington, ex parte Rixon*) (1998)

# Consultation

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- Legitimate expectation
  - Promise or representation:

*R (Greenpeace) v Secretary of State for Trade and Industry* (2007): a White Paper on the future of UK energy production said that the Government would hold the “fullest public consultation” before any decision on new nuclear build , creating a legitimate expectation
  - Past practice of consultation
  - Guidance indicating consultation will be carried out



# Consultation

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- Duty to consult may arise as a matter of fairness or due process
  - General duty to act fairly, not general duty to consult:

*“...judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly.”* (R v Devon County Council, ex parte Baker (1992))

# Consultation

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- Impact of a proposed decision on individuals may give rise to a right to be consulted
  - *R (Dudley MBC) v Secretary of State for Communities* (2012)

The Secretary of State's decision fundamentally altered the nature of a previously-made commitment to fund capital projects, and had a significant impact on the local authority. To make the decision without consultation was so unfair as to amount to an abuse of power.

# Consultation

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- Contrast with:
  - *R (on the application of British Medical Association) v General Medical Council* (2008):  
The GMC abolished without consultation an exemption on the payment of medical register fees for doctors aged over 65. The impact was minimal and the GMC were not acting unfairly

# Fairness in Consultation

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*R (on the application of Moseley) v Haringey LBC*  
(2014)

- Supreme Court reaffirmed principles of fair and adequate consultation:
  - Consultation at formative stage of proposals
  - Proposer to give sufficient reasons for proposals
  - Adequate time for consideration and response
  - Product of consultation to be taken into account

# Fairness in Consultation

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## *R (on the application of Moseley) v Haringey LBC* (2014)

- Previously wide discretion on options on which to consult
  - No obligation to consult on rejected options
- New ingredient: Court in *Moseley* held that consultees had to be made aware of alternative options and why the Council had rejected them

# Fairness in Consultation

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- Cases since Moseley suggest that the circumstances in which a public body must consult on alternatives are rare
- Obligation to provide sufficient information for intelligent consideration
- R (Robson) v Salford City Council (2015)
  - The Court of Appeal held that in Moseley, consultation material conveyed a **positively misleading impression**. In this case, whilst the material presented an incomplete picture, this did not amount an unfair consultation process.

# Fairness in Consultation

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- Application of the duty of fairness in consultation cases is “intensely case-sensitive” (*R (Rusal) v London Metal Exchange* (2014))
- “*Judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind*” (*R (Greenpeace Ltd) v Secretary of State for Trade and Industry* (2007))

# Public Sector Equality Duty

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## Section 149, Equality Act 2010

*(1) A public authority must, in the exercise of its functions, have due regard to the need to—*

- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*



# Protected Characteristics

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- Age
- Disability
- Gender reassignment
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

# 'Due Regard'

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- Not a duty to achieve a result
  - It means “*the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the [disadvantaged group] that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-making is performing.*”  
(R (Baker) v Secretary of State for Communities and Local Government (2008))

# Public Sector Equality Duty

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- Duty applies when a public authority is carrying out its functions:
  - Formulation of policy and other general matters
  - Discharge of statutory duty
  - Exercise of a discretion
  - Carrying out a common law obligation
- Duty must be discharged by decision-maker responsible
  - Cannot be delegated

# Specific Duties

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## Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017

- Annual gender pay gap reporting (for organisations with 250+ employees)
- Information demonstrating compliance with equality duty
- Equality objectives
- Requirement to publish in a manner accessible to public

# Discharging the PSED

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## *R (Brown) v Secretary of State for Work and Pensions* (2008)

- Duty must be fulfilled before and at time when a particular policy is considered
- Duty to be exercised “*in substance, with rigour and with an open mind*”. It is not merely a question of “*ticking boxes*”.
- Continuing duty: must be reconsidered if new information comes to light

# Discharging the PSED

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- *Equality and Human Rights Commission  
Technical Guidance on the Public Sector Equality  
Duty*
- Evidence gathering
- Consultation
- Focus groups with protected characteristic representatives
- Statistics relating to potential impact
- Documenting decisions

# Discharging the PSED

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- Compliance cannot be avoided on the basis that the public authority lacks the resources to do so
- Equality Impact Assessments
  - Not required, but will assist in demonstrating thorough equalities analysis

# Failure to comply with PSED

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## Powers of the Equality and Human Rights Commission

- S.30(1) Equality Act 2006: EHRC can instigate or intervene in legal proceedings (judicial review or otherwise)
- S.32 Equality Act 2006: Compliance notice for failure to comply
  - Written confirmation of steps taken to comply within 28 days of notice
  - Application to High Court in case of non-compliance with notice



# PSED: Judicial Review

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- Non-compliance with PSED: illegality
- *LDRA Ltd v Secretary of State for Communities and Local Government* (2016)
  - Planning Inspector granted planning permission for an office and warehouse development at a car park next to a river. The Inspector found that the development would involve loss of public access to the riverside for 40 metres, but that harm was limited and outweighed by other factors.

# PSED: Judicial Review

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- *LDRA Ltd v Secretary of State for Communities and Local Government* (2016)
  - Held: The Inspector had had clear evidence before him that the car park and the access it gave to the river was regularly used and valued by disabled people. It was difficult or impossible for them to access the river from another location. In failing to recognise the importance of this evidence, the Inspector did not have due regard to the public sector equality duty. The decision was quashed.

# PSED: Judicial Review

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- *London Borough of Hackney v Haque* (2017)
  - A local authority had provided temporary accommodation to a disabled homeless man, to comply with its duties under the Housing Act 1996
  - The man claimed the accommodation was unsuitable due to his physical and mental condition, but the Council's reviewing officer decided it was suitable
  - The decision was quashed for failure to comply with the PSED
  - The local authority appealed...

# PSED: Judicial Review

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- *London Borough of Hackney v Haque* (2017)
  - Held: Appeal allowed. The Council's reviewing officer did not set out in express terms his reasoning about whether the applicant had a protected characteristic, whether the duty applied and its effect. However, the officer had described the applicant's disabilities in his decision, demonstrated sufficient recognition of the disabilities and their consequences, and demonstrated a focus on the applicant's needs.

# Human Rights Act 1998

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- Incorporates the rights set out in the European Convention on Human Rights into domestic law
- Section 6(1): requirement on public authorities to act in a way which is compatible with the Convention rights
- Section 6(6): an 'action' of a public authority includes a failure to act

# Human Rights Act 1998

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- Article 6 – Right to a fair trial
- Article 8 – Right to respect for private and family life
- Article 14 – Prohibition of Discrimination
- Article 1, First Protocol – Peaceful enjoyment of possessions

# Human Rights Act 1998

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- ‘Public authorities’ under the HRA 1998 includes:
  - A court or tribunal (s.6(3)(a))
  - Any person certain of whose functions are functions of a public nature (s.6(3)(b))
  - Private organisations carrying out functions of a public nature are only required to comply with the convention when performing acts of a public nature

# Bringing a claim under HRA 1998

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- Victim status: directly affected by the decision under challenge or at risk of being affected
- Equality and Human Rights Commission can bring a claim (s.30 Equality Act 2006)
- Time limits
  - Within one year of the act complained of
  - Three months if application for judicial review (NB requirement for promptness)



# Human Rights & Judicial Review

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- Failure to comply with HRA: illegality
- Proceedings to be brought in the ‘appropriate court or tribunal’ (s.7(1)(a))
- S.7(3) HRA 1998: If the applicant is, or would be a ‘victim’, he is to be taken as having a sufficient interest for the purposes of judicial review

# Human Rights Act 1998

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## *R (Johnson) v Secretary of State for the Home Department* (2016)

- Continuing discrimination: denial of automatic British citizenship to man born out of wedlock to Jamaican mother and British father
- Man faced deportation
- Supreme Court held that denial of citizenship when it has important effect on person's identity engages article 8 and article 14
- Deportation amounted to violation of ECHR

# Disclosure and the duty of candour

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- No standard disclosure under the Civil Procedure Rules in judicial review
- Defendant must make full and frank disclosure: give a true and comprehensive account of the decision-making process
- Failure to comply treated seriously by court
- Claimant owes same duty of candour, although “*the vast majority of the cards will start in the authority’s hands*” (*R v Lancashire CC, ex parte Huddleston* (1986))

# Consultation on duty of candour

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- Lord Chief Justice Discussion paper on defendant's duty of candour and disclosure in judicial review
- Proposals to amend Civil Procedure Rules
- Clarify position on defendant's duty of candour reflect current approach in case law
- Procedure for specific directions on content of defendant's acknowledgement of service

# Order for specific disclosure

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- Traditional approach: defendants set out events in witness statements, rather than exhibit documents
- Order for disclosure of documents only made where court considered statement to be inaccurate, misleading or incomplete in a material respect
- Change of approach: *Tweed v Parades Commission for Northern Ireland* (2006)
  - Claimant sought specific disclosure of certain documents summarised in statements

# Order for specific disclosure

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- *Tweed v Parades Commission for Northern Ireland* (2006)
  - House of Lords held that there may be judicial review applications where precise facts are significant. Documents relied on by a party should ordinarily be exhibited.
- Post *Tweed*, no need to establish that evidence is inadequate or incorrect to seek disclosure
- Test: where disclosure appears necessary to resolve the matter fairly and justly

# Duty of candour - cases

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*R (on the application of Kahn) v SoS for the Home Dept [2016] All ER (D) 38*

- CA emphasised C has duty to disclose all relevant docs and cannot rely on requirement for D to respond with AoS
- Requirements of duty of candour may require a C to not only furnish documents, but also to draw attention to court relevance of documents

# Procedural issues

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## Developments in JR - Criminal Justice and Courts Act 2015, Part 4

- The 'no substantial difference' test
- New rules on recovery and payment of costs by interveners in High Court and Court of Appeal judicial review proceedings
- Costs capping orders



# No substantial difference

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- New CPR 54.11A (from 13 April 2015)
- Court can on its own motion hear submissions on the question of whether it is likely that the outcome would have been different if the conduct complained of had not occurred
- If the court finds the outcome would not have been different, it then has to consider whether there are reasons of exceptional public interest which make it appropriate to give permission

# Intervener's costs

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- S87 of the Criminal Justice and Courts Act 2015 provides interveners must bear own costs
- S87(6) sets out 4 grounds – if the court considers any are met it must order an intervener to pay other party's costs
- Grounds are:
  - Intervener acted in substance as sole or principal applicant, respondent, defendant, appellant

# Intervener's costs

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- Intervener's evidence and reps, taken as a whole, have not been of sig assistance to the court
- Sig part of intervener's evidence and reps relate to matters it is not necessary for the court to determine
- The intervener has behaved unreasonably
- If an intervener becomes a relevant party, must be treated as if been a relevant party at all times
- CPR 46.15

# Third party costs

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- S85 and 86 of Criminal Justice and Courts Act 2015, amending s31(3) Senior Courts Act 1981 (**not yet in force**)
- Will enable court to require various information about financial resources and funding when a JR claim is launched
- Court will then have power to determine that costs are payable by a third party

# Costs capping

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- Sections 88 – 90 of Criminal Justice and Courts Act 2015, and CPR 46.16 – 46.19
- Court can only make an order if permission has been granted
- Court can make a costs capping order if it is satisfied that
  - the proceedings are public interest proceedings,
  - in the absence of the order, the applicant would withdraw the JR; and,

# Costs capping

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- it would be reasonable to do so (s88(6))
- S88(7) defines ‘public interest proceedings’ and s88(8) sets out what court must have regard to in determining if proceedings are public interest proceedings
- Provisions do not apply to Aarhus Convention claims
- Section 89(1) of the 2015 Act requires the court to have regard to the financial resources of all the

# Costs capping

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- parties; the extent to which the applicant (or any financial supporter of the applicant) will benefit if relief is granted to the applicant; and whether the applicant's legal representatives are acting 'free of charge'. The court will also need to consider whether the applicant is an appropriate person to represent the interest of others or the public interest generally.
- If one party's costs are limited, the other's must be too (though note, not at the same level.

# Cost capping – case law

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## *R (on the application of Hannah Beety) v NMC* [2017]

- NMC had decided that professional indemnity arrangements made by mid-wives association IMUK did not satisfy the requirements of the Nursing and Midwifery Order 2002
- Nurses sought costs capping order in relation to their JR of the NMC's decision



# Cost capping – case law

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## *R (on the application of Hannah Beety) v NMC* [2017]

- Held – order granted but at £25,000 rather than £20,000
- Matters at issue were not of general public importance, but s 88(7) test was just satisfied
- Nurses would not proceed with claim in absence of cost cap

# Case Law on Procedure – permission to appeal

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## Glencore Energy UK Ltd v Revenue and Customs Commissioners [2017] EWHC 1587

- C refused permission to bring a JR sought permission to appeal from the HCt under CPR 52
- D argued that there was a specific regime set out in CPR 54 and that was what applied
- Court agreed – High Court had no power to grant permission to appeal having refused permission for a JR

# Case law on procedure – totally without merit

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*Wasif v SoS for the Home Department [2016]*  
*EWCA Civ 82*

- Reasons for refusal of permission on the papers can be given in a brief form where a C has a right to an oral hearing
- Where a claim is to be certified as TWM, fuller reasons must be given
- What is required depends on case, but each of C's point should be taken in turn

# Case law on procedure – expert evidence

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*HK v SoS for the Home Dept [2016] EWHC 857 (Admin)*

- If expert evidence is to be relied on, permission for its use must be sought through the normal provisions set down in CPR 35
- Notwithstanding a failure to apply, evidence admitted, but Judge determined weight of report acknowledging failure to apply

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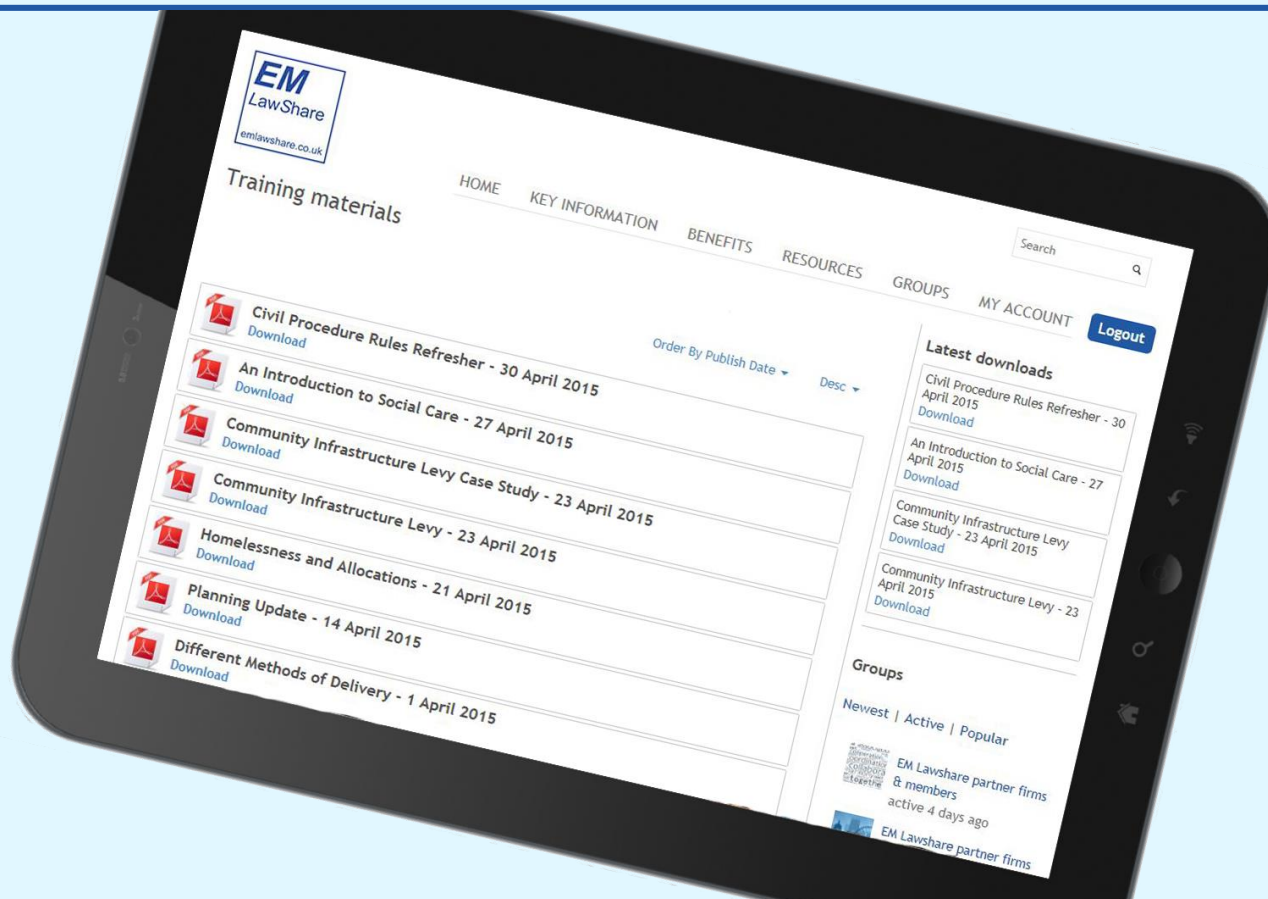
# Case Study

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# Any questions?

# Check out the website ...



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