CAUSE NO: G 103 OF 2022

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
BETWEEN

THE KING

(on the application of

(1) CAYMAN ISLANDS URGENT CARE LTD (Trading as DOCTORS EXPRESS)
(2) KAISER DAY CANNACEUTICALS, LTD
(3) KAISER DAY PHARMACEUTICALS, LTD)

Applicants

-and-

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances:	**Mr Jude Bunting KC and Mr James Austin-Smith instructed by Campbells for the Applicants** **Ms Toyin Salako, Assistant Director of Public Prosecutions, for the Respondent**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**11 July 2024**
Judgment:	**5 August 2024**

Judicial review—decision by DPP not to prosecute—decision based on advice from external leading counsel—applicable test for discovery in judicial review proceedings—whether advice from external leading counsel and instructions to leading counsel should be disclosed

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JUDGMENT ON APPLICATION FOR SPECIFIC DISCOVERY

A. Introduction

1. This is my judgment on the Applicants' application for discovery of two documents, namely the advice of leading counsel to the DPP on whether to lay charges against certain persons in the circumstances described below, and the instructions to leading counsel that generated that advice.

2. The application was presented by Mr Jude Bunting KC for the Applicants, with Mr James Austin-Smith of Campbells, and was resisted by Ms Toyin Salako for the Director of Public Prosecutions. I am grateful to counsel on both sides for their helpful submissions.

3. This case arises out of a previous application for judicial review brought by the Applicants against the Director of HM Customs, Ms Catherine O'Neil JP, the Commissioner of the Royal Cayman Islands Police Service (RCIPS) and the former Chief Medical Officer (CMO), Dr John Lee.

4. Following the outcome of that case, described below, in the present proceedings the Applicants challenge the decision by the DPP's office not to pursue prosecutions of various persons.

5. On 16 February 2023, Richards J gave the Applicants leave to pursue judicial review on the papers in the following terms:

> *"49. In my view the Applicants raise points which do not appear to be resolved by the response of the Director such that it could be said that there is no arguable case. Those which are immediately apparent are:-*
>
> *i) Whether all the available material was reviewed by the Director before decisions were made. In particular, the reference in the reasons to the absence of evidence as to what was said on the application for the search warrant. Whether this is correct given the assertion of the Applicants that there are two affidavits from the Justice of the Peace which are not listed as having been reviewed. There is also the reference in the reasons to the absence of a record of the evidence of CO Schneider in the 2019 proceedings which record say the Applicants is in fact available.*
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> *ii) Whether the elements of the offence of misconduct in public office, in particular the mental element, were appropriately considered. Was a higher test as to intent applied?*

iii) Whether there are factual errors stated in the review of the evidence underlining the decision making.

iv) Whether there was a failure to consider all the offences under s.322 of the Penal Code.

50. At this stage on a prima facie basis, the complaint of a failure by the Director to consider all the available evidence and the full range of offences with the possible consequential effect as asserted by the Applicants appears to be arguable."

B. Factual background – the prior proceedings

6. It is necessary to set out the underlying background to understand the context of the application before me. The following summary is drawn from the report of the previous proceedings, *Cayman Islands Urgent Care and Others v HM Director of Customs and Others* [2021] (1) CILR 443.

7. The Applicants held certificates and licences which allowed them lawfully to import, possess and prescribe medical cannabinoids, in accordance with the provisions of s.2A of the Misuse of Drugs Act (2017 Revision), amongst other sections of the Act. There was initially no restriction on the prescription of medical cannabinoids for administration by vaporisation (or any other method) in the Cayman Islands.

8. On 10 September 2019, the Applicants caused a text message to be sent to users of Digicel telephones advertising that vaporisable medical cannabinoids were available from the First Applicant.

9. The Customs and Border Control Department were clearly concerned about this advertisement and decided to conduct an enquiry. On 11 September 2019, customs officers met with the registrar of the Health Practice Commission (HPC). On 13 September 2019, the registrar sent an email to the CMO stating that the HPC Board considered that the CMO should send a cease notice in respect of vaporising medical cannabinoids to all medical practitioners and attached a draft notice. The registrar also stated that Customs and Border Control had asked the HPC Board to request that the products be detained until a decision was reached.

10. The CMO prepared a cease notice on 14 September 2019, largely reflecting the draft sent by the registrar of the HPC. The cease notice was addressed to all registered healthcare practitioners. It stated that an investigation had been opened into the use of cannabinoids in medicine at the CMO's request;

that serious concerns had been received from various sources about the growth in cannabinoid prescribing in the Cayman Islands; and that there was a lack of sufficient evidence surrounding the safety and efficacy of vaporising cannabinoids. The notice stated that, pursuant to the CMO's powers under s.14 of the Misuse of Drugs Act, all healthcare practitioners were to cease and desist from issuing, processing, dispensing or selling any cannabinoid which would be used by vaporisation until further notice.

11. However, in parallel with this, the CMO wrote to the chairwoman of the HPC stating:

> *"I think it is highly likely that vaporising cannabinoids is not more injurious to health than smoking marijuana. The deaths from vaping seem more related to an additive (an oily Vitamin E compound) which is found in cheaper vapes, and not in the medical cannabinoid vapes that Doctors Express are using, so I am told. However, the juxtaposition of the worldwide focus on vaping deaths at the same time as the Doctors Express flagrant use of blanket advertising was unfortunate for Doctors Express and gives us a chance to rein in this widespread use of cannabinoids in the face of guidance to the contrary."*

12. The cease notice was not sent to the Applicants on 14 September 2019, even though they operated the only medical facility prescribing and dispensing vaporisable medical cannabinoids in the Cayman Islands.

13. On 16 September 2019, The RCIPS arranged to attend the Applicants' premises for an explanatory discussion, but the RCIPS then cancelled the meeting.

14. On 17 September 2019, Ms Holly Schneider, a customs officer, applied to Ms O'Neil, in her capacity as a Justice of the Peace, for a search warrant under the Misuse of Drugs Act on the basis that there were reasonable grounds to suspect an offence of possession of a controlled substance, namely cannabinoids to be used by vaporisation. Ms O'Neil was apparently not informed that:

    14.1 the Applicants had a licence to import, possess and prescribe medical cannabinoids;

    14.2 the advertisement pre-dated the cease notice;

    14.3 RCIPS had requested and then cancelled the meeting with the Applicants arranged for 16 September 2019;

    14.4 there was an alternative means of lawful entry under s.6 of the Misuse of Drugs Act.

Ms Schneider's reasonable cause for suspicion was said to be based on the Applicants' failure to retract the advertisement. She alleged that entry to the premises would not be granted without a search warrant.

15. Ms O'Neil granted the search warrant on 17 September 2019.

16. Later, on 17 September 2019, officers from Customs and Border Control and RCIPS raided the Applicants' medical facility and offices, claiming to be executing the search warrant. During the search, a representative of the Applicants explained that they were fully licensed by the HPC and other relevant bodies and that the cannabinoids had been imported under the authority of certificates issued by the CMO. The officer in charge replied that the CMO had rescinded such permission.

17. Sometime after the search began, the Applicants were sent the cease notice dated 14 September 2019, with an apology that it had not been sent to them previously.

18. The Applicants pursued a claim for judicial review. They sought a declaration that the cease notice was unlawful; an order quashing the search warrant; a declaration that the entry of customs and police officers into the applicants' premises and the search conducted at the premises were unlawful; delivery up of all items seized; damages and costs.

19. The Applicants complained, amongst other things, that:

19.1 the CMO's decision to issue the cease notice was unlawful in that (a) he did not have power to issue the cease notice pursuant to s.14 of the Misuse of Drugs Act, or at all; and/or (b) his decision to issue the cease notice was unreasonable, unnecessary, disproportionate and procedurally unfair;

19.2 the CMO failed to take into consideration all relevant information and took into consideration irrelevant information when he decided to issue the cease notice;

19.3 the CMO failed to discharge his statutory obligations pursuant to s.19(1) and (2) of the Constitution;

19.4 Ms Schneider did not have reasonable grounds to suspect that the Applicants had committed any crime when she applied for the search warrant;

19.5 there were no reasonable grounds to believe that there would be material essential to any inquiry at the Applicants' offices or medical facility;

19.6 there were no reasonable grounds to believe that entry to the Applicants' offices or medical facility would not have been granted without a search warrant;

19.7 there was no or insufficient evidence before Ms O'Neil to justify the grant of the search warrant;

19.8 Ms Schneider failed to make full and frank disclosure to Ms O'Neil when applying for the search warrant; and

19.9 the search warrant was defective in material respects.

20. Following a trial, McMillan J delivered a comprehensive judgment, comprising 392 paragraphs over 164 pages, in which he held that:

20.1 As a matter of law, the CMO did not have power to issue the cease notice.

20.2 Even if the CMO was justified in issuing the cease notice, the Applicants had a legitimate expectation that they would be afforded a fair hearing to be informed of and contest the relevant facts. There had been a clear departure from the principles of natural justice.

20.3 The cease notice was issued for a reason other than the reason specifically identified, viz. serious health risks associated with the use of vaporisable medical cannabis. It was in fact issued in response to an initiative undertaken by HM Customs and supported by the HPC.

20.4 The CMO knew that there was no health risk to justify issuing the cease notice in relation to the Applicants' products.

20.5 There was no reason to issue the cease notice other than to target the Applicants, given that no other medical dispensaries were dispensing cannabinoid products.

20.6 The decision to issue the cease notice was irrational and unfair. Whatever the concerns of HM Customs and HPC arising from the Applicants' advertisement on Digicel, they did not justify the CMO's action.

20.7 There was no basis to issue the cease notice. If there were, then it would have had to have been served personally, which it was not, which was fatal to its validity.

20.8 There was a breach of natural justice in failing to give the Applicants the opportunity to argue for the restoration of their suspended licence.

20.9 The CMO had acted for an improper purpose in issuing the cease notice.

20.10 The CMO had no reasonable basis to issue the cease notice, which (a) was functionally targeted against the Applicants; and (b) was issued on a basis which the CMO himself did not believe.

20.11 The cease notice was unlawful and was set aside.

20.12 There were a significant number of formal errors and deficiencies in obtaining the search warrant which justified quashing it, including:

(a) The application was formally sought in respect of possession of a controlled drug under s.14 of the Misuse of Drugs Act, but that section did not create any offence.

(b) The assertion that entry to the Applicants' premises would not be granted unless a search warrant was produced was false and misleading.

(c) The assertion that it was necessary that the warrant authorised entry to and search of the premises at *any* time to achieve its purpose was false and misleading.

(d) The assertion that there were reasonable grounds for believing that there was an offence of possession with intent to supply was unsupported by any evidence or any reliable evidence.

(e) In relation to the allegation of possession of a controlled drug, the Applicants had lawful authority to possess it.

(f) In relation to the allegation of possession with intent to supply, the only basis identified was the advertisement, which preceded the cease notice. There was no evidence that the cease notice had been disobeyed.

(g) There was no explanation as to how or why the items specified in the application would or could provide evidence likely to be relevant or of substantial value to the investigation of the alleged offences.

(h) The warrant identified the alleged offence of possession of a controlled drug only, failing to specify any of the items to be seized, and the items in fact seized were not produced to the court as stipulated in the warrant.

(i) There were material non-disclosures as to the sequence of events, HM Customs' overriding objective to detain the items in question and the CMO's lack of jurisdiction and justification for issuing the cease notice.

(j) No note was taken of the evidence given in support of the application for the search warrant, in circumstances where a note was critical.

(k) Ms O'Neil was not told of any features that mitigated against the search warrant being granted.

(l) The items sought were of no probative evidential value.

(m) The search warrant was sought and obtained for an improper purpose, viz. to detain the items by any means possible.

C. Factual background continued – the lead-up to these proceedings and the application for discovery

21. Following the conclusion of the Applicants' first judicial review claim, and in light of the terms of the judgment of McMillan J, the Applicants wrote on 10 February 2021 inviting the DPP to consider authorising criminal charges against the individuals involved. The DPP replied on 15 February 2021, indicating that any decision would be made after careful consideration of the judgment and *"a significant amount of further information"*.

22. On 28 February 2022 the Applicants were informed that the DPP was not intending to commence a prosecution against any of the persons involved. The Applicants sought an explanation from the DPP but, apart from stating that the potential prosecutions had failed the evidential test, the DPP refused

to provide any further information at that time. The Applicants sent a short pre-action protocol letter on 14 April 2022, requesting a response by 28 April 2022.

23. Not having received a response, the Applicants commenced the current judicial review proceedings by an application for leave filed on 4 May 2022 challenging the decision of the DPP not to lay charges.

24. Coincidentally, on 4 May 2022, Ms Salako, as Assistant DPP, wrote to the Applicants to provide some limited further information. She informed the Applicants that in January 2022 the Acting DPP (at that time) had decided that it would be prudent to obtain leading counsel's advice on the decision whether to lay charges. Ms Salako's letter stated:

> *"On 10 February 2022 leading counsel submitted to the ADPP a full and comprehensive advice.*
> *...*
> *Leading Counsel, applying the CPS Full Code Test that the ODPP applies for advice as to charge on all criminal matters, concluded that the evidential test, namely whether there was sufficient evidence and reasonable prospect of conviction, was not met for any criminal offence. In light of the conclusion that the evidential test had not been met, leading counsel was not required to address the public interest test.*
> *The ADPP reviewed the advice and endorsed it.*
> *As previously advised, the ODPP are not prepared to disclose any further material to you or your client ..."*

25. It is common ground that no separate contemporaneous note or record of the Acting DPP's decision-making process on or around 10 February 2022 has been disclosed.

26. On 20 May 2022, the Attorney General's Chambers responded to the Applicants' pre-action letter on behalf of the DPP – the author is not specified. The letter purported to set out the materials and questions that the DPP had considered, and purported to set out, potential defendant by potential defendant and offence by offence, what was said to be the DPP's reasoning.

27. As recorded earlier in this judgment, the Applicants' application for leave was determined by Richards J on the papers on 16 February 2023. The learned judge indicated four areas where she considered that the Applicants' complaints appeared to be arguable.

28. On 18 May 2023, the DPP filed detailed submissions opposing the substantive judicial review, settled by leading counsel, and running to 74 pages and 214 paragraphs.

29. On 22 May 2023, Ms Salako swore an affidavit stating that the submissions:

> *"… accurately identify the facts and reasoning process leading to the Respondent's decision not to institute criminal proceedings."*

This, the Respondent's submissions and the letter of 4 May 2022 stating that the Acting DPP reviewed leading counsel's advice and endorsed it, is the extent to which there is an explanation of what the Acting DPP took into account in making her decision and how she arrived at it. Ms Salako confirmed that she was not the Acting DPP referred to, so there is no evidence before me in the Acting DPP's own words as to her decision-making.

30. Finally of relevance, on 5 July 2023 the Applicants expressly requested that the DPP provide a copy of leading counsel's advice and instructions pursuant to the DPP's duty of candour, and on 12 July 2023 the DPP refused to do so.

31. I note here that following this exchange, both sides discussed having the matter listed for the discovery issue to be resolved. In addition, the DPP has been pressing for the substantive application for judicial review to be determined. I am therefore surprised and disappointed that it appears to have taken 12 months to have the matter listed before me. This is not consistent with the need for speedy determination of judicial review proceedings, and it risks being unfair to those persons who may still face the possibility of criminal charges, depending on the outcome of this judicial review.

D. The Applicants' submissions

32. Mr Bunting argues that the judicial review will turn upon what was the decision-making process and what was the evidence underlying the decision-making process. He says that this will be a fact sensitive exercise, which will need to focus on who took the decision, on what material they based it, and how they reached their conclusion.

33. The Applicants rely on:

33.1 the description of leading counsel's advice in Ms Salako's letter dated 4 May 2022 as being *"full and comprehensive"*;

33.2 the statement in Ms Salako's letter dated 4 May 2022 that the Acting DPP reviewed leading counsel's advice and endorsed it; and

33.3 the DPP's reliance in the submissions dated 18 May 2023 on the fact that the DPP obtained leading counsel's advice on charge, and that the Acting DPP agreed with that advice.

34. Mr Bunting argues that these factors make clear that leading counsel's advice sets out the contemporaneous reasons for the decision not to charge, which were then endorsed by the Acting DPP. The Applicants contend that leading counsel's advice is likely to be directly relevant to each of the grounds for judicial review for which leave has been granted. They say that, in the absence of any note prepared by the Acting DPP, it is the best evidence of what was considered by the Acting DPP, and of her reasoning, and it should be disclosed so that it can speak for itself. The best evidence is provided by contemporaneous documents rather than by subsequent rationalisations, and any summary is apt to mislead.

35. Mr Bunting dismisses the evidential value of the letter dated 20 May 2022 from the Attorney General's Chambers as follows:

> *"The letter purported to summarise some of the reasons not to prosecute, but it is unclear to what extent it fully or accurately summarises the full contemporaneous reasons, which are set out in the advice of leading counsel."*

In addition to this general point, Mr Bunting points out that the letter refers throughout to the decision made by the DPP and to the DPP's reasoning, whereas the DPP was not the person who made the decision – it was the Acting DPP at that time. He says this raises a serious question over the accuracy of the content of the letter and undermines its evidential value.

36. Turning to the request for discovery of the instructions to counsel, Mr Bunting again refers to the letter dated 20 May 2022 from the Attorney General's Chambers:

> *"The letter also set out the evidence which the decision-maker had considered. It is clear from this list that a number of documents that appear to be of importance were not placed before the decision-maker (as this Court found in its reasons for granting leave)."*

37. Accordingly, the Applicants argue that the instructions to leading counsel are likely to identify the documents and information that were, or were not, provided to leading counsel, and they are therefore important to determining what material was considered by leading counsel in preparing her advice, and by the Acting DPP in making the relevant decision at issue.

38. As regards the DPP's submissions dated 18 May 2023, the Applicants argue that these are not the decision, are not the reasons for the decision and are not evidence of the reasons for the decision. Instead, they are an *ex post facto* rationalisation or justification of the decision. They have been prepared by a different leading counsel from the person who advised on 10 February 2022. They are prepared as argumentative submissions, not as evidence. The Applicants therefore argue that these submissions are not a proper explanation of the Acting DPP's decision-making and are not a satisfactory substitute for sight of leading counsel's advice and instructions.

39. Mr Bunting says that both sides are agreed that the test for discovery in judicial review cases is set out in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 A.C. 650. He says that *R (S) v Crown Prosecution Service* [2016] 1 W.L.R. 804, which was the main focus of Ms Salako's submissions, does not take the matter any further.

    39.1 Mr Bunting disagrees with Ms Salako's submission that *Tweed* applies an exceptionality test. He says that the test is whether discovery is necessary for disposing fairly of the claim, particularly where the question is "how" a decision was made.

    39.2 Mr Bunting seeks to distinguish *R (S)* on the basis that it concerned a judicial review of the legality of the Victim Right to Review Scheme, in the context of a decision to prosecute S following such a review, rather than a decision not to prosecute.

    39.3 He also argues that *R (S)* was focused on challenges to the rationality of a decision, where there is no or very limited fact finding required, rather than procedural challenges, where there is a

greater requirement for fact finding, so that *R (S)* is not a binding answer against discovery in this case.

39.4 In any event, he invites me to consider what was disclosed in *R (S)* and compare it with what is being sought in this case. His position is that the Applicants' discovery request does not trespass any further than what was disclosed in *R (S)*.

39.5 He also refers me to *R (Joseph) v DPP* [2022] Cr. App.R. 17 and *R (Monica) v DPP* [2018] EWHC 3508 (Admin) and argues that both of these cases post-date *R (S)* and are good examples of how the court should approach the question of discovery in a failure to prosecute case following *R (S)*.

40. Finally, Mr Bunting points out that the Cayman Islands has an additional feature that does not arise in England & Wales, in that the Applicants have a constitutional right, pursuant to article 19(2) of the Constitution, to reasons for the DPP's decision. Article 19(1) provides that all decisions and acts of public officials must be *"lawful, rational, proportionate and procedurally fair."* Article 19(2) adds that, *"Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."*

41. Mr Bunting concludes by saying that this is an obvious and straightforward case, and the best approach is to order the discovery requested, and to let the contemporaneous documents speak for themselves at the hearing of the judicial review.

E. The Respondent's submissions

42. Ms Salako reminds me that challenges to prosecutorial decision-making rarely succeed. She points out that the decision whether to prosecute is one for the Office of the DPP, not for anyone else. Ms Salako argues that leading counsel's advice and instructions are irrelevant as a result, because the decision was that of the Office of the DPP. It is a matter for the DPP whether external advice is accepted or not.

43. Further, Ms Salako points out that the case before McMillan J was an application for judicial review; he was not concerned with whether any criminal offences may have been committed. McMillan J's findings of fact would not be admissible in any criminal trial and were therefore not relevant when deciding whether to lay any charges.

44. Ms Salako relies on the letters of 4 May and 20 May 2022 as setting out the materials considered, the offences under consideration and the test applied in relation to each. She says that a detailed explanation of the decision-making was given in the letter of 20 May 2022, with the result that the Respondent should not be required to provide more.

45. Ms Salako also argues that the court should be looking at the decision as one that was made by the Office of the DPP, rather than by a particular individual within the DPP's Office. It may be that this provides an answer to Mr Bunting's criticisms of the use of "DPP" in the letter dated letter 20 May 2022 from the Attorney General's Chambers.

46. Ms Salako recognises that the Respondent is subject to a duty of candour but argues that it has complied with that duty by providing detailed explanations of the decision-making to the Applicants in correspondence.

47. Ms Salako relies on *R (S)* and *Tweed* as indicating that discovery should be "exceptional". She says that there is nothing exceptional about this case to justify ordering discovery of leading counsel's advice and instructions. She submits that the application is simply a fishing expedition and should be dismissed.

48. Ms Salako did not suggest that there is any confidentiality or public interest immunity reason for refusing discovery, and no evidence was filed by the Respondent to support such an argument.

F. The law

49. The application for discovery is made pursuant to GCR O.24, r.7, dealing with discovery of specific documents, and subject to the limitation in GCR O.24, r.8, which provides that I should refrain from

ordering discovery if I am satisfied that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

50. Both parties rely on *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 A.C. 650 and *R (S) v Crown Prosecution Service* [2016] 1 W.L.R. 804. It is therefore useful to set out the relevant passages in the judgments.

51. Starting with *Tweed*, this was a decision of the House of Lords on an appeal from the Court of Appeal of Northern Ireland. The following passages are relevant:

51.1 Lord Carswell, giving the leading speech, and with whom the other Law Lords agreed, said:

> *"28. Applications for judicial review in Northern Ireland are not subject to the requirement … that the parties exchange lists of documents, which applies only to actions in which pleadings are served. They are governed instead by the provisions of rule 3(1), whereby the court may order any party to make disclosure by a list of documents, and rule 7(1), empowering the court to require a party to make disclosure by affidavit in relation to any specified document or class of documents. These rules are in turn subject to rule 9, which provides that on applications for orders under rule 3 or 7 the court shall refuse to make an order for disclosure 'if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.' Until the CPR came into force in England and Wales identical provisions applied under RSC Orders 24 and 53. …"*

Pausing there, the House of Lords was therefore considering discovery under procedural rules that were materially identical to the applicable Rules in the Cayman Islands.

51.2 Lord Carswell continued:

> *"29. The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits … the courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence …*
>
> *…*
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> *32. Mr Hanna QC for the appellant invited your Lordships to reconsider these principles limiting the extent of disclosure in judicial review applications, as they have not been explored in an appeal before the House. … **I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances.** It will not arise in*

> *most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ.* ***Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice.*** *This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.*
>
> *33. … **A party whose affidavits contain a reference to documents should therefore exhibit them in the absence of a sufficient reason (which may include the length or volume of the documents, confidentiality or public interest immunity)**. **If he raises objection** to production of any document, **the judge** in a Northern Ireland case **can decide** on the hearing of a summons under rule 12 whether to order production, **bearing in mind** the provisions of rule 15(1) that **no such order is to be made unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs**. In England and Wales the court may order specific disclosure or inspection under CPR Rule 31.12. In determining the extent of such disclosure or inspection the court will take into account all the circumstances of the case and in particular the overriding objective in Part 1 and the concept of proportionality: Civil Procedure 2006, vol 1, para 31.12.2."* (emphasis added)

Thus, it is notable that: (a) Lord Carswell indicated that documents referred to in evidence should be exhibited unless there is a sufficient reason not to do so; and (b) the test for discovery is whether it is necessary for disposing fairly of the cause or matter or saving costs, i.e. as specified in GCR O.24, r.8.

51.3 In his speech, Lord Brown of Eaton-under-Heywood added:

> *"54. … Plainly nowadays, in cases like the present, a more intensive review, a closer factual analysis of the justification for restrictions imposed, is required than used to be undertaken on judicial review challenges. But it is important too to recognise that even in proportionality cases judicial review still remains a very different process from the sort of litigation in which disclosure orders are ordinarily made. The challenge by definition goes to the legality of the decision impugned. Generally no fact-finding will be necessary—unless perhaps in procedural challenges where it may be necessary to establish what happened in the course of the decision-making process rather than what material was before the decision-maker. And it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge. Even, moreover, where proportionality is an issue, as Lord Steyn remarks towards the end of the passage cited from his judgment in* Daly*:*
>
> > *'This does not mean that there has been a shift to merits review. On the contrary … the respective roles of judges and administrators are fundamentally distinct and will remain so.'*
>
> *…*
>
> *56. This then is the general framework within which applications for disclosure in judicial review should be considered.* ***In my judgment disclosure orders are likely to remain***

exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely 'fishing expeditions' for adventitious further grounds of challenge. *It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper.* ***I share, however, Lord Carswell's*** *(and, indeed, the Law Commission's)* ***view 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 arising 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.*

...

59. I too, therefore, for substantially the same reasons as those given by Lord Carswell, would allow the appeal and make the necessary order." (emphasis added)

51.4 Lord Bingham, said:

"3. ***In the minority of judicial review applications in which the precise facts are significant, procedures exist*** *in both jurisdictions, as my noble and learned friends explain,* ***for disclosure of specific documents to be sought and ordered.*** *Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts.* ***But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.***

4. ***Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort.*** *But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document.* ***It is enough that the document itself is the best evidence of what it says.*** *There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."* (emphasis added)

51.5 Lord Hoffman and Lord Rodger agreed with all three speeches.

52. There is a difference between general orders for discovery under GCR O.24, r.3 and focussed orders for discovery of specific documents under GCR O.24, r.7. It seems to me that Lord Brown's comment in paragraph [56] about flooding the court with needless paper is more apposite as a warning against general orders for discovery under GCR O.24, r.3 than in respect of an application for specific discovery under GCR O.24, r.7. Lord Brown's indication in paragraph [56] that orders for discovery should be exceptional should be read in that context. It is notable that he then went on in paragraph [57] of his speech to temper the breadth of that comment and at [59] he agreed with Lord Carswell's decision to allow the appeal *"for substantially the same reasons."*

53. Lord Carswell was explicitly addressing the question of discovery of specific documents when he endorsed the test whether the discovery sought is necessary for disposing fairly of the cause or matter or for saving costs. Lord Bingham's formulation of the test is to the same effect: is the discovery necessary to resolve the matter fairly and justly. To the extent that there is a real difference in the approach of their Lordships, which I do not consider there is in light of paragraph [57] of Lord Brown's speech, Lord Carswell and Lord Bingham were in the majority, and Lord Hoffman and Lord Rodger expressly agreed with them.

54. In addition, the Law Lords who gave substantive reasons all made the important point that the underlying documents referred to in evidence should be exhibited, and the other members of the House of Lords agreed with them.

55. I now turn to the decision of the English Court of Appeal in *R (S) v Crown Prosecution Service* [2016] 1 W.L.R. 804. Briefly, the facts in *R (S)* were that the CPS had taken a decision not to prosecute S for an alleged rape. The victim then sought a review of that decision under the Victim Right to Review Scheme, which was introduced in the UK as the result of an EU Directive enacted in 2012. The case was reviewed by an independent prosecutor who considered that the decision not to prosecute was wrong and that a prosecution should be commenced. Having been charged, S sought judicial review of the legality of certain aspects of the Victim Right to Review Scheme, with a consequential attack on the decision to prosecute him. The President, Sir Brian Leveson, with whom William Davis J

agreed, rejected the challenge to the legality of the Scheme, and rejected S's challenge to the decision to prosecute.

56. A subsidiary issue was whether the CPS should disclose documents relating to its initial decision not to prosecute S and communications between the victim and the CPS. This was addressed at paragraph 25 in the judgment of Sir Brian Leveson, with whom William Davis J agreed, and on which Ms Salako relies heavily:

> *"25. [Counsel for S] cited* Tweed v Parades Commission for Northern Ireland *[2006] UKHL 53 in support of his request.* Tweed *primarily concerned the proper extent of disclosure in judicial review proceedings where proportionality was in issue in relation to a convention right under the ECHR. In such proceedings this court may be required to assess the balance which the decision maker has struck and not simply whether the decision is within the range of rational decisions.* ***Even in those cases orders for disclosure will be the exception rather than the rule****: see per Lord Brown at para. 56 in* Tweed*. Where (as here) the issue is whether the decision of the CPS was one open to a reasonable prosecutor and the decision maker has provided evidence of the basis for her decision, the interests of justice do not require further disclosure in order to assess the reasonableness of the decision."* (emphasis added)

57. In *R (S)*, the judgment records that there was a detailed witness statement from the CPS caseworker who had carried out the review and quotes from it. It is clear that it provided an exhaustive explanation in her own words from the decision maker in question.

58. Whereas Ms Salako relies on the emphasised text in the quotation above, Mr Bunting relies upon the last sentence in the quotation. He argues that the case illustrates by reference to the level of detail in the CPS caseworker's statement that, in practice, a prosecutor is required to set out the reasons why they have taken decisions not to prosecute and to provide evidence of those reasons. He submits that the reason that the Court refused the discovery sought by S was that *"the decision maker has provided evidence of the basis for her decision"*, so that the interests of justice requirement was not engaged.

59. As an exemplar of the court's approach, Mr Bunting relies upon *R (Joseph)*. The judgment at paragraph [18] indicates that the DPP had disclosed:

59.1 a *"thorough and detailed 143 paragraph Review Note dated June 2020"*, which was a contemporaneous document prepared by the CPS caseworker who made the decision not to prosecute; and

59.2 a 13-page letter dated 20 July 2020 notifying the claimant of the decision and explaining the reasoning for the decision.

The Review Note was exhibited to the witness statement of the CPS caseworker, pursuant to an order for disclosure of the evidence upon which the decision was based. Popplewell LJ, sitting in the Divisional Court with Dove J, endorsed the disclosure given and the order for disclosure that was made, commenting on this aspect as follows:

> *"The Review Note was not provided to the claimant at the time, but was produced by Ms MacDaid as an exhibit to a witness statement she made on 22 June 2021 following the order of Cheema-Grubb J in these proceedings granting permission to apply for judicial review, which included an order for disclosure of the evidence upon which the decision was based so far as required by the Crown's duty of candour and the overriding objective. In correspondence, and in the claimant's written skeleton argument, criticism was made of the extent of this disclosure. In oral argument Mr Mansfield QC did not press this complaint. He was right not to do so. I am satisfied that the disclosure was in accordance with the order made, and in accordance with the Crown's duty of candour and the relevant authorities (including* S v The Crown Prosecution Service *[2016] 1 WLR 804 per Sir Brian Leveson P at [24]-[25]) as to the limited extent to which such disclosure is appropriate."*

60. In *R (Monica) v DPP* [2018] EWHC 3508 (Admin), it appears from Lord Burnett's description of the decision under challenge at paragraphs [14]-[25] in the judgment that the relevant CPS caseworker had prepared a detailed contemporaneous letter explaining her decision to support the original decision not to prosecute, which ran to over 75 paragraphs.

61. In his written skeleton argument, Mr Bunting also relies upon *R (Bullock) v Director of Public Prosecutions* [2020] EWHC 2259 (Admin). This was another case based upon the exercise of the Victims Right to Review Scheme. The CPS caseworker endorsed the decision not to prosecute and sent a detailed letter explaining his reasoning. The complainant's family (the complainant had died) challenged the decision. The judgment in question concerned the family's application for disclosure. In the course of addressing this argument, the court also considered whether the test was different depending on whether the claim concerned a decision to prosecute or a decision not to prosecute. William Davis J said this:

> *"6. We observe that the starting point, in relation to disclosure in judicial review proceedings, is that they are usually regarded as unnecessary. In argument, Mr Rule appeared not to accept that proposition. We disagree and need to refer only to what was said by Lord Bingham in* Tweed v. Parades Commission for Northern Ireland *[2006] UKHL 53 at paras. 2 and 3. We shall have cause to return to* Tweed *shortly.*

> *7. The claimants' position is that they are entitled to disclosure of specific documents in order to allow proper submissions to be made, both as to the rationality and the legitimacy of the decision made by Mr Hurlstone. … They acknowledge that disclosure in cases of this kind was considered by this court in S v CPS [2016] 1 W.L.R. 804. At para. 25 of the judgment in S, Sir Brian Leveson P said this,*
>
> > *'…the issue is whether the decision of the CPS was one open to a reasonable prosecutor and the decision maker has provided evidence of the basis for her decision, the interests of justice do not require further disclosure in order to assess the reasonableness of the decision.'*
>
> *8. It is argued that what was said in S does not apply to this case: first, because that case involved a decision to prosecute rather than not to prosecute; second, there was no breach of Convention rights asserted in S, whereas here the claimants rely on interference with their rights under Articles 2, 3 and 8 of the Convention. They say that their case is more than a simple challenge to the rationality of the decision. The relevance of the latter factor, so it is said, is that it brings into play what was said in Tweed, to which we have already referred, about specific disclosure being appropriate in judicial review proceedings when an interference with Convention rights is alleged.*
>
> *9. The argument put on behalf of the Crown Prosecution Service is that the view expressed in S should apply to a decision of the CPS, whether it is a decision to prosecute taken on review or a decision not to prosecute. It is the decision-making process which is relevant, not the outcome.*
>
> *10. The Crown Prosecution Service's submission is that this case really is about the rationality of the decision not to prosecute.*
>
> *11.* ***We see no merit in the argument that S concerned the decision on review to prosecute, after an initial decision not to prosecute, rather than a decision not to prosecute. The nature of the decision, in our view, has no relevance to the issue of disclosure.*** *The principal question in S, as it will be in almost any case where there is a challenge to a prosecutorial decision, was whether the decision was perverse. That is the principal question here. We agree with and endorse the rationale for not ordering disclosure as was given by Sir Brian Leveson in S, to which we have already referred.*
>
> *12. As it happened, the decision in respect of disclosure in S had nothing to do with it being a case in which there was to be a prosecution and the applicant already had the relevant material, a distinction suggested by the claimants. The application in S related to material considered by the reviewing prosecutor, which was not part of the prosecution or disclosed case.*
>
> *13.* ***The core question is whether the letter of Mr Hurlstone provides the evidence of the basis for his decision. If it did, the claimants need no further disclosure to challenge the rationality of his decision.*** *There is one exception to that, acknowledged today by Mr Price, on behalf of the Crown Prosecution Service: the letter, whilst referring to medical issues, did not provide sufficient information about the medical evidence. Therefore, disclosure has been given of that relevant medical evidence. With that exception, it is said that the letter of 12 September 2019 provides what is needed to assess reasonableness and rationality. We agree.*
>
> *14.* ***The grant of permission referred to exchanges of text messages being the critical factor. That material is available in full. The way in which Mr Hurlstone assessed it is perfectly apparent from his letter.****"* (emphasis added)

62. *R (Bullock)* therefore indicates that the nature of the decision is not material to the question of discovery, and the court should focus whether there is proper evidence of the basis for the decision.

If there is, then discovery should not be ordered; if not, then it may be appropriate to order discovery, subject to the qualification that the discovery must be necessary for disposing fairly of the cause or matter or for saving costs.

63. Finally, it is useful to note the comment in the judgment of Jay J, with whom Bean LJ agreed, in *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin):

> *"71. … Neither the Defendant's two decision letters nor Mr Jackson's first witness statement (in whichever iteration) contains an explanation for the refusal of DV clearance. Mr Jackson's second witness statement was provided more than two years after the material events in the context of litigation. The authorities make it clear that the purpose of judicial review proceedings is not to extract an explanation which ought to have been provided earlier, but once such an explanation has been given its value and weight must be considered. …*
>
> *72. The effect of the jurisprudence on this topic is that* ***late-provided reasons must be treated with caution owing to the obvious risk of the truth becoming 'refracted, even in the case of honest witnesses, through the prism of self-justification'****: see Elias J, as he then was, in* Herefordshire Waste Watchers Ltd v Herefordshire Council *[2005] EWHC 191 (Admin) at paras 45-49. In* R (oao Nash) v Chelsea College of Art and Design *[2001] EWHC 538, at para 34, Stanley Burnton J, as he then was, listed a series of factors which all bore on the need for caution. These included any delay that has occurred and whether the further reasons are redolent of retrospective justification rather than elucidation."* (emphasis added)

In my judgment, this is a useful reminder that contemporaneous documents are likely to be of more evidential value than after-prepared rationalisations.

G. Decision

64. The principles relating to discovery in judicial review claims that I distil from the cases discussed above are:

64.1 The usual practice is to exhibit documents referred to in the evidence: see Lords Carswell, Brown and Bingham in *Tweed*. In most cases, this will necessarily involve disclosing the documents recording the decision and the reasoning that led to the decision, if they exist. This is because the affidavit in opposition to the judicial review application will have to address and explain the decision-making and will necessarily have to refer to the contemporaneous documents when doing so as part of the respondent's duty of candour.

64.2 The court should always be cautious about ordering discovery (of any kind) in judicial review cases, and it may be wholly unnecessary depending on the nature of the challenge being

mounted. However, the court should take a flexible approach to deciding the need for discovery, depending on the facts of each individual case.

64.3 It will be rare that the court needs to make a general order for discovery under GCR O.24, r.3. That situation can properly be described as exceptional.

64.4 However, it is more likely to be appropriate to make targeted orders for specific discovery where important documents have not been exhibited for any reason. The court should not hold back from ordering specific discovery under GCR O.24, r.7 where it is necessary either for disposing fairly or justly with the cause or matter or for saving costs.

65. As examples of the approach of the courts:

65.1 In *R (S)*, there was a detailed witness statement from the CPS caseworker who had made the decision;

65.2 In *R (Joseph)*, there was a 143-paragraph contemporaneous Review Note prepared by the decision-maker and a 13-page close to contemporaneous letter explaining the reasoning for the decision.

65.3 In *R (Monica) v DPP* there was a contemporaneous decision letter explaining the reasoning, which ran to over 75 paragraphs.

66. In this case, the following factors seem to me to be important:

66.1 No record of the decision-making within the DPP's office has been disclosed.

66.2 The closest to a contemporaneous explanation of the decision-making that has been disclosed is the letter from the Attorney General's Chambers dated 20 May 2022, some two months after the decision in question. There appear to be errors or infelicitous use of language in the letter, particularly regarding whether the decision was made by the DPP or by the ADPP, which raise question marks over the accuracy of the letter. There may be a simple explanation, but it has not been provided to me.

66.3 There is no affidavit or other evidence from the decision-maker as to how she carried out that task.

66.4 In her comments on the draft of this judgment, when addressing the identity of the decision-maker, Ms Salako stated *"The particular individual holding the post of DPP at various stages of this matter is not relevant, as the decision was based on the opinion of external counsel."* To my mind, this simply highlights the importance of the opinion in question.

66.5 The submissions filed on behalf of the Respondent on 18 May 2023 within the judicial review proceedings are simply that – they cannot be relied upon as a record or evidence of the decision-making in question.

66.6 The affidavit from Ms Salako, sworn over 1 year after the event, does not set out any details of the decision-maker's approach to the decision and how she made it, Ms Salako simply endorses the Respondent's submissions as accurately identifying the facts and reasoning process. Ms Salako was not the decision-maker.

66.7 The advice of leading counsel and the instructions to leading counsel which are sought patently exist – there is explicit reference to them in the Respondent's own correspondence and submissions.

66.8 The advice and the instructions are undoubtedly relevant in that the advice provides the background and context for the decision made, and the instructions to counsel will assist with the determination of the Applicants' complaint that the decision-maker failed to consider relevant documents and information.

66.9 The advice and the instructions are the only contemporaneous materials apparently available that are likely to cast any light on the decision-making that occurred.

66.10 It appears, on the material before me at present, that it will be difficult, if not impossible, to determine the judicial review claim without reference to and consideration of both the advice of, and instructions to, leading counsel.

66.11 It risks being a wholly artificial exercise not to have before the court documents which clearly underpinned the decision and which the decision maker *"endorsed"*.

66.12 If there were to be cross-examination of witnesses in this case, which I note took place in *Cayman Islands Urgent Care and Others* and is a real possibility in this case, it strikes me as bizarre that the Applicants would be forced to cross-examine the person who was Acting DPP

in February 2022 about the advice received from leading counsel and the instructions to leading counsel, whilst being deprived of sight of those documents.

67. For these reasons, I conclude that the discovery sought by the Applicants is necessary for disposing fairly of the cause and for saving costs and should be ordered.

68. I therefore order that the Respondent shall disclose the advice of leading counsel dated 10 February 2022 and the instructions to leading counsel that led to that advice.

69. Within 7 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 5 August 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT