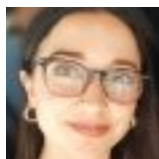


**Need to know**

# Strategic litigation for immigration lawyers

## Substantiating evidence; disclosure; judicial review and duty of candour

**Sarah Looney and Ellen Fotheringham set out how immigration practitioners can build the strongest possible strategic challenges and explain the role that grassroots groups can play in obtaining evidence.**



**Sarah Looney**



**Ellen Fotheringham**

**L**itigation in defence of migrants' rights can often start with a feeling that something really is not right. When the injustice is investigated, often some unlawfulness is uncovered and grounds of a claim start to form. The more information you have about your client's circumstances or the formation and functioning of the law and policy that is applied to them, the better chance you have of successfully bringing a challenge.

Perhaps unsurprisingly, government bodies, particularly the Home Office, are not always keen to part with inside information and there can often be significant delays in getting your hands on what is needed. With this in mind, we discuss the importance of collaborating with grassroots groups to substantiate evidence and develop strategic litigation, as well as obtaining disclosure and the duty of candour in the context of strategic judicial reviews in the

immigration context, drawing on Public Interest Law Centre's (PILC's) experience to provide some pointers and warn of pitfalls.

### Movement lawyering approach

Grassroots groups, frontline organisations and existing campaigns are experiencing or seeing the harms being caused day in, day out. Working alongside these groups and being led by them is a vital tenet of movement lawyering and is at the heart of PILC's approach to litigation. This recognises that the law is a tool to assist, support and empower migrants. Those on the frontline often have a wealth of data and information gathered through their knowledge and experience that you may not be able to obtain via the traditional routes outlined below. Your role will be to assist the organisations to collate, analyse and present their information or data in a way that can support a legal challenge.

### Pre-litigation

If you are considering a challenge on behalf of your client and wish to seek further information not in the public domain, there are two key ways to do this. Many lawyers will be familiar with these processes, so we will recap them briefly here:

#### 1. Subject access request

Under data protection law, the Home Office will - or ought to - hold all your client's personal data for at least seven years from the date of the conclusion of their matter. A subject access request (SAR) for your client's detailed file should include all ingoing and outcoming correspondence as well as internal Home Office notes relating to any decision-

making about your client, including in relation to applications, accommodation and/or detention.

An online application form to make a SAR to the Home Office can be found via guidance, *Request copies of your personal immigration and borders information* (UK Visas and Immigration, Border Force and Immigration Enforcement, 4 March 2014; last updated 25 February 2025). Be careful to comply with the ID requirements as failure to do so is often used by the Home Office as a basis to delay making disclosure.

As with all SARs, it is incumbent on the Home Office under data protection law to make disclosure within 30 days. There is often a delay long past this time limit. Lawyers should diarise the date for response and immediately submit a written complaint to the Home Office if the deadline expires. If you have not heard back within a further 30 days, you can consider submitting a complaint to the Information Commissioner's Office.

Even if you make clear in your initial request that you require the full detailed file, the Home Office will initially provide an electronic file. If this does not meet your needs, write back and ask for your client's full file to be disclosed. It is not unusual for incomplete files to be disclosed even at second disclosure. Check your file carefully and if you believe anything is missing, revert to the Home Office with a further request for disclosure.

Once you (finally) receive your client's file from the Home Office, take both a detailed and a strategic approach to reviewing the disclosure. Perhaps you are investigating whether an unpublished policy has been applied to your client. Pinpoint the time frame in which the relevant decision has been made and read those pages closely. You may be looking for evidence that your client has been treated in a discriminatory manner. Identify the moment of potential discrimination and

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review those pages closely. You should also review the rest of the file closely for evidence of any acknowledgement of their protected characteristic and/or need for reasonable adjustments.

## The Home Office is not always keen to part with inside information and there can often be significant delays in getting your hands on what is needed.

### 2. Freedom of Information Act requests

The Freedom of Information Act (FoIA) 2000 gives us wide-ranging rights to access information from the Home Office that is not otherwise publicly available, so long as certain exemptions to not apply.

A FoIA request can be made to the Home Office at: [immigrationenforcementfoipq@homeoffice.gov.uk](mailto:immigrationenforcementfoipq@homeoffice.gov.uk). When drafting your request, be as specific as possible about what information you are seeking, as requests drafted too widely can be refused on the basis that they would be too expensive to comply with. However, you need to make sure your request is broad enough to capture the documents that you are looking for. For example, if you want to understand more the formation of a policy, don't ask for 'all documents relating to the policy'; instead ask for 'any internal policy documents, notes, memorandums relating to the policy' and separately 'any policy research, statistics or evidence relied on in formulating the policy'. If you are looking into the equalities implications of a policy or practice, ask for 'records of all equalities considerations given to ...' rather than the equality impact assessment (EIA), as considerations may meet the definition of an EIA even if not given this name.

There are various exemptions that the Home Office can rely on to try to avoid disclosing information sought. Particularly relevant in this context is FoIA 2000 s31, which provides an exemption where disclosure would prejudice 'law enforcement' including 'the operation of the immigration controls'.

If you wish to challenge a delay or refusal in response to a FoIA request, this can be done through a complaint to the Information Commissioner's Office.

### Using disclosure to support litigation

Disclosure in the form of a SAR or a FoIA request may give you the evidence you need to support a legal challenge and/or reveal new grounds of challenge. When waiting for disclosure, it is important to always keep in mind your limitation date and, in judicial review claims, the need to act promptly. If the Home Office is not forthcoming with the information you have sought in a reasonable time frame, you may need to proceed with your claim without it and ask for it during the course of the litigation.

Note that if you receive new information in SAR or FoIA request disclosure that gives rise to a new ground or grounds of challenge, you may need to act quickly from that point. In the judicial review context, it has been held that where a claim is brought promptly upon a claimant becoming aware of grounds for challenge, but outside three months, it is out of time. However, lack of knowledge of a decision can be relevant to whether an extension of time for bringing the claim should be granted (*R v Department of Transport ex p Presvac Engineering* (1991) 4 Admin LR 121 at 133 and 134).

### During judicial review litigation

Most strategic legal challenges will be brought by way of judicial review, so we focus on the duty of candour in this article. If you are bringing a civil claim, the general rules in Civil Procedure Rules 1998 (CPR) Part 31 governing the disclosure of documents will apply.

### The duty of candour

The duty of candour and cooperation with the court applies to all parties in judicial review proceedings and obliges them to ensure that all of the relevant facts - including those that both support and undermine your case - are put before the court, to give it the 'full picture' (see the *Administrative Court judicial review guide 2024* (Courts and Tribunals Judiciary, October 2024), para 7.5, page 46, and para 15.1, page 112,<sup>1</sup> and

*R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at paras 20-21).

The scope of the duty of candour is a broad one (*Administrative Court judicial review guide 2024*, para 15.3.5, page 115) and it is well established that there is a very high duty on public authority defendants, 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' (*Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 at para 50).<sup>2</sup> There can be serious consequences for failing to comply, including adverse costs and refusal of permission (see *R v Wirral MBC ex p Bell* (1994) 27 HLR 234).

The duty of candour applies at all stages of judicial review proceedings, including the pre-action stage (*R (HM and others) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) at para 39). You should think carefully about what facts, documents and data you want the Home Office to provide you with and include this in the Pre-Action Protocol for Judicial Review letter, making it explicit that you rely on the duty of candour.

Despite the importance of the duty, it is not a certainty that the Home Office will comply; it has recently been strongly rebuffed by the court for failing to do so (*R (HM and others)* at paras 38-39). The Home Office should provide unredacted documents and if redactions are made, these must be justified in an application to the court (*Secretary of State for Home*

## Those on the frontline often have a wealth of data gathered through their knowledge and experience that you may not be able to obtain via the traditional routes.

*Department and Secretary of State for Levelling Up, Housing and Communities v R (IAB and others)* [2024] EWCA Civ 66; March 2024 *Legal Action* 38 at para 29). If you find that the Home Office is

not complying with the duty of candour, write to it reminding it of its duty, the serious consequences of failure, and that failure to provide the requested information and data will result in you making an application for directions to comply or an order under CPR Part 18.

### Disclosure

In judicial review claims, the duty of candour should ensure that all relevant information is before the court, so disclosure is not required unless the court orders otherwise (see CPR Practice Direction (PD) 54A para 11.2). You may apply for an order from the court that the Home Office provide further information under CPR r18.1, but such requests are exceptional and the court will only direct that the Home Office provide the information where it is necessary to do so in order to resolve the matter fairly and justly (*R (JZ) v Secretary of State for the Home Department and others* [2022] EWHC 1708 (Admin) at paras 26–28). Before making a request under CPR Part 18, you should first request the information from the Home Office and allow a reasonable time for response (CPR PD 18 para 1.1).

**Despite the importance of the duty of candour, it is not a certainty that the Home Office will comply; it has recently been strongly rebuffed by the court for failing to do so.**

Specific disclosure applications are normally filed at a later point in the claim, after the Home Office has filed and served its detailed grounds of resistance and evidence. You should ensure that any application for specific disclosure is made with a solid evidential basis, as the court will guard against ‘fishing expeditions’ (*R (Hoppr Entertainment Ltd) v Office of Communications* [2011] EWHC 3693 (Admin) at paras 19 and 21).

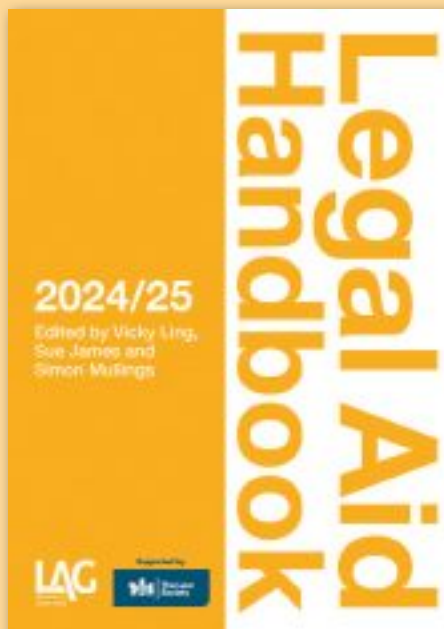
### Conclusion

It is important to think broadly and early about what evidence you may

need to support your client’s case and build strategic litigation, and where and when will be the best places to get it. Consulting and collaborating with grassroots groups and existing campaigns that are working on the issue you are trying to challenge can be a vital way to show that what has happened to your client is a wider issue that needs to be challenged, and can also be a way of obtaining and substantiating evidence that may not be available through the traditional channels of FoIA requests, SARs, the duty of candour, and disclosure. It is important to use as many different means as possible to build a picture for successful strategic litigation to achieve wider impact beyond individual cases. ■

- 1 The claimant’s duty of candour is explained at para 15.2, pages 113–114.
- 2 See also *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Belize Electric Company Ltd* [2004] UKPC 6 at para 86, *Lancashire CC v Taylor* [2005] EWCA Civ 284; May 2005 *Legal Action* 23 at para 60 and *R v Lancashire CC ex p Huddleston* [1986] 2 All ER 941.

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