UT Neutral Citation Number: [2022] UKUT 00338 (IAC)

R (on the application of BG) v London Borough of Hackney (social media; candour; disclosure)

Upper Tribunal
(Immigration and Asylum Chamber)

At Field House

THE IMMIGRATION ACTS

Heard on 18 August 2022
Promulgated on 27 October 2022

Before:

MR C.M.G. OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE BLUNDELL

Between:

THE KING
on the application of
BG (by his Litigation Friend Kevin Perkins)

Applicant

- and -

LONDON BOROUGH OF HACKNEY

Respondent

Amanda Weston KC and Donnchadh Greene
(instructed by the Joint Council for the Welfare of Immigrants), for the applicant

Hilton Harrop-Griffiths
(instructed by London Borough of Hackney - Legal Services) for the respondent

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J U D G M E N T

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(1) The duty of candour which applies in judicial review proceedings obliges the parties to disclose all material facts, including those which are or appear to be adverse to his case.

(2) That duty also obliges the parties to make reasonable enquiries to identify such facts, so as to ensure that the judge dealing with the application has the full picture.

(3) In practice, the duty of candour obliges an applicant's legal representatives in Age Assessment Judicial Review proceedings to:

(i) Ascertain what social media and other methods of communication are used by the applicant;

(ii) Consider the relevant accounts with a view to ascertaining whether they contain any material which potentially undermines the applicant's case; and

(iii) Disclose any material which might be relevant to the case, including any material adverse to the applicant.

(4) The duty is a self-policing one, but the Upper Tribunal might legitimately require a 'disclosure statement' from an applicant's solicitor, confirming that the applicant has disclosed to them the details of any social media accounts that they hold and that the solicitor in question has undertaken a reasonable and proportionate search of those accounts in order to ensure that all documents relevant to the issues in the case have been disclosed.

(5) When the Upper Tribunal considers an application for specific disclosure, it will be a highly material consideration that the applicant's solicitor has made such a disclosure statement.

(6) In order for the Upper Tribunal to make an order for specific disclosure, it is necessary for there to have been an application for the same; such an order cannot be made as a matter of course. Instead, the test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.

(7) An order for specific disclosure of material from an applicant's social media accounts is likely to represent an interference with their private life and it is necessary to consider the breadth of the disclosure required in order to decide whether a less intrusive measure might suffice.

Judge Blundell:

1. It is a fact of modern life that a great deal of information about a person might often be found on the internet, particularly where that person uses social media platforms such as Facebook. This judgment concerns the circumstances in which a tribunal which is resolving a dispute as to a person's age might properly require the disclosure and inspection of that person's social media accounts in order to resolve that dispute.

2. Whilst this judgment arises in the context of an application for judicial review of the decision of an age assessment decision by a local authority, we anticipate that much of the guidance we give might apply equally to appeals against such decisions, as provided for by Part 4 of the Nationality and Borders Act 2022.

Relevant Background

3. The following is a summary of the background to this interlocutory judgment. It does not purport to be a comprehensive summary of the procedural background or of the case as a whole. We have intentionally omitted irrelevant aspects of the history in the interests of brevity.

4. The applicant is an Afghan national who entered the United Kingdom by boat on 8 September 2021. He claimed asylum the following day. That claim remains outstanding.

5. The applicant maintains that he was born in 2008. The respondent concluded, following a short-form age assessment[1] in September 2001, that the applicant was an adult of between 22 and 25 years old. Immigration Officers at the Kent Intake Unit had previously concluded that the applicant was 25 or older.

6. The applicant has a brother in the UK. His brother is a recognised refugee. It is a feature of this case that the applicant's brother stated when he was interviewed by the respondent that he had made contact with the applicant when the applicant was in Serbia, en route to the United Kingdom. He had been able to do so, he said, because he had come across a photograph of the applicant on Facebook and had been able to make contact with him as a result.

7. The applicant told the social workers who interviewed him that he had put the photograph on Facebook in the hope that his brother might see it and might make contact with him. He said that he had bought a mobile telephone whilst he was in Serbia and that he had used that to create a Facebook account and to upload a family photograph which he had been given by his mother before leaving Afghanistan. The applicant was noted by the social workers

[1] R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin) refers

who undertook the short-form assessment to be 'using a number of opened windows on his mobile phone under the table' and said that his friend had 'activated the phone for him so that he can use Whatsapp.'

8. In concluding that the applicant was an adult, the respondent attached significance to his appearance, his demeanour and his ability to set up and use a Facebook account.

9. The applicant issued these proceedings in the Administrative Court on 25 January 2022. On 28 January 2022, Bennathan J ordered anonymity and refused to join the Secretary of State for the Home Department as an interested party. On 18 February 2022, permission to apply for judicial review was given by Bourne J, who also granted interim relief and ordered that the application be transferred to the Upper Tribunal (IAC).

10. Standard case management directions were duly given by an Upper Tribunal Lawyer on 3 March 2022. The second paragraph of those directions was in the following terms:

> Both parties must serve on all other parties all documents relevant to the determination of age and date of birth and file a list of documents (not including the documents) served on all other parties with the Upper Tribunal electronically to age-assessment-inbox@justice.gov.uk, no later than 28 days (4pm) after the date on which these directions are sent. These include specifically:
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> (i) from the applicant, documents related to his immigration claim, including all interview records, submissions, representations, decisions, determinations and any challenges or appeals by the applicant or the Home Office to any court or tribunal,
>
> (ii) from the respondent, all social care records relating to the applicant (including medical reports and information received from third parties).

11. The applicant filed a list of thirteen documents in compliance with those directions on 31 March 2022. No evidence from Facebook was disclosed in that list.

12. The applicant filed a bundle of witness statements shortly thereafter. There was reference at [16]-[17] of the applicant's brother's statement to the circumstances in which they had regained contact through Facebook and how they had chatted over Facebook Messenger before speaking through voice messages and phone calls. No evidence from Facebook was exhibited to this statement.

13. An Agreed Statement of Facts was filed on 7 June 2022. This recorded, at [5], that the applicant and his brother 'report connecting by Facebook in the summer of 2021, prior to BG's entry to the UK'.

14. A Case Management Hearing took place before Upper Tribunal Judge Mandalia on 23 June 2022, at which the fact-finding hearing was listed to be heard on 4 October 2022, with a time estimate of three days. At paragraphs [2]-[4] of the order, the judge directed as follows:

> (2) The applicant and the respondent shall arrange a mutually convenient time and date for a review of the applicant's social media accounts (the review to be undertaken by the local authority in the presence of the applicant). The review of the applicant's social media accounts will be completed by 8th July 2022 and the applicant shall provide the respondent with his username(s) and password(s) insofar as they are available to him, for the purposes of that review.
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> (3) The applicant shall by 4pm on 15th July 2022 disclose all relevant material following a proportionate search of the applicant's social media or other electronic communication accounts. This will include, where the applicant has a Facebook account, the applicant's 'locations of access to Facebook,' where available, and the 'full timeline of social media activities' that is readily available on the "Download Your Information" function of Facebook. The parties attention is drawn to paragraph [41] of the decision of the Upper Tribunal in XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC).
>
> (4) The applicant and the respondent have leave to file and serve any additional evidence relied upon following a review of, and disclosure of material relating to the applicant's social media accounts by 4pm on 29th July 2022.

15. On 11 July 2022, the applicant applied for paragraphs (2)-(4) of UTJ Mandalia's order to be set aside. Detailed grounds in support of that application, settled by Mr Greene of counsel, were appended but it suffices for present purposes to reproduce what was said at section 3.1 of the application notice:

> The Applicant seeks:
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> a. paragraph 2 be set aside as it is unlawful;
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> b. paragraph 3 also be set aside, as the Applicant will comply with his duty of candour and it is unnecessary for the fair resolution of the proceedings to require him to do a search of his social media and download significant amounts of data; and,

c. paragraph 4 be set aside as the consequence of paragraph 2 and 3 being set aside.

16. The set aside application was said to be made with the consent of the respondent. The respondent's email of 4 July 2022 in fact recorded its agreement to the 'application to stay paragraphs 2, 3 and 4 of the order until it is determined by the court'. The application to set aside those three paragraphs was accordingly listed to be heard before us on 18 August 2022.

17. Prior to the hearing, the Upper Tribunal received a consolidated bundle which contained skeleton arguments and authorities in addition to statements from the applicant and a solicitor named Edward Taylor of Osbornes Solicitors LLP. The applicant also filed an expert report from Dr Michael Veale, Associate Professor in Digital Rights and Regulation at University College London.

18. On 17 August 2022, the parties were provided with copies of the decisions of the Upper Tribunal in R (HB) v Derby City Council (JR/5394/2019) and R (LS) v London Borough of Brent (JR/1050/2021) in order that they could make any relevant submissions upon those judgments.

Submissions

19. In their skeleton argument for the applicant, Ms Weston KC and Mr Greene of counsel submit that the relevant paragraphs of the order of 23 June 2022 ought to be set aside under rules 5(2) and 6(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") because, in summary:

    (i) Paragraph 2 of the order extends beyond the power provided to the Upper Tribunal by the Procedure Rules; it is contrary to Articles 8 and 10 ECHR; it is inadequately reasoned; or it represented an unlawful exercise of the Tribunal's discretion.

    (ii) Paragraph 3 of the order is too broad and ill-defined to be proportionate, sufficiently clear and specific to be capable of fair and effective compliance, or consistent with the duty of candour in public law.

    (iii) Paragraph 4 of the order should be set aside as a result.

20. For the local authority, Mr Harrop-Griffiths indicated in his skeleton argument that the application to set aside the relevant paragraphs of the order was opposed on the basis that there was nothing wrong with the directions, which were made in order to assist the Upper Tribunal in determining the probable age and date of birth of the applicant.

21. In the event, we heard limited submissions on the application. It was confirmed to us by Mr Greene and Mr Harrop-Griffiths, both of whom had appeared at the Case Management Hearing on 23 June 2022, that there had been no application made at that hearing for specific disclosure or inspection of any social media material. Mr Harrop-Griffiths stated that there had in fact been no mention of Facebook at that hearing and that the applicant had already provided the respondent with copies of two photographs which had been sought by way of specific disclosure.

22. We were able to indicate in light of that confirmation that we were prepared to set aside the relevant paragraphs of the order and that we would give our reasons for doing so in a reserved judgment. We invited counsel to agree an order which would stand in place of those paragraphs. Counsel in due course agreed that an order which provided materially as follows would stand in place of those paragraphs:

> (2) The Applicant's solicitor shall by 4pm on 25 August 2022 conduct a proportionate search of:
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> a. the Applicant's private Facebook profile page, "About Me";
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> b. the Applicant's timeline; and,
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> c. the date the account was opened
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> and shall disclose any information relevant to the issues in the application including but not limited to
>
> i. the date the Facebook account was opened;
> ii. any date of birth given in the "About Me" profile page; and,
> iii. if it is recorded, the location of the Applicant when the account was opened
>
> and shall certify in writing that the foregoing search has been duly completed and material disclosure provided.
>
> (3) The Respondent to make any application for specific disclosure to be filed and served by 4pm on 1 September 2022.

23. We approved the order at the hearing and a sealed copy was sent to the parties. We nevertheless invited submissions from Ms Weston and Mr Harrop-Griffiths on the process which might be followed in such cases in the future.

24. Ms Weston submitted that it was inherently problematic for an order to be made in the terms set out at (2)-(4) of the order of 23 June. It appeared that the order was made as a matter of course, as was suggested in the witness

statement made by Mr Taylor. Whilst she accepted that the Tribunal's role in Age Assessment proceedings was an inquisitorial one, she submitted that a more refined approach was necessary. She submitted that directions for specific disclosure were to be made on the application of a party and for proper reason. The test was always whether, in the given case, such disclosure appeared to be necessary in order to resolve the matter fairly and justly.

25. Ms Weston accepted, firstly, that there could be no objection to an initial direction that an applicant should file and serve a list of the social media platforms he used. She accepted, secondly, that some assistance as to the procedure to be followed might be gleaned from that adopted in CPR Practice Direction 31B (Disclosure of Electronic Documents), to which Mr Harrop-Griffiths had referred at [16] of his skeleton argument. Ms Weston accepted, thirdly, that a solicitor's duty of candour in proceedings such as these extended to 'scrolling through' an applicant's Facebook and other accounts in order to ascertain whether they contained any material which furthered his case or which were, or appeared to be, adverse to his case. She noted, however, that children were not always discerning and that there was a need in any given case to consider their best interests and their privacy.

26. For the respondent, Mr Harrop-Griffiths noted that the duty of candour and the standard directions which were made as a matter of course in such cases should reveal any relevant social media or other such material which bore one way or another on an applicant's age. He accepted, however, that this was clear to expert solicitors and counsel undertaking this niche area of practice and that it would assist other practitioners to provide some guidance on the questions which might properly be asked in such cases.

Terminology

27. In the Civil Procedure Rules, standard disclosure requires a party to disclose the documents on which he relies; the documents which: (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and the documents which he is required to disclose by a relevant practice direction: CPR 31.6 refers.

28. 'Document' in this context has an extended meaning. By CPR 31.4, it means anything in which information of any description is recorded. The same definition appears in rule 1(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and in rule 1(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

29. 'Disclosure' in this context has a specific meaning. By CPR 31.2, a party discloses a document by stating that the document exists or has existed, which

might include making reference to a document in a witness statement: Smithkline Beecham Plc v Generics (UK) Ltd [2003] EWCA Civ 1109; [2004] 1 WLR 1479. Disclosure is to be distinguished from inspection. A party to whom a document is disclosed has a right to inspect that document except where specific exceptions apply: CPR 31.3.

30. CPR 31.10 describes the procedure for standard disclosure. We need not set out the full process here. It suffices to record that a party is required to serve on every other party a list of documents which must identify the documents in a convenient order. The list must include a disclosure statement which certifies the extent of the search which has been carried out; that the signatory understands the duty to disclose documents; and certifying that to the best of his knowledge he has carried out that duty. A false disclosure statement may result in proceedings for contempt of court. By CPR 31.11, the duty of disclosure continues during the proceedings. By CPR 31.12, the court may make an order for specific disclosure.

31. We do not suggest that these *procedures* apply in the Upper Tribunal, or even that they apply in an application for judicial review in the Administrative Court. We have made reference to these provisions of the Civil Procedure Rules in order that we might use the same *terminology* (documents, standard/specific disclosure, disclosure statement, and inspection) in the remainder of this judgment. To do so will avoid confusion, since it is that terminology which appears in the authorities to which we refer below.

The Duty of Candour in Judicial Review Proceedings

32. Neither the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014 nor the Tribunal Procedure (Upper Tribunal) Rules 2008 contain obligations similar to those in the CPR. It would be erroneous to suggest that the provisions of the CPR apply in the FtT or the Upper Tribunal, which have their own rules of procedure, framed as permitted by the Tribunals, Courts and Enforcement Act 2007. That the obligations of disclosure (etc) do not apply in statutory appeals in the FtT and the Upper Tribunal is clear from Nimo (appeals: duty of disclosure) [2020] UKUT 88 (IAC); [2020] Imm AR 894.

33. The duty of candour in judicial review proceedings is well established by authority, however. That duty applies in the Upper Tribunal, in precisely the same way as in the Administrative Court. A respondent is under a 'very high duty … to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide': Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd [2002] EWCA Civ 1409, per Laws LJ. The duty is not a new one, and was described by Sir John Donaldson MR in 1986 as one to place 'all cards face upwards on the table': R v Lancashire County Council ex parte Huddleston [1986] 2 Al ER 941 at 945g. The duty is

underlined and explained in the Treasury Solicitor's Department's Guidance on *Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*, dated July 2010

34. The duty is not only imposed upon a respondent to judicial review proceedings, however. It is equally well established that an applicant owes a duty to make 'frank disclosure of all relevant facts': Cocks v Thanet District Council [1983] 2 AC 286, at 294G.

35. In R (Khan) v SSHD [2016] EWCA Civ 416, the Court of Appeal considered the scope of that obligation. The Court had before it (amongst other matters) an application to set aside its own grant of permission to appeal on the basis that the applicant and/or his representatives were in serious breach of their duty of candour. The case was one which concerned an application for Indefinite Leave to Remain on grounds of Long Residence under paragraph 276B(i)(b) of the Immigration Rules, as then in force. The appellant maintained in his application that he had entered the United Kingdom fourteen years earlier, in 1998, and that he had remained ever since. That was the basis upon which he pursued his subsequent application for permission to apply for judicial review before the Upper Tribunal and his successful application for permission to appeal to the Court of Appeal.

36. The applicant had applied for a Work Permit in 2002, however, and he had stated in that application that he had been employed as a chef in a hotel in Pakistan in 2001. The appellant and/or his advisers had included the 2002 Work Permit application in the judicial review bundle before the Upper Tribunal but had submitted in the grounds for judicial review that the appellant had entered the UK in 1997 and had 'continuously remained in the United Kingdom since then'. There was no comment on the contents of the application made in 2002 and the applicant had made no witness statement in order to explain the contradiction in his accounts. It was accepted before the Court of Appeal that the significance of what had been said in the 2002 application had been missed by those advising both parties until counsel had been instructed to appear for the Secretary of State in the Court of Appeal.

37. The submission made by the Secretary of State was that the appellant and/or his representatives were in breach of their duty of candour in failing to draw the attention of the court to the potentially adverse effect of the 2002 application: [32]. It was as a result of that failure that Sullivan LJ (who had granted permission to appeal) was said not to have been 'given the full picture'. The appellant responded that the work permit application had been presented to the Secretary of State and the Upper Tribunal and the point had not been taken in the summary grounds of defence: [34].

38. At [35]-[46], Beatson LJ conducted a thorough review of the authorities, including *ex parte* Huddleston and Quark Fishing. Amongst other matters, he noted that:

    (i) 'The duty to disclose all material facts known to a claimant in judicial proceedings including those which are or appear to be adverse to his case prior to applying for permission is well established.': [35]

    (ii) Notwithstanding the requirement in the CPR for a respondent to file an acknowledgement of service and summary grounds, 'it remains the case that a claimant in judicial review proceedings must ensure that the judge dealing with such an application has the full picture in order to make the relevant decision': [36]

    (iii) If a material document is not disclosed, the fact that the claimant did not know it contained material facts is no excuse if the claimant would have known had he or she made appropriate inquiries before applying for permission: [37]

39. At [46], having considered the obligations placed on applicants in other types of litigation, Beatson LJ concluded that an applicant's duty of candour was not discharged by providing 'a pile of undigested documents' and that the duty extended to an obligation 'to explain material in a disclosed document that is adverse to the claim' (the emphasis is ours). The failure of the claimant to do so when he secured permission from Sullivan LJ sufficed to justify the setting aside of the grant of permission.

40. The Senior President of Tribunals agreed with that outcome, noting at [71] that an applicant's 'duty is not to mislead the court which can occur by the nondisclosure of a material document or fact or by failing to identify the significance of a document or fact.'

41. Longmore LJ dissented on the outcome of the application to set aside the grant of permission to appeal.

42. It is clear from the judgments of the majority, therefore, that an applicant's duty of candour in judicial review proceedings extends not only to disclosing documents which are adverse to his claim; he is also obliged to draw the significance of those documents specifically to the attention of a judge considering his application. (See also [106](5) of R (Citizens UK) v SSHD [2018] EWCA Civ 1812; [2019] Imm AR 86 and Farbey J's consideration of the duty of candour and R (Khan) v SSHD at [24]-[26] of R (JS) v SSHD [2020] EWHC 30653 (Admin).

Age Assessment Judicial Review

43. Part III of the Children Act 1989 ("the 1989 Act") imposes a range of duties on local authorities in respect of children within their area who are in need. Section 17 of that Act, for example, obliges local authorities to safeguard and promote the welfare of such children and to provide a range and level of services appropriate to their needs. Section 20(1) of the Act requires that every local authority shall provide accommodation for any child in need within their area. And, by section 23C of the Act, a local authority may continue to be obliged to perform certain functions in respect of a former relevant child (or a person who should be treated as such) even after that individual has attained the age of eighteen.

44. By section 105(1) of the 1989 Act, 'child' means a person under the age of eighteen. In R (A) v London Borough of Croydon [2009] UKSC 8; [2009] 1 WLR 2557, the Supreme Court held that whether a person is a child is a question of precedent or jurisdictional fact to be determined by the courts: per Lady Hale at [32], with whom Lords Scott, Walker and Neuberger agreed, and Lord Hope at [51].

45. There is a good deal of learning on the way in which that task is to be performed by the Administrative Court and, more recently, by the Upper Tribunal. A comprehensive review of the authorities is unnecessary for present purposes. It suffices to mention R (CJ) v Cardiff City Council [2011] EWCA Civ 1590; [2012] PTSR 1235. In his judgment in that case, Pitchford LJ (with whom Laws LJ and Lloyd Jones J (as he then was) agreed) held that the nature of the court's enquiry under the Children Act is inquisitorial and that it was inappropriate to speak in terms of a burden of establishing a precedent or jurisdictional fact: [21]. The court is required, Pitchford LJ continued, to apply the balance of probability without resorting to the concept of discharge of a burden of proof, and a sympathetic assessment of the evidence is appropriate.

46. An applicant's real age is a question of 'hard-edged fact' which it is necessary to resolve by receiving evidence which is usually tested by cross-examination. In such cases, which represent a departure from the usual approach in judicial review proceedings, there is a heightened duty of disclosure on the respondent: R (Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387 (Admin); [2010] HRLR 2. We see no reason why that heightened duty should not apply equally to an applicant in such proceedings, given the nature of the enquiry to be undertaken.

Analysis

47. It is clear, on a straightforward application of the principles which we have outlined above, that an applicant for judicial review is under a duty to disclose

all material facts which bear one way or another on the matters in issue. In age assessment proceedings such as these, that necessarily entails the following process in respect of an applicant's social media and other such accounts.

48. Firstly, as Ms Weston accepted, those representing the applicant are obliged to ascertain what social media and other such methods of communication are used by the applicant.

49. Secondly, as Ms Weston also rightly accepted before us, the applicant's solicitors are required to consider those accounts with a view to ascertaining whether they contain any material which potentially furthers or potentially undermines the applicant's case. A solicitor who does not do so is at risk of failing to provide the Tribunal with the 'full picture' which is required by the authorities considered above.

50. That obligation is one which falls squarely on the applicant's solicitors because, as Charles J stated in R (DL) v Newham Borough Council [2011] EWHC 1127 (Admin); [2011] 2 FLR 1033 "the exercise should be carried out or supervised and checked by a lawyer (or other suitably trained and experienced person) by reference to the issues in the case". That was said in the context of a social worker being required by his department to consider questions of disclosure. It applies *a fortiori* when the applicant is a young person seeking asylum.

51. We regard it as uncontroversial to frame the scope of the duty of candour in this way. That it includes an obligation on a party to review their communications and to disclose material which might be adverse to the case that party seeks to advance is clearly demonstrated by considering relevant communications within a respondent council. In the event that a social worker in the respondent council wrote an email or a Whatsapp message casting doubt on the age assessment undertaken, it would naturally be incumbent on the respondent's solicitor to disclose that material in order to comply with the duty of candour.

52. It is impossible to be prescriptive about the type of documents which must be disclosed as a result of this exercise. The exercise will be fact sensitive but the issue in the proceedings is the age of the applicant and anything which militates in favour of the view taken by the respondent must be disclosed. That will necessarily include any express statement of the applicant's date of birth, whether contained in a message on a social media platform or in the personal details provided to the platform by the applicant. It will also encompass, for example, any information given by the applicant about the dates they attended school. It is probably unhelpful to attempt to give further examples beyond these.

53. Seen in this context, the standard directions which are routinely issued by an Upper Tribunal lawyer in all such cases might be thought to be otiose. As we have recorded above, those directions require production of 'all documents relevant to the determination of age and date of birth' but both parties are under an ongoing duty from the outset of the claim to disclose all such material in any event. Those directions nevertheless serve as a useful *aide memoire* to applicants and respondents alike to ensure that the duty of candour is observed.

54. It is the experience of the Upper Tribunal, however, that this obligation has not always been fully understood by those acting for applicants, or has not been fully explained to applicants so as to ensure compliance. There have been cases which have settled at a late stage as a result of a respondent's late discovery of social media material which casts grave doubt on the age claimed by an applicant. In most cases of that nature, there will be no reasoned judgment recording the course of events; a short order will be agreed, recording that the proceedings are withdrawn by consent, with consideration of costs to follow.

55. In R (LS) v London Borough of Brent (JR/1050/2021), however, Upper Tribunal Judge Keith refused the applicant's request for permission to withdraw his application for judicial review as he considered it necessary to give a reasoned judgment. The applicant had failed in that case to make any reference to his Facebook account which, it transpired, contained photographs of him undertaking what could only have been a ceremony of marriage. He had never mentioned being married and had not disclosed his own Facebook account. When he finally disclosed his wife's name, the respondent council was able to consider her Facebook account, whereupon his own solicitors and counsel also reviewed the account, became professionally embarrassed and withdrew from the proceedings. The judge understandably inferred that the applicant had withheld this information, and his marriage certificate, because it cast doubt on his claimed age.

56. There was a similar failure in R (HB) v Derby City Council (JR/5394/2019), which resulted in Upper Tribunal Judge Smith being compelled after the start of the hearing to make an order for specific disclosure of relevant screenshots of the applicant's Whatsapp account and text messages from both of her mobile telephones. It seemed to the judge that the solicitor with conduct of the matter had misunderstood the proper approach to relevance when she had come to consider the messages on the applicant's phone. The judge was particularly concerned when the applicant subsequently deleted these messages.

57. It appears, therefore, that the duty of candour has not always been fully discharged, or even fully understood, in cases such as this. It has been said that the duty is a 'self-policing' one (R (Houreau & Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin)) but it appears that the duty has not always been observed, or policed, as it should have been in this context.

58. For the future, we consider that it would be permissible for the Tribunal to require a statement from an applicant's solicitor, confirming that the applicant has disclosed to them the details of any social media accounts they hold and that the solicitor in question had undertaken a reasonable and proportionate search of those accounts in order to ensure that all documents relevant to the issues in the case have been disclosed. We note that this was the course of action taken by UTJ Keith in R (LS) v London Borough of Brent. It was also the course of action urged upon us, by consent, in this case. And we note that it was the course of action taken by Eady J at [39] of R (Gardner & Anor) v Secretary of State for Health and Social Care & Ors [2021] EWHC 2422 (Admin), in which questions arose about the extent to which the respondents had complied with their duty of candour.

59. Requiring a 'disclosure statement' of that nature serves at least three different purposes. It ensures, as we have said, that the applicant and their solicitors have undertaken a process which may otherwise have been overlooked. It ensures, secondly, that an applicant's social media accounts – which might contain highly personal and sensitive information which has no bearing on their age – are only subjected to scrutiny by their own legal representative to the extent that is properly considered necessary. It also serves to ensure that a respondent to such proceedings has a specific reassurance from an officer of the court that any relevant material has been disclosed.

60. Ms Weston did not submit that a process such as that we have outlined above would be unlawful, whether in the sense that it would extend beyond the ordinary duty of candour, or that it would be contrary to section 6 of the Human Rights Act 1998. We cannot see how such a submission could have been made. To require a party to disclose such material, insofar as it is relevant to the issues before the Tribunal, must in our judgment be lawful and proportionate.

61. Having considered the steps which should be taken by the parties in order to comply with the duty of candour, and the way in which that might best be facilitated by the Tribunal, we turn to the question of specific disclosure. The starting point for any such application is to consider whether the applicant has demonstrably complied with their duty of candour. It will be a highly material consideration that there is a statement from a solicitor confirming that they have undertaken a reasonable and proportionate search of the

applicant's social media accounts and have disclosed anything of relevance to the question of the applicant's age. The fact that the statement is made by a solicitor and the consequences of making a false or incomplete statement will enable a respondent and the Tribunal to invest considerable trust in that process.

62. Cases will nevertheless arise in which a respondent or the Tribunal is concerned that material of relevance has not been disclosed to the Tribunal. R (LS) v London Borough of Brent, cited above, provides a real example, in which belated scrutiny of the applicant's wife's social media account cast doubt on the extent to which the applicant had complied with his duty of candour. Where an application for specific disclosure is made, a number of material considerations arise, many of which we gratefully adopt from the skeleton argument prepared by leading and junior counsel for the applicant in this case.

63. We consider that it is necessary, firstly, for there to be an application for specific disclosure. The directions which were given in this case for disclosure and inspection of the applicant's social media accounts were not made on application and it appears from the statement made by Mr Taylor of Osbornes Solicitors that similar orders have been made as a matter of course in other Age Assessment cases. To do so is contrary, in our judgment, to the approach required by Tweed v Parades Commission for Northern Ireland [2006] UKHL 53; [2007] 1 AC 650, in which Lord Bingham stated at [3] that 'orders for disclosure should not be automatic [and] [t]he test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.'

64. That leads us to a second point made by Ms Weston, which is that it is impermissible in this context to make an application for specific disclosure which amounts, in truth, to nothing more than a 'fishing expedition' of the type deprecated expressly by Lord Carswell and Lord Brown at [31] and [56] of Tweed v Parades Commission. Whilst a respondent in such proceedings might desire to have access to an applicant's entire social media footprint, we consider there to be a number of proper objections to a request which is framed so widely. As we have already observed, and as reflected in the expert report of Dr Veale, an individual's social media accounts are likely to contain a vast amount of information about them, much of which is likely to be irrelevant to the matters in issue. That material may contain information about a person's medical history or even information which is subject to legal professional privilege.

65. To require an applicant to surrender their login details and to have their social media accounts scrutinised by a local authority's legal team is an interference with their private life. We cannot see how it would ever be proportionate to

expect an applicant who has confirmed that they have complied with their duty of candour to submit to such wide-ranging scrutiny in the hope that the local authority might discover something not previously disclosed which bears on the matters in issue. Before making such a wide-ranging order, it would be incumbent upon a judge to consider whether a less intrusive measure could properly be used in order to achieve the legitimate aim pursued, since that is a necessary consideration in the modern conventional approach to issues of proportionality under Article 8 (or Article 10) ECHR: Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700.

66. Ms Weston submitted that the Tribunal must take account of the best interests of the child in considering whether to make an order for specific disclosure in such cases. We disagree, since that submission assumes what must be established in the proceedings; the age of the person concerned. We doubt that consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 would add much if anything to the enquiry required by Article 8 ECHR in any event.

67. As Lord Bingham stated in Tweed v Parades Commission, the test will always be whether the disclosure in question is necessary to determine the matter in issue. Whether it is necessary and proportionate to make such an order will be for the Tribunal in question. We consider Ms Weston to have been correct in her oral submission that there should be some 'trigger' for such an application. Whether that is because it transpires that a young person has a previously undisclosed social media account or because, as in R (LS) v London Borough of Brent, some other matter is discovered which tends to suggest a previous lack of candour, there should be some specific reason for the application. We accept Ms Weston's contention that the submission at [11] of Mr Harrop-Griffiths' skeleton ("[t]here is much information that could be relevant to the determination of age") will not suffice.

68. At the risk of extending Ms Weston's analogy too far, we consider that there should also be a specific *target* when an application for specific disclosure is made. On the facts of this case, for example, there has understandably been a focus on the applicant's Facebook account and the activity on that account before he arrived in the United Kingdom. Had his solicitors failed to disclose the posts which he made in Serbia, the respondent might properly have asked for an order that the applicant's Facebook activity between one date and another be disclosed.

69. We have made scant reference thus far to the expert report of Dr Veale. We have factored his concerns into our analysis insofar as we have considered it necessary to do so. We recognise and record that he expressed particular reservations about the reliability of the 'timeline' and any view formed by a Meta platform about the age of a particular user. We also note that he had

further concerns about the scope of the information which would be produced by the 'Download Your Information' function on Facebook. We did not hear argument on these points and do not consider it necessary to attempt to resolve them, since there was no attempt on the part of the respondent in this case to support the salient part of the order made after the Case Management Hearing. Such objections might need to be considered in the context of applications for specific disclosure, however. For the avoidance of doubt, nothing we have said in this judgment is intended in any way to undermine or even to revisit what was said on that subject in XX (PJAK – Facebook) Iran CG [2022] UKUT 23 (IAC).

Post-Script – The Transfer of Age Assessments to the FtT

70. By Part 4 of the Nationality and Borders Act 2022 and from a date to be appointed, challenges to age assessment decisions made by a local authority (or the Secretary of State) will be brought by way of appeal to the First-tier Tribunal rather than proceedings commenced in the Administrative Court and transferred to the Upper Tribunal. By s54(3) the Tribunal's task in such an appeal is to determine the appellant's age on the balance of probabilities and to assign a date of birth to him or her. By s54(5), a determination of age on such an appeal is binding on the Secretary of State for the Home Department and on a local authority.

71. Evidently, in such an appeal, there is no duty of candour upon an applicant. There is no duty of disclosure comparable to that which appears in the CPR. Indeed, the only duty upon a respondent to such an appeal is not knowingly to mislead: Nimo (appeals: duty of disclosure) [2020] UKUT 88 (IAC). We doubt that either the parties' duty to co-operate with the First-tier Tribunal or Baroness Hale's as-yet undeveloped statement about a 'co-operative process of investigation' in Kerr v Department for Social Development [2004] 1 WLR 1372 suffices to fix an appellant in such a case with anything approaching a duty of candour such as would exist in judicial review proceedings.

72. That said, the FtT clearly has power to require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party: rule 4(1)(d) refers. The FtT also has a power to order any person to answer any question or produce any documents in that person's possession or control which relates to an issue in the proceedings: rule 15(1)(b) refers.

73. As presently advised, we so no reason why directions of the kind contemplated above might not permissibly be made by the FtT. It might, in other words, direct that an applicant is to provide details of any social media accounts he uses, and that his solicitor is to conduct a reasonable and proportionate search of those accounts in order to ascertain whether they contain any material which relate to the sole issue in the proceedings: the

appellant's age. *Prima facie*, the making of such a direction would be necessary and proportionate, given the need for the First-tier Tribunal to decide the question posed by statute with sight of all evidence relevant to that task.

74. Subject to the considerations we have outlined above, that Tribunal might also order the specific disclosure of material from a social media account. Whilst the FtT cannot have the reassurance provided by the duty of candour, it may legitimately and in accordance with the guidance we have set out above give directions to the parties which will ensure that it is equipped to assign a date of birth to the applicant, as required by statute.

75. We offer those observations in light of the forthcoming transfer of these cases to the First-tier Tribunal. The reasons that we approved the order proposed by the parties in this case appear in the preceding sections of this judgment. The application for judicial review is now proceeding on the basis of that order.

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