Non-party disclosure orders in judicial review proceedings (R (AB) v Secretary of State for Health and Social Care)

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Public Law analysis: Two children sought permission to judicially review various decisions made by the Secretary of State for Health and Social Care relating to provision of coronavirus (COVID-19) vaccines to children. To pursue their claim, they sought disclosure of various statistics from the Office for National Statistics (the ONS). As the ONS was not a party to proceedings, they made an application under CPR 31.17 for disclosure. Mr Justice Swift dismissed that application on the basis that the information sought was not necessary for the fair determination of the questions of law raised by the pleaded case. Written by Jonathan Lewis, barrister at Henderson Chambers.

R (AB and others) v Secretary of State for Health and Social Care) [2022] EWHC 87 (Admin)

What are the practical implications of this case?

This case provides a helpful distillation of the principles governing how CPR 31.17 (orders for disclosure against a person not a party) is to be applied in the context of judicial review claims. The judgment reminds practitioners to consider the following 'purely pragmatic matter' when deciding to make an application for disclosure against a non-party (at para [11]). The purpose of an application for judicial review is to challenge a public law decision taken by a public authority decision-maker. Given that, and given also the grounds of challenge commonly available in judicial review proceedings, it is likely to be 'a rare case indeed where documents relevant to any issue necessary in order to determine the legality of the decision challenged are held by a non-party rather than either the actual decision maker or, possibly…a person who is an interested party to the claim' (at para [11]).

What was the background?

The claim as initially formulated challenged five decisions taken on various dates on or after 2 December 2020 relating to the provision of coronavirus vaccines to children. Permission to claim judicial review was refused on the papers. The claimant's renewed their application but narrowed the challenge to two decisions: (i) the decision of 4 August 2021 to offer the Pfizer vaccine to children who are 16 and 17 years old and (ii) the decision of 13 September 2021 to offer the same vaccine to those between 12 and 15 years old.

The claimants challenged the decisions in question on the basis that they were irrational (one such reason was that there was no basis for a conclusion that benefit to children of either age group from the vaccine outweighed the potential risk to those children from the vaccine) (at para [12]) and because the Secretary of State failed properly to inform himself before taking each decision (at para [13]).

The claimants made an application under CPR 31.17 against the ONS. They sought information from the ONS about each child or young adult who had died on or after 1 May 2021 to date after having been administered with a coronavirus vaccine. The ONS opposed the application. No point was taken that the application was a request for information rather than a request for documents.

What did the court decide?

Swift J's starting point was that on any application for disclosure as between the parties to a judicial review claim, the question to be considered is whether disclosure of the documents

requested is necessary for the fair determination of the issues in the case (relying upon *Tweed v Parades Commission* [2007] 1 AC 650).

CPR 31.17(3) provides that the court may make an order for disclosure against a non-party only where (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

Swift J noted that CPR 31.17 was primarily formulated with Part 7 claims in mind (at para [8]). The criterion at CPR 31.17(3)(a) reflects the approach to standard disclosure formulated at CPR 31.6, an approach which is not the one applied in Part 54 (judicial review) claims. CPR 31.17(3)(b) does refer to necessity and in Part 7 claims it is clearly intended to limit the possibility of such disclosure orders.

Swift J held that 31.17(3)(a) cannot have any independent application when the application for disclosure is made in the context of Part 54 proceedings (at para [9]). This is because, giving it any independent application would establish an approach to disclosure against non-parties that was more generous than the approach taken as between the parties themselves. Rather, in judicial review proceedings, it must be established as a minimum requirement that disclosure of the documents or information requested is necessary for the fair determination of the issues in the case (which is consistent with *Tweed*).

Swift J was not satisfied that disclosure of the information sought from the ONS was necessary for the fair determination the pleaded issues (at para [14]). He noted that, so far as it post-dates each decision under challenge, the information requested was not relevant to the legality of that decision as it was not material available to the Secretary of State to take account of. He found that the claimants' desire to see the information that pre-dated the decision rested 'on mischaracterisation of the nature of an application for judicial review and the court's function when deciding such a claim'. The mischaracterisation was to assume that the proceedings were 'something in the form of a general enquiry into the merits of the Secretary of State's decisions' (at para [17]).

In fact, the court's function is not to decide the factual merits but only to decide whether the conclusion reached was one that was legally permissible. Where the legality of a decision is challenged on the ground that before the decision was taken further or different information should have been obtained and considered, the general rule is that the court assesses only whether the approach taken by the decision-maker was a legally permissible approach—'The court does not dictate the single possible course of action by which the decision-maker should have approached his task' (at para [17]). Swift J concluded, that once that position was properly understood, it was clear that the information sought was not necessary for the fair determination of the questions of law raised by the case pleaded (at para [18])

Case details

- Court: Queen's Bench Division (Administrative Court)
- Judge: Mr Justice Swift
- Date of judgment: 13 January 2022

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