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Case No: CO/4397/2020; CO/4398/2020; CO/4399/2020;
CO/4400/2020; CO/4401/2020; CO/4402/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION

And

MRS JUSTICE TIPPLES DBE

- -

Between :	
CO/4397/2020	
DVP	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**
And Between:	
CO/4398/2020	
CBW	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**
And Between:	
CO/4399/2020	
MDE	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**
And Between:	
CO/4400/2020	
RAM	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

And Between:
CO/4401/2020
ASH **Claimant**
- and -
The Secretary of State for the Home Department **Defendant**

And Between
CO/4402/2020
BMS **Claimant**
- and -
The Secretary of State for the Home Department **Defendant**

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Ms Stephanie Harrison QC (instructed by **Duncan Lewis LLP**)
The Secretary of State for the Home Department did not appear and was not represented.

Hearing date: 17 February 2021
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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will deemed to be 10am on Wednesday 17th March 2021. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the listoffice@administrativecourtoffice.justice.gov.uk.

Dame Victoria Sharp P.

Introduction

1. This is the judgment of the court.

2. The *Hamid* jurisdiction is a facet of the court's jurisdiction to regulate its own procedures and to enforce the overriding duties owed to it by legal professionals: see *R (Hamid) Secretary of State for Home Department* [2012] EWHC 3070 (Admin). Although the *Hamid* jurisdiction originated in the field of immigration, it is not confined to immigration or even to public law claims: see, for example, *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB) and *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588 at para 11.

3. This present case has been referred to the Divisional Court under the *Hamid* jurisdiction. This reference arises from an order made by Swift J on 30 November 2020, following an urgent application that had come before him on that day in the Administrative Court, which related to six different claims for judicial review, all of which had been issued in materially identical terms. This hearing is not concerned with the underlying merits of the claims. It concerns only the issues which gave rise to the need for the court to invoke the *Hamid* jurisdiction.

4. In his order, Swift J identified significant concerns about the conduct of the claims by Duncan Lewis LLP. Central to those concerns was the use (or abuse to be more precise) of the 'urgents' procedures in the Administrative Court. There were a number of particular features of this on which it has been necessary to focus, namely whether the application that was made was urgent; the failure to provide the required information to the court; the fact that the application for interim relief purported to be made on behalf of people other than the claimants, when there were no instructions to do so and breaches of the duty of candour.

5. Following the order made by Swift J, Duncan Lewis were sent what is called a "show cause" letter by the court. Mr Toufique Hossain, the lead solicitor at Duncan Lewis with responsibility for the six claims, and Mr David Head, the Director of Compliance at Duncan Lewis were then directed to appear before the Divisional Court to address the concerns identified in Swift J's order and to give reasons why they should not be reported to the Solicitors Regulatory Authority. At this *Hamid* hearing, Duncan Lewis have been represented by counsel who were instructed by Duncan Lewis in relation to the judicial review claims and in the application which came before Swift J on 30 November 2020. We heard from Ms Stephanie Harrison QC who spoke on their behalf.

Urgent applications in the Administrative Court

6. The Administrative Court often deals with urgent applications. This is a very important part of its work in the public interest, and a High Court judge is always available to hear such applications. Thus, a High Court judge is always available in the Administrative Court during court hours in the week, to deal *only* with urgent applications. Cases which are so urgent that they need to be dealt with out of normal

court hours, including weekends, public holidays and vacation, are dealt with by the High Court judge on 'out of hours' duty.

7. It is of the utmost importance that this limited resource is not abused, and over the years, the courts have developed rules to ensure this does not occur. If cases that are not truly urgent displace those that are, this will have serious consequences for litigants who have a good reason for applying for urgent relief. Two things flow from this. First, those seeking to make use of the 'urgents' procedures are under a duty to the court to satisfy themselves that the application they are considering really is urgent and to adhere, to the letter, to the rules of court which protect the procedure from abuse. This has always been the case. The fact that case papers can now be filed electronically, has not altered the position. Secondly, any abuse of the 'urgents' procedures will not be tolerated by the court and will be met with appropriate sanction.

8. *The Administrative Court Judicial Review Guide 2020* (the Guide) is essential reading for all those who practice in the Administrative Court. It sets out the practice for urgent cases and applications for interim relief in sections 14 and 15, at pages 70 to 78. The Guide reminds all litigants and their advisers that for urgent cases, they *must*: (a) clearly set out the reasons for urgency on the face of the application notice; (b) comply with their duty of candour which requires them to disclose all relevant material to the court (para 14.1 of the Guide); and (c) comply with the Civil Procedure Rules, Practice Directions and other obligations owed to the court (paras 15.1.2 and 15.1.3 of the Guide).

9. The duty of candour in this context, means that the claimant must disclose any relevant information or material fact which either supports or undermines his case. Material facts are those facts which it is material for a judge to know when dealing with the urgent application. The duty requires the claimant to make the court aware of the issues that are likely to arise and the possible difficulties in the application or underlying claim. The information the claimant puts before the Administrative Court in support of an urgent application *must* be presented in a fair and even-handed manner, and in a way which is not designed simply to promote his own case. The court *must* be able to rely on the claimant's compliance with the duty of candour, as urgent applications in the Administrative Court are usually made on very limited notice to a defendant, and an exceptionally urgent application may be made without any notice to the defendant at all.

10. The court will set aside an order obtained without full notice to the other party, if there has been a breach of the applicant's duty of candour to the court, even if the order might otherwise have been justified. This principle applies to the Administrative Court, as it does to every other jurisdiction. Amongst other reasons, this is done to deter the misuse of the court process: see for example *R (SB (Afghanistan)) v Secretary of State for the Home Department* [2018] 1 WLR 4457, CA at para 79 (4471F-G), per Lord Burnett of Maldon CJ.

11. Section 16 of the Guide explains the steps the court can take if its procedures for urgent consideration are abused. This includes making adverse or wasted costs orders. The *Hamid* jurisdiction is explained, and it is made clear that professional representatives may be referred to their relevant professional regulator for

consideration of disciplinary action if they fail to comply with their professional obligations.

12. It is necessary to refer to three other important parts of the Guide in relation to urgent cases.

13. **First**, in relation to applications for urgent consideration of judicial review claims the Guide provides that:

    a. In exceptionally urgent circumstances, a person may make an application, typically for interim relief, before starting judicial review proceedings. The court may only grant a pre-action order where the matter is urgent; or it is otherwise necessary to do so in the interests of justice (para 15.2.1 of the Guide).

    b. Where the circumstances of the case require urgent consideration of the application for permission to apply for judicial review, the claimant may apply for urgent consideration at the same time as issuing the claim form. These situations will generally be those where some irreversible action will take place unless the hearing of the claim is expedited (para 15.2.2 of the Guide).

14. **Second**, *Form N463* is the standard court form for urgent applications in judicial review cases. It is the application notice, and the critical document for the purposes of an urgent application, to which the judge dealing with the application will normally turn first. In order to make an urgent application, the claimant *must* complete form N463 and provide the following information which *is required* to be inserted into the relevant boxes on the application form:

    a. The circumstances giving rise to the urgency. If the representative was instructed late, an explanation must be provided as to why their client instructed them at the last moment. If the form is filed only shortly before the end of the working day, an explanation should also be provided as to why the application was not made earlier in the day (para 15.2.3.1 of the Guide).

    b. The timescale sought for the consideration of the application (para 15.2.3.2 of the Guide).

    c. The date by which any substantive hearing should take place (para 15.2.3.3 of the Guide).

    d. When the defendant and any interested parties were put on notice of the application for urgent consideration (or if the defendant/interested parties are not on notice of the application, the reason why and the efforts made to give notice to them) (para 15.2.3.4 of the Guide).

15. That the information required *must* be provided on form N463 is made clear not only by the Guide, but also on the form itself. Page 1 says at the top "*This form must be completed by the claimant or the claimant's advocate if exceptional urgency is being claimed and the application needs to be determined in a certain time scale*". The middle of page 1 says "*You must complete sections 1 to 5 and attach a draft Order*".

Sections 1 to 5 of the form are entitled: SECTION 1 Reasons for Urgency; SECTION 2 Proposed timetable; SECTION 3 Justification for request for immediate consideration; SECTION 4 Interim relief; SECTION 5 Service. Further, the form concludes with a declaration on page 3 which has to be signed by the claimant or the claimant's advocate and provides "I confirm that all relevant facts have been disclosed in this application".

16. The completion of form N463 is an important discipline for those who wish to make urgent applications in the Administrative Court, and practitioners must follow the correct procedures. It is not acceptable for litigants or practitioners to leave any of these sections blank or to side-step what the form requires them to do by cross-referring to other documents. If an application is genuinely urgent, it will be neither difficult nor onerous to identify the information required. The requirement to do this is no mere formality. It enables cases that are genuinely urgent to be identified by court staff and the judge to whom the application is referred, and ensures that each such case is managed with appropriate expedition. It is therefore critical to this important part of the work of the Administrative Court. Plainly, the judge should not have to hunt for the key information elsewhere or seek to understand the underlying reasons for the urgency from other documents provided, which may be extensive. Reasons for urgency should be capable of short and straightforward explanation so that they can be set out in the box provided in section 1.

17. There is nothing new about this. The requirement to provide the information on the form was spelt out by Sir John Thomas P, at paras 7 and 8 of the decision in *R (Hamid) v SSHD* itself:

> "[7.] … If any firm fails to provide the information required on [form N463] and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated and the efforts made to notify the defendant, the court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case, but the firm concerned. Non-compliance cannot be allowed to continue.
>
> [8.] That will not be the only consequence of failing to complete the requirements set out in the form. First, one consequence may be that, if the form is not completed, the judge may simply refuse to consider the application. Second, if reasons are not properly set out or do not explain why there has been a delay or the reasons are otherwise inadequate, the court may simply refuse to consider the application for that reason and that reason alone."

18. **Third,** as already mentioned, urgent applications are typically made on very limited notice to the defendant. Particular care is required by claimants therefore where such an application is made, and they are required to comply with the duty of candour to the court (see para 9 above).

19. Nevertheless, if possible, the court will want to know the defendant's position in relation to any urgent application. Para 15.2.9 of the Guide provides that:

> "Wherever possible the court will want representations from the defendant before determining the application. In cases where interim relief is sought, the court will generally make an order allowing the defendant a short time to file written submissions before deciding the application, unless irreversible prejudice would be caused to the claimant in the meanwhile; alternatively, the judge may list the matter for a hearing on notice to the defendant (see paragraph 13.2 of this Guide for listing). In cases where an expedited substantive hearing is sought, the court may abridge time for service of the defendant's Acknowledgment of Service and request the defendant's views on the order sought, to enable the court to take an early view on permission and any consequential case management directions."

20. This does not affect the obligation on the claimant to comply with his duty of candour. The onus is on the claimant to satisfy the court that the relief sought is justified and, in the context of an application made on short notice to a defendant, the claimant must comply with the duty to make full, fair and accurate disclosure of all material information to the court.

Factual background: the six judicial review claims

21. The Penally Camp in Pembrokeshire is a former military barracks or training site owned by the Ministry of Defence which, in 2020, the Secretary of State for the Home Department (the SSHD) decided to use for the provision of accommodation to asylum seekers not in detention.

22. Each of the six claimants is an asylum seeker who was accommodated at the Penally Camp from 30 September 2020.

23. The claimants instructed Duncan Lewis to act for them in relation to their claims for judicial review against the SSHD. Mr Hossain is the director of the Public Law and Immigration Departments at Duncan Lewis. This is a position he has held since 2013 and he is responsible for overseeing a team of 45 lawyers and caseworkers. He qualified as a solicitor in 2004 and joined Duncan Lewis in 2011. There were three other members of the team at Duncan Lewis working on this case: a solicitor who qualified in 2016 (who we shall refer to as solicitor 2), a solicitor who qualified in 2020 and a trainee solicitor. Mr Hossain wanted counsel to be "closely involved in the formulation of the case" and instructed Ms Harrison QC, together with two junior counsel, at an early stage. We do not know when Duncan Lewis instructed counsel, but it was well before the issue of the urgent application.

Pre-action correspondence

24. Between 13 and 21 October 2020 Duncan Lewis, on behalf of the first to fifth claimants, sent Pre-action Protocol letters (PAP letters) to the SSHD requesting that

their clients be transferred out of the Penally Camp to other accommodation. The PAP letters also asserted that:

> "this claim raises wider issues and our client wishes to see that: adequate risk assessments are carried out in relation to Penally Camp; all asylum seekers are immediately transferred to suitable asylum accommodation which complies with the [Public Sector Equality Duty] and paragraph 17.5 of the Asylum Support policy pending the conclusion of these risk assessments".

25. On 29 October 2020, the first to fifth claimants were transferred *out* of the Penally Camp.

26. On 29 October 2020 the Government Legal Department (GLD), acting on behalf of the SSHD, wrote to Duncan Lewis saying that, as the first to fifth claimants had been moved out of the Penally Camp, this made the claimants' claims academic. However, given the number of issues raised, these were being investigated and the GLD would respond in due course. The GLD also pointed out that the "rush" by Duncan Lewis to issue proceedings was unjustified.

27. On 6 November 2020, the SSHD sent Duncan Lewis a substantive response to the PAP letters. The claimants' request to transfer all asylum seekers out of the Penally Camp was described as "misconceived". The GLD said amongst other things that:

> "[5.] As noted in our letter dated 29 October 2020, it would be open for the Secretary of State to take the view that the proposed claims have been rendered academic and that the Pre-action Protocol had been concluded positively. However, in accordance with our duty to work collaboratively under the Pre-action Protocol, our client stated she would provide a detailed response as soon as she was able. That response is set out below …
>
> [68.] Your letter asks that "all asylum seekers" are "immediately transferred" out of the sites. Neither you nor your clients have standing to make such a request. The overwhelming majority of the residents at the sites have not intimated claims and, just because your clients wish to move to alternative accommodation, does not mean that any (let alone all) of the other residents would wish to do so. Moreover, such a move would require the Secretary of State to identify hundreds of new beds, at no notice, and thus with no time to make the many preparations that are required in order to ensure an appropriate reception. You would be asking the Secretary of State to do so in the midst of a pandemic and during the imposition of further restrictions. The request is misconceived and is practically impossible."
>
> (Emphasis added).

28. The SSHD's position was not accepted by Duncan Lewis. By letters dated 13 and 17 November 2020 Duncan Lewis made further demands, on behalf of the claimants, for *all asylum seekers* to be transferred out of the Penally Camp. The letter of 17 November 2020 said this:

> "Unless [the SSHD] confirms by return that she will act to release those in the [Penally] Camp as soon as she can make safe arrangements to do so and agree not to transfer anybody else there on or after the 2 December 2020, we will lodge this claim on behalf of [the sixth claimant] along with our existing claimants and seek an urgent case management hearing and interim relief"

29. The sixth claimant was transferred out of the Penally Camp on 18 November 2020.

30. On 19 November 2020, the GLD, on behalf of the SSHD, wrote to Duncan Lewis saying that:

> "[2.] … to the extent that other potential claimants have additional individual reasons for seeking a transfer, then those should continue to be dealt with in the ordinary way on a case-by-case basis first via the pre-action process and then, if so advised, by litigation if the pre-action protocol process fails to resolve the dispute".

31. In the same letter the GLD pointed out to Duncan Lewis that they were not instructed by:

> "[16.] … all residents of Penally and your client(s) have no standing to challenge other people's accommodation provision. Your firm simply cannot know what is in the best interests of those it does not represent, and this part of your letter suggests a potentially dangerous overreach."

32. The GLD confirmed that the SSHD did not intend to transfer all residents from Penally by 2 December 2020 or cease moving residents into Penally from that date.

33. On 23 November 2020 Duncan Lewis informed the GLD that "in the light of the refusal to review the general decision, the failure to review the individual decisions and your indication that you will not review transfer to Penally Camp after the 2 December 2020" they would be issuing proceedings without delay.

The Form N463 in this case

34. On 25 November 2020 solicitor 2 from Duncan Lewis filled in one form N463 in respect of all six claims. On the form he said he had served it by email on the SSHD the same day and he signed the confirmation as the claimant's advocate on page 3.

35. It is instructive to see what information was (and was not) provided in the form N463:

a. SECTION 1 Reasons for urgency: The answer to this was "See application for interim relief attached". No other information was provided.

b. SECTION 2 Proposed timetable:

i. Question 2.1 says: "How quickly do you require the application (Form N463) to be considered?". The options are (a) Immediately (within 3 days) or (b) Urgently (over 3 days). The claimants ticked (a) and indicated that the form N463 needed to be considered within 72 hours. Exceptional urgency was therefore being claimed.

ii. Question 2.2 says: "Please specify the nature and timeframe of consideration sought". The box for interim relief was ticked, and the court was told that the application for such relief should be considered *in three days*. The box for abridgement of time for AOS was not ticked. The claimants thereby informed the court they were not seeking this relief. This was in fact, wrong, as appears below.

c. SECTION 3 Justification for request for immediate consideration: The date and time when it was first appreciated that an immediate application might be necessary was identified as *19:42 on 19 November 2020*. The response in relation to the request for "reasons for any delay in the making the application" was "N/A". In answer to the question "What efforts have been made to put the defendant and any interested party on notice of the application?" the claimants said "see attached pre-action correspondence in Tab E of the Judicial Review bundle". Tab E compromised 31 different items of correspondence and was 236 pages long. The correspondence was, unhelpfully, presented in reverse order in the electronic bundle. It is also to be noted that the claimants' *essential reading list* for the urgent application failed to refer to any of the correspondence in Tab E.

d. SECTION 4 Interim relief (*state what interim relief is sought and why in the box below*). A draft order must be attached: The answer to this was "See application for interim relief and draft order attached." No other information was provided. There was a draft order in the electronic bundle, but there was no page reference identifying where it was. It was at page 83.

e. SECTION 5 Service: This identified that the form N463 had been served on Kathryn Nicholas at GLD on 25 November 2020. The form was signed by solicitor 2, who confirmed that all relevant facts had been disclosed in the application. The claimants' advocate was required to sign the form as exceptional urgency was being claimed.

The claim papers in this case

36. Duncan Lewis filed the full claim papers with the Administrative Court on 26 November 2020. This was done by way of an electronic bundle. The bundle contained 151 separate items and ran to 1412 pages. It was provided to the court as four separate PDFs. At page 9 of the bundle was a list described as essential reading. This list directed the judge to read 15 different items in the bundle, totalling 239

pages. This included the entirety of the grounds for judicial review (61 pages), the application for interim relief, the form N463, a draft order, and a draft order for interim relief, together with the witness statement of Mr Hossain dated 20 November 2020 and its exhibits. The list did not include the material parts of the claim forms. It did not focus on the key parts of documents. It did not identify the letter from the GLD which had, purportedly, triggered the need for an urgent application. The list did however start by suggesting the judge read the 8-page index to the electronic bundle. This reading list was of no assistance to the judge in understanding the application. The reading list should have directed the judge to the key documents and the relevant part of the documents in question. A targeted approach was required, having regard to the voluminous documentation in the bundle.

37. The six claim forms were issued by the court on 26 November 2020. The decision challenged in each claim form is the SSHD's decision, which was described as on-going, "to use Penally Camp as accommodation for asylum seekers and the process by which the initial decision was taken and has been maintained".

38. The grounds for judicial review identified 10 separate grounds and, at paragraph 184 set out 19 different items of relief, the first item of which was:

> "[i]. A declaration that the [SSHD's] decision to utilise Penally Camp as accommodation for asylum seekers and/or the decision to transfer these claimants to the said camp breached the public sector equality duty under s. 149 Equality Act 2010 and/or was irrational and/or unreasonable."

39. The application for interim relief and expedition was settled by counsel. It sought the following relief on behalf of the claimants, namely:

> "[1]. An order that pending determination of the claims, the SSHD: (i) undertake an urgent review of the vulnerability and health needs of those who remain at the Camp and, thereafter, transfer out of the Camp any person with a disability or with significant vulnerability or health needs, in accordance with the statement of policy and intended practice set out in the [SSHD's] Equality Impact Assessment of September 2020. Section 2 p. 6 and section 4 p. 12 in particular; (ii) refrain from transferring any other person to the Camp in the meantime and pending resolution of these proceedings.
>
> [2]. The claimants also seek an interim declaration from the court that there is no lawful power to impose a curfew between 10pm and 10am or at all on those accommodated in the Penally Camp."

40. The application set out the *American Cyanamid* test. It addressed arguability and the balance of convenience, and maintained that the SSHD had no power to impose the alleged curfew. The conclusion in the application was expressed in these terms:

> "The claimants recognise that this matter must be dealt with at an *inter partes* oral hearing. Given the gravity and pressing nature of the issues and the number of people effected (sic), the claimant seeks a direction that the matter be put before a judge as soon as reasonably practicable and within 3 days. The court is requested to order a truncated timetable for the [SSHD] to file its acknowledgment of service and any response to the application for interim relief within 7-days of the order and that the matter should be listed for an oral hearing on the first available date, thereafter, and before 11 December 2020."

41. The draft Order the claimants were inviting the judge to make on consideration of the form N463 was in these terms:

> "[1.] The application for expedition and urgent directions to be considered on the papers forthwith.
>
> [2.] The application for interim relief and further directions to be considered at an *inter partes* oral hearing to be listed first available date after 2 December 2020 and before 10 December 2020.
>
> [3.] The Defendant to serve the summary grounds of defence and any reply to the application for interim relief 7 days from the date of this order."

The SSHD's response

42. At 11.25 a.m. on 27 November 2020 the GLD emailed the Administrative Court to say that they were instructed on behalf of the SSHD in respect of the six claims. In that email, they said that they understood that the claimants had asked the court to consider the application in 72 hours, and that that period expired on 28 November 2020. The GLD explained that it was urgently seeking instructions on the application and that the SSHD intended to respond to the application by 2 p.m. that day. The GLD asked the court to wait until receipt of the SSHD's submissions before considering the application. At 14.27 the GLD emailed the court again to explain that the SSHD's response to the application had been settled, and that it would be filed as soon as they had instructions to do so. The SSHD's submissions in answer to the claimants' application were filed with the court at 15.11.

43. The SSHD's submissions prepared by the GLD were succinct and to the point. They were just over 4 pages long. Paragraph 1 identified the application. Paragraph 2 set out the order sought (namely that set out at para 41 above). Paragraph 3 said that the claimants' request for expedition was opposed. Paragraph 4 identified that none of the claimants were accommodated at the Penally Camp. Paragraph 5 submitted that "this degree of expedition sought from these case management directions is inimical to the overriding objective of dealing with cases justly and proportionately by ensuring they are dealt with "expeditiously ***and fairly***" (CPR 1.1(2)(d))". Part of the submission said:

> "Further, the [SSHD] has real doubts as to the standing of these claimants to seek the urgent interim relief that they are seeking.

> First, the interim relief is academic insofar as it relates to them, given that they have already been transferred into alternative accommodation. Secondly the interim relief sought relates to residents of Penally who are not party to these proceedings, including those who have not even yet moved to Penally."

And that:

> "[I]t cannot safely be assumed that the submissions made via the representatives for these six claimants, who have already been transferred from Penally, represent the best interests of those still at Penally or yet to be moved there".

44. The SSHD's submissions concluded by inviting the court to refuse the claimants' request for expedition, and suggested some alternative case management directions.

45. Just over 20 minutes after the SSHD's submissions had been filed with the court, solicitor 2 emailed the court to say:

> "The Defendant has unusually filed submissions in reply to an *ex parte* application for which there is no procedural provision. Nevertheless, and in the interests of fairness and we hope, to assist the Judge, we are going to send a reply within the next hour, and we ask you not to send the file to the Judge until we have provided a response to these submissions of the Defendant."

46. Shortly after that, submissions settled by counsel, in reply to the SSHD's submissions were filed with the court by the claimants. Paragraph 1 said this:

> "The [SSHD] has filed submissions on the claimants' application for expedition and case management, at the eleventh hour. There is no procedural provision for her to interpose in this way. In any event, the submissions filed are unnecessary: the Claimants are not seeking any substantive interlocutory relief by way of the application filed; rather they simply seek case management and directions and for an *inter partes* oral hearing to decide the question of interim relief. It is expressly accepted within the application filed by the claimants that the court will wish and need to hear from the [SSHD] when determining the question of interim relief. That is the proper venue at which the [SSHD] may make the submissions she seeks to prematurely ventilate now."

47. Contrary to what was said by solicitor 2 and by counsel, the court is always assisted on an urgent application if it has been informed by the defendant of its position. This is a matter that should be obvious to any legally qualified person conducting litigation, but in any event, is made clear in the Guide itself (see para 19 above). The position taken therefore by the claimants' legal team, both solicitors and counsel, was inappropriate and wrong.

48. Paragraph 2 of the claimants' submission in reply continued by asserting that:

> "It is hopeless and to miss the point to argue, as the [SSHD] does, that there is no urgency in this case where the individual claimants are no longer accommodated at Penally Camp. First,

> these claimants bring this challenge on behalf of those still resident at Penally Camp …"

49. The submissions concluded by stating that the claimants were willing to be "pragmatic" and were prepared to push back the timetable so that (i) the SSHD had until 9 December 2020 to file her summary grounds of defence and response to the application for interim relief, (ii) the hearing of the application for interim relief be listed for an *inter partes* hearing between 14 and 18 December 2020.

Order of Swift J dated 30 November 2020

50. The papers were placed before Swift J, the judge in charge of the Administrative Court. On 30 November 2020, the judge made the following order on the claimants' application for interim relief and expedition: (1) the application for interim relief was refused; (2) the application for expedition was refused; (3) the SSHD had to serve and file her acknowledgment of service in accordance with CPR part 54.8; (4) the papers relating to the claimants' application for urgent consideration were referred for consideration under the *Hamid* jurisdiction.

51. The judge's reasons laid bare the serious defects in the application for extremely urgent relief which came before him, and we set them out in full:

> "[1.] The claimants' claims relate to detention (pursuant to Immigration Act powers) at a former military camp at Penally in Wales. The claims were filed on 26 November 2020. By an application under the urgent application procedure the Claimants sought interim relief in the form of orders (a) requiring assessment of their health needs (and those of others at Penally Camp); (b) requiring their transfer from Penally Camp (and the transfer of others who are disabled or have specific health needs); (c) prohibiting the Secretary of State from transferring to Penally Camp any other person who is subject to immigration control; and (d) declaring that the Secretary of State has no power to impose a curfew requirement on those who live at Penally Camp. The claimants also requested an order for expedition of their claims.
>
> [2.] The claimants ought not to have made the applications for urgent consideration. None of the claimants is at Penally Camp. All bar the sixth claimant were transferred to other accommodation as long ago as 29 October 2020 (see variously, the Statement of Facts and Grounds at §§37, 39, 41, 44, and 46). The sixth claimant left Penally Camp on 18 November 2020 (see Grounds at §49). In the premises, there is no prospect that an application for interim relief will succeed, and no need at all for expedition of these claims.
>
> [3.] The claimants contend that they bring these claims "on behalf of" others who remain at Penally Camp. That contention

> is fallacious. Neither the claimants nor their legal representatives act on behalf of any other person who is presently accommodated at the camp. The judicial review procedure exists to resolve claims brought by specific claimants on matters affecting them, not to conduct general inquiries into matters which may be of public interest. That is *a fortiori* when it comes to applications for interim relief. The lawyers whom the claimants instruct have no means of knowing the instructions of others at Penally Camp.
>
> [4.] If any of the claimants' claims survived their removal from Penally Camp, there is no reason why any now require expedition.
>
> [5.] The claimants' applications under the urgent consideration procedure should be considered under the *Hamid* jurisdiction. The claimants (even the sixth claimant) had left Penally well before the application was made. Moreover, the form N463 made no mention of this. The "Reasons for Urgency" section simply read "see application for interim relief attached". That application appears to have comprised only (a) a draft order; and (b) a draft order for interim relief. It ought to have been clearly stated on the form N463 itself that none of the Claimants was resident at Penally. I can see no such statement on the form. Taken together, the claimants' claims ran to several thousand pages of documents. It is unsatisfactory, on applications for urgent relief, for matters central to the application not to be "front and centre" on the face of the application. It is also striking that the claimants' solicitors/counsel seemed to take offence when the Secretary of State – entirely understandably – provided a short letter in response to the application for interim relief (see, for example the terms of the "reply" document filed shortly after). It was only that letter that brought the Claimants' circumstances clearly to the Court's attention."

The Hamid referral

52. On 7 December 2020, Duncan Lewis wrote to the court apologising for the fact that that the claimants' transfer from the Penally Camp to alternative accommodation had not been expressly stated in the form N463. The letter said that Duncan Lewis took full responsibility for this. The letter said however (mistakenly) that the claimants' case did not fall within the ambit of the *Hamid* jurisdiction and it did not address, satisfactorily or at all, the many other problems with the application which Swift J had identified.

Show cause letter and Mr Hossain's evidence in response

53. On 14 December 2020 a "show cause" letter was sent to Mr Hossain. He was asked to provide a full and frank explanation of the matters identified in the order made by

Swift J and to take specific note of the requirements set out in para 97 of the Divisional Court's judgment in *R (Sathivel) v Secretary of State for the Home Department* [2018] 4 WLR 89. On 29 December 2020, Mr Hossain filed with the court his witness statement in response to the show cause letter, together with a training note prepared by him entitled "N463 and Hamid referrals – a cautionary tale".

54. Mr Hossain's witness statement contained an apology to the court made on behalf of all solicitors and counsel involved. He accepted that the form N463 did not contain the information that it should have contained. Essentially, he said there was too much to explain to fit in the boxes provided. Instead, the lawyers:

> "took the view it would assist the judge not to truncate all the issues into the limited space provided on the form where important detail might be missed, and instead set it out in relative fullness in a separate document (the interim relief grounds) … that is why in the box [for section 1] we referred the reading judge to the attached "Application for Interim Relief and Expedition", writing in [the box for section 1] "see application for interim relief"…".

This explanation was wrong on several levels. We have already identified what is required in the form N463 and why; and the problems with the way in which the documents were presented (see paras 35(c) and 36 above). Further however, as we identify below, the interim relief grounds, to which the judge was cross-referred, provided no explanation whatever of what urgent or exceptionally urgent relief was required, or therefore, what reasons there were for that urgency. It is to be noted too that Mr Hossain did not explain why the claimants had taken umbrage at the written submissions filed by the SSHD in answer to the claimants' urgent application, in contravention of what he had been asked to do by the "show cause" letter.

The hearing

55. On 28 January 2021 directions were given for a *Hamid* hearing before the Divisional Court, including that any further written submissions or evidence that Duncan Lewis wished to rely on had to be filed in advance of the hearing. Duncan Lewis did not file any further evidence. The court was nonetheless provided with further information both at and after the hearing. We heard from Mr Hossain in person, and we were provided with written submissions in advance of the hearing by counsel, paragraph 6 of which says this:

> "Counsel wish to make it clear that responsibility for this matter cannot be properly attributed to Mr Hossain alone. The preparation of the claim was a collective endeavour for which counsel, including leading counsel must and do take joint responsibility".

Conclusions

56. We have identified what is required when an urgent application is made to the Administrative Court, and what actually happened in this case. We can address

therefore the specific issues to which this case gives rise and our conclusions in respect of them quite shortly. In summary however, it is apparent that there was a significant abuse of the 'urgents' procedures in this case.

(a) Lack of exceptional urgency or urgency

57. At the hearing, in response to a question from the court, Ms Harrison submitted the matter had become exceptionally urgent on 18 November 2020, but could provide no cogent reason why this was so. Ms Harrison was also asked to identify the trigger for the urgent application. She pointed to the conclusion of the pre-action correspondence and, in particular, the GLD's letter dated 19 November 2020, which said that the SSHD would not be transferring any people who were not Duncan Lewis' clients out of the Penally Camp. In the end she accepted there was no distinction between the trigger for the issue of the claimants' claims, and the issue of the urgent application.

58. The GLD's letter of 6 November 2020 made it abundantly clear that the SSHD would not be transferring all asylum seekers out of the Penally Camp in accordance with their requests. If this matter was ever urgent, it became urgent on 6 November 2020 when the GLD's letter of that date was received by Duncan Lewis. In reaching this conclusion, we express no view about the underlying merits of the claims or the issue of standing. As it is, there was nothing urgent, let alone exceptionally urgent about the claimants' request for urgent consideration filed as it was with the court almost three weeks' later, on 26 November 2020. This was a clear abuse of the procedures for urgent applications.

(b) The Failure to complete the form N463

59. Ms Harrison accepted Swift J's criticisms of the contents of the form N463. She acknowledged that it had been a fundamental mistake on the part of Duncan Lewis to fill in this form by cross-referring to other documents. She accepted this made it extremely difficult for the court to find the material information and understand what the application was about. Mr Hossain accepted full responsibility for this as he was responsible for overseeing the completion of form N463 by solicitor 2.

60. Quite apart from that however, the document which was cross-referenced in this case did not contain the relevant information either. As we have said, solicitor 2 had cross-referred to the application for interim relief when completing section 1 of the form N463 which required identification of the reasons for urgency. We asked Ms Harrison to show us where on the application for interim relief the reasons for urgency were set out. She was unable to do so. Indeed, she was unable to take the court to *any* document in the electronic bundle which identified the reasons why the claimants' application was urgent, let alone exceptionally urgent. This is not surprising given there were no reasons to justify an urgent application at all.

61. It follows that section 2 of the form, should not have required the court, as it did, to consider the form N463 immediately and the application for interim relief within 3 days.

62. As for section 3, there was significant delay in making the application, which was not identified, let alone explained. As for the question of notice to the SSHD, the information given simply cross-referred to Tab E of the electronic bundle which ran to some 236 pages, comprising 15 different items of correspondence. Moreover, notwithstanding the extensive pre-action correspondence, to some of which we have referred, section 3 contained no summary of the SSHD's position on the application,

and, in particular, her stance that it was "misconceived". The best Ms Harrison could do in this context, which was not good enough, was to draw attention to one sentence in the application for interim relief and expedition which said that the SSHD insisted that the claimants had no standing.

63. Section 4 failed to set out the interim relief sought and why. Rather, it simply cross-referred to the application for interim relief and draft order. This in itself was wrong. What the claimants were actually asking the court to do, by seeking urgent consideration, was to give directions in relation to the application for interim relief, namely expedition and service of the SSHD's response and summary grounds of defence within seven days, rather than grant the substantive relief sought in the application.

64. Ms Harrison informed the court that the form N463 had not been reviewed before it was sent out. It should have been. Properly supervised, solicitor 2 could not have signed the confirmation as the claimants' advocate. This is because he had failed to disclose any of the relevant facts in the application.

(c) Purporting to act without any instructions

65. Ms Harrison submitted that the claimants brought the claim on behalf of others as part of a "systemic and generic challenge" to, amongst other things, the way people were transferred into the Penally Camp. She submitted this was an exceptional case, notwithstanding the fact that the claimants had moved out of the Penally Camp on 29 October 2020 (first to fifth claimants) and 18 November 2020 (sixth claimant). She referred in her submissions to nine additional clients identified by Duncan Lewis, whose details were set out in a list filed with the full claim papers. Ms Harrison accepted that it would have been necessary for pre-action letters to be written to the SSHD seeking judicial review of the decision transferring the nine individuals to the Penally Camp. In a letter written to the court after the *Hamid* hearing, Duncan Lewis said that these nine additional clients had signed "authority forms" confirming that they wished Duncan Lewis to act for them.

66. However that might be, Ms Harrison had informed the court on instructions at the hearing, that when the urgent application was made, Duncan Lewis did not know how many people there were in the Penally Camp, and they did not know how many people in the Penally Camp had vulnerabilities. However, Ms Harrison submitted "there were significant numbers of people who had or were likely to have the significant difficulties experienced by [Duncan Lewis'] clients". She submitted it was evident that these other people were likely to suffer adverse consequences and, as a result, the claimants' solicitors and counsel thought it appropriate to bring "the claims that were fully prepared". It is difficult to avoid the inference that the trigger for the application was the preparedness of Duncan Lewis to issue it, regardless of the position of the SSHD, and regardless of the position of the claimants.

67. Following the hearing, Duncan Lewis drew our attention to an ITV news report included in the electronic bundle which reported that on 6 November 2020 there were 171 people at the Penally Camp. On 8 December 2020 the number of people had apparently reduced to 143 people.

68. On 26 November 2020, the date when the claims were issued, Duncan Lewis were instructed by the claimants, but they had all been transferred out of Penally Camp some time earlier. There were nine "claimants in waiting" at the Penally Camp ready to instruct Duncan Lewis, but they were not the claimants. There were more than 100 other people at the Penally Camp who had not made any contact with Duncan Lewis at all and had not instructed Duncan Lewis to act for them. Duncan Lewis had no means whatsoever of knowing what the interests of all these other people were. This point had been made time and again by the GLD in the pre-action correspondence, but Duncan Lewis ignored it. Nevertheless, Ms Harrison submitted that all solicitors and counsel instructed on the case were entitled to make a "judgment call" in deciding whether to issue the urgent application, and that this decision was not unreasonable or wrong.

69. We reject that submission. The claimants were not facing irreversible action as a result of any conduct on the part of the SSHD. Five of them had been transferred out four weeks before, and the sixth was transferred out a week before, the urgent application was issued. An application for directions on the claimants' application for interim relief (which sought the transfer of people out of the Penally Camp, and to prevent people being transferred into the Camp) was an application which did not concern the claimants in any way. It was utterly hopeless and bound to fail.

70. Further, all lawyers involved were obliged to comply their professional obligations. Duncan Lewis were not instructed by all the people in the Penally Camp, and they could not so act without instructions. This is fundamental. The court relies on the integrity of solicitors and counsel complying with their professional obligations, including that they act only on the instructions of those clients they represent.

71. Since the hearing in this case, the decision in *R (KMI) v The Secretary of State for the Home Department* [2021] EWHC 477 (Admin) has been handed down. The court did not decide the question of jurisdiction and the appropriateness of interim relief expressed as class relief. However, at para 39 the Court made the following observation:

> "An injunction is an order by a court to a party to proceedings requiring him to do or to refrain from doing a particular act. First, on any analysis, it is appropriate that the persons intended to be the beneficiaries of any order are clearly identified and that the terms of any injunction are clear as to what the defendant is and is not required to do. It would not, generally, seem desirable to make orders where the beneficiaries or the terms are unclear, or where those issues would need to be subject of argument, nor would that appear fair to the defendant who is required to comply with the order. Further, lack of clarity could create difficulties over the enforcement of orders. Breach of an order can be made the subject of application for contempt in certain circumstances: see *Mohammad v Secretary of State for the Home Department* [2021] EWHC 240 at paragraph 26."

72. For reasons we have explained, there was no clarity at all in relation to the alleged beneficiaries of the urgent relief which the claimants sought.

(d) Breach of duty of candour

73. In presenting all relevant facts to the court on the form N463, the claimants and their professional advisors, were required to comply with the duty of candour. As we have explained, this required the claimants' advocate to disclose on the form any relevant facts which were adverse to the claimants' case, so that all relevant facts were presented on form N463 in a fair and even-handed manner. Therefore, any points which could have been made in the SSHD's favour should have been on the form.

74. Form N463 did not identify:

    a. that the claimants had all left the Penally Camp, or the dates on which they had left;

    b. the significant delay in making the application, or the reasons for any such delay;

    c. that there had been extensive pre-action correspondence with the GLD, solicitors for the SSHD, and that the SSHD maintained the application was misconceived as Duncan Lewis were not instructed by all the other people at the Penally Camp.

75. There was no excuse for not putting this information on the form. In the circumstances, Duncan Lewis failed to comply with their duty of candour, a failure for which Mr Hossain is responsible.

76. In his email to the court of 27 November 2020, solicitor 2 recognised, in terms, that this was a without notice application. He, and counsel in their written submissions, complained that the SSHD had filed written submissions in answer to it. Any without notice application on the part of the claimant carries with it an obligation to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to any significant factual, legal and procedural aspects of the case. The claimant's advocate has particular duty, so far as it is consistent with urgency of the application, to ensure this obligation is complied with. Duncan Lewis and counsel in this case were seemingly oblivious to these obligations, or their importance.

77. The complaint by Duncan Lewis and counsel when the SSHD filed short written submissions in answer to the claimants' application (that this had been done at "the eleventh hour" and that there was "no procedural provision for her to interpose in this way") was telling. The claimants and their legal advisors had singularly failed to comply with their own obligations to place critical information before the court; and then objected, on purported procedural grounds, to the SSHD so doing. In the end, it was the SSHD's submissions, and only those submissions, that informed the judge "up front" that none of the claimants were at the Penally Camp and identified why the claimants' so-called urgent application to the court, was not in fact urgent at all.

Overall Conclusion and Disposal

78. It is essential that the court can have confidence in the thoroughness and objectivity of practitioners, solicitors and counsel, who make urgent applications in the Administrative Court. It follows that all who do so must understand their professional obligations, must prepare such applications with care, must comply with the requirements set out in the Guide and set out the information they are required to provide in the form N463.

79. This application was a significant abuse of the procedures made available for urgent applications in the Administrative Court and should never have been made. Moreover, the claimants' legal team seem to have misunderstood or to have overlooked their duty to make full, fair and accurate disclosure of all material information to the court; and in consequence, they failed to comply with their obligation of candour.

80. The court will not tolerate the abuse of its process, and will not hesitate to refer those who do so, to their professional regulators. We have given very careful consideration to doing so here.

81. In determining what should now be done, we have regard to the fact that Mr Hossain and counsel have all accepted responsibility for what happened and have apologised to the court. We also have regard to the regret Ms Harrison expressed on behalf of the lawyers concerned, that Swift J's criticisms of their application had necessitated a hearing before the Divisional Court when the court is under significant pressure in the midst of a pandemic. Mr Hossain too personally expressed his profound regret for his failures and those of Duncan Lewis; and said that training and procedures had been put in place to ensure such failings did not occur again. Mr Hossain told us that he had learned from these failings and, annexed to his witness statement a training note produced for all solicitors working in public law at Duncan Lewis. We accept these apologies and have concluded it is sufficient in this case for the court's disapproval of what happened to be marked by this public judgment.