The merit in judicial review

The Court of Appeal has decided that the phrase 'totally without merit' refers to a case that is bound to fail, explains **Richard Honey**

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Rule 54.12(7) of the Civil Procedure Rules provides that where the Administrative Court refuses permission to proceed with a judicial review (JR), and records the fact that the application is totally without merit (TWM), the claimant may not request the decision be reconsidered at an oral hearing.

In 2013, the government said that the policy intention behind the TWM proposal was to ensure that weak, frivolous and unmeritorious JRs could be filtered out as early as possible, reducing delays and costs. It said that the TWM provisions would strike an appropriate balance between reducing burdens on public services and maintaining access to justice for those with an arguable case or one that displayed any merit.

This approach was applied by the Court of Appeal in *R (Grace) v SSHD* [2014] EWCA Civ 1091. Maurice Kay LJ said that the purpose of the TWM provision was to ensure that hopeless cases do not take up more of the time of respondents and the court than is reasonable and proportionate. The context was said to be that the "exponential" growth of JRs in recent years had given rise to a significant number of hopeless applications, which caused trouble to public authorities and put an unjustified burden on the resources of the Administrative Court.

Appeal process

The result of a TWM decision is that the claimant is barred from renewing his application orally at a hearing. The only way forward is to apply to the Court of Appeal, which also considers permission only on the papers. Permission can, therefore, be finally refused without a claimant ever having an oral hearing.

> **TWM provisions would strike an appropriate balance between reducing burdens on public services and maintaining access to justice**

The concept of TWM was first introduced into the CPR in the context of civil restraint orders. In *Grace*, the claimant argued that a finding of TWM in JR should not be made unless a claim was so hopeless or misconceived that it would justify a civil restraint order if repeated. The Court of Appeal rejected this approach, saying that it wrongly sought to introduce into CPR 54.12 the hallmarks of abusiveness or vexatiousness which underlie the civil restraint order jurisprudence.

The court held that the provision was not expressly linked to the idea of repetitive or multiple applications and could apply where there was no previous history of abusive or vexatious claims. A "non-abusive claimant" could still be denied an oral hearing. Maurice Kay LJ said that "hopeless cases are not always, or even usually, the playthings of the serially vexatious". To give the provision the limited application sought by the claimant would defeat its purpose.

Judicial understanding

Maurice Kay LJ drew attention to two important safeguards, which he considered were sufficient. First, no judge would certify an application as TWM unless he was confident after careful consideration that the case truly is bound to fail. Second, a claimant still had access to a Court of Appeal judge who, with even greater experience and seniority, would approach the application independently and with the same care.

The judge said that he "had no doubt that in this context TWM means no more and no less than 'bound to fail'".

Lord Dyson MR agreed. He did, however, comment that it was unfortunate that the word 'merit' was included in the phrase, as this usage conflicted with the normal meaning of the word, which was to connote the idea that a claim was 'just'. In 2013, the government said that the phrase TWM was "well understood by judges". Notwithstanding Lord Dyson's comment, this case proves this prediction was correct. **SJ**

KEY POINTS

- This rule provides a strong means to ensure that hopeless JRs which are bound to fail do not take up the court's time with oral hearings.
- When responding to a JR, defendants should consider asking the court to certify the claim as totally without merit.
- In practice, a TWM finding will be relatively rare.
- If acting for a claimant in a case certified as TWM, carefully consider whether to appeal.
- Given the serious consequences which follow, a Court of Appeal judge might be more inclined to give a claimant the benefit of the doubt than a judge sitting in the Administrative Court.