

PRACTICE DIRECTION HC81  
EXPLANATORY NOTE

**Purpose and effect**

1. The Practice Direction is intended to constitute general guidance, for the assistance of parties concerned, as to procedural steps or requirements that the court will normally expect. It does not preclude any individual applicant from seeking directions that any particular step or requirement should not apply in any given case, without prejudice to the overriding legal and professional duties of parties and legal representatives to the court.

**Disclosure generally**

2. In view of the principle of uberrima fides applying to ex parte applications (e.g., *Adam v. Minister for Justice, Equality and Law Reform* [2001] IESC 38), applicants have a general duty to put all relevant material before the court when making any form of ex parte application. The purpose of Practice Direction HC81 is inter alia to give practical effect to this requirement.
3. Primary responsibility for giving effect to the principle of utmost good faith in ex parte applications rests on the applicant. Applicants' legal representatives are responsible only to the extent of the duty of diligence and inquiry to take reasonable steps to identify any relevant matters that should be disclosed, and the duty of candour to disclose such adverse matters that come to their attention following those steps as well as to disclose any relevant respects in which relevant information was not sought out or obtained. In lieu of the requirements at para. 7(8)(b)(i) and (ii), applicants' solicitors shall aver that they have taken reasonable steps to identify any relevant matters that should be disclosed, and that such adverse matters as have come to their attention following those steps are disclosed on affidavit and/or will be disclosed in written submissions, as well as particularising any relevant respects in which relevant information was not sought out or obtained. An applicant's solicitor shall also specify that he or she has explained the averments of verification to the applicant and that he or she believes the applicant understands those averments, specifying the language that the applicant understands. It shall not be necessary to explain individual previous representations.
4. As regards proceedings filed on or after 1<sup>st</sup> January, 2019, the requirements of para. 7(8) apply to any leave application even if it is intended to apply to transfer the case to the holding list or a settlement list.
5. As regards the requirement of para. 7(8)(b)(iv) that a solicitor acting on behalf of an applicant swear as to the mode of swearing of the deponent's affidavit in his or her presence, if such solicitor is not present at the time of swearing of the affidavit, a person who is so present (including the person taking the affidavit) may swear an affidavit complying with para. 7(8)(b)(iv).

**Relevance**

6. The intention of the Practice Direction is that disclosure obligations will only apply to the extent that disclosure is relevant and reasonable.
7. As regards relevance, material regarding previous applications or proceedings may be relevant to questions of candour, conduct or discretion even if such material was not before the decision-maker in respect of the particular decision being impugned in the proceedings.

8. Any previous application by an applicant himself or herself will be regarded as presumptively relevant. There may be circumstances where this is not the case, but if so this must be explained on affidavit.
9. If strict disclosure of all documentary material regarding previous protection and immigration related applications is not in any given case reasonably practicable, this can be done as an alternative to the process specified in HC81 by the applicant specifying on affidavit a list of the relevant previous applications and in any given instance either exhibiting the relevant material or explaining why such material is either not relevant or not available, and in the latter case indicating what steps are being taken to procure such material. Applicants who aver that a previous application is not relevant may however be held to have failed to comply with the requirement of uberrima fides in the event that any such previous application is subsequently held to be either relevant to an issue including a representation made by the applicant, or to be relevant to general questions of candour, conduct or discretion (as to which questions see e.g., *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 per MacMenamin J.).
10. If an applicant fails to make full disclosure at the ex parte stage in accordance with the Practice Direction (including a failure that arises by averring incorrectly as to the non-relevance of matters that are subsequently held to be relevant), any failure in that regard may be taken into account if the question of discretionary relief including injunctive relief arises at a later stage of the proceedings, independently of whether such non-disclosure is a ground for setting aside the order granting leave.

**Material within the procurement of the applicant/ deponent**

11. The requirements of the Practice Direction as to disclosure only apply to matters within the knowledge, information or belief of the applicant/ deponent or his or her power, possession or procurement. Insofar as information is within the procurement of the applicant/ deponent but has not been actually procured as of the date of swearing of the affidavit concerned, the applicant/ deponent shall be taken to have complied with the requirement of disclosure in that regard provided that:
  - a. All matters within his or her actual knowledge as of the date of swearing are disclosed;
  - b. The applicant/ deponent deposes that reasonable steps have been taken to procure other relevant matters or alternatively that such materials are ones in the possession of a respondent; and
  - c. If the applicant is seeking such materials from sources other than a respondent, the applicant/ deponent will put such matters before the court when procured.
12. As regards whether information is in the procurement of an applicant, material that the applicant can obtain by taking reasonable steps (such as by requesting it from a relevant body outside the State) will normally be taken to be within his or her procurement.
13. An applicant is not obliged to seek documents from a respondent to the proceedings (whether by way of freedom of information or otherwise) for the purpose of complying with the obligation of disclosure. It is sufficient compliance to make available all relevant materials that are available to the applicant from other sources.

**Family members**

14. Reference in HC81 to previous applications by family members is to members of the nuclear family only that is partner and children, or parents/guardians in the case of a minor applicant; apart from cases where the applicant claims rights by reason of

dependency on some other person in which case full details in relation to that other person should also be provided. If an applicant is unable to obtain details of, or is otherwise unaware of, an application by a family member, this should be deposed to specifically.

### **Mode of swearing of affidavits**

15. The requirement to specify on affidavit the precise mode of swearing of the applicant's affidavit is designed to assist parties by ensuring that the legal requirements regarding oaths are correctly applied. However the specific requirement to state such religion expressly may be modified if the deponent avers that he or she objects on the basis of constitutional, ECHR or other corresponding rights to expressly stating his or her religion in the body of an affidavit. In such a case, subject to the following and without prejudice to the power of the court to give further directions in an individual case, the averment of verification may specify that the deponent identified his or her religion to the person taking that affidavit, and that the affidavit is being or was sworn in the manner recognised by that religion. Given the possibility in a given case that the deponent may have already disclosed or volunteered his or her religion in a previous application in the course of his or her immigration history, such as in the context of a basis for, or evidential element in, an international protection claim, an averment setting out an objection under this paragraph should identify the ground of objection, and should state whether there has been any such previous disclosure in any previous immigration or protection related application by the deponent and if so should explain how such previous disclosure can be reconciled with the deponent's assertion of a right not to disclose such religion.
16. An affidavit taken outside the State does not need to be accompanied by an affidavit verifying the means of swearing as envisaged by para. 7(8)(b)(iv).

### **Translation**

17. The requirement to exhibit a translation of a document executed in a language other than an official language will only apply if such translation pre-existed the proceedings, if the party producing the document is relying on such document, or if directed by the court.

### **Application of O. 99 rr. 6 and 7**

18. Absent exceptional circumstances, orders under O. 99 rr. 6 and 7 or similar orders directed to legal representatives will arise only where there is a disregard of practitioners' obligations, and will not arise simply where there is an error of judgment by a practitioner in a reasonable and good faith attempt to comply with such obligations and with the Practice Direction.

### **General**

19. Paragraph 21(3) will remain postponed pending further directions.
20. This Explanatory Note will be published as an annex to the Practice Direction and shall be taken to be part of same.