1. In July the automatic right to an oral permission hearing in judicial review claims was withdrawn. Cases deemed on the papers to be ‘totally without merit’ are no longer entitled to an oral renewal. Here I examine the justification for reform, the new test and its possible consequences.

WAS THERE A CASE FOR CHANGE?

2. In December 2012 the government announced proposals for reforming judicial review.

3. Readers of the consultation paper[1] were told that the reforms would ‘...tackle red tape, promote growth and stimulate economic recovery’. As evidence of a clogged system the paper cited the growth in judicial review: in 1974 there had been 160 applications, but in 2011 there were around 11,000.[2] It was suggested that large infrastructure projects were being held up by such challenges and this was harmful to a fragile economy.

4. The tenor of the paper was that the administrative court was backed-up with weak claims: UK Plc was suffering by indulging time-wasters. It was asserted that one way to counter these problems was a more rigorous permission stage which would refocus judicial resources on worthy cases.

5. The paper asked: ‘Do you agree that where an application for permission to bring Judicial Review has been assessed as ‘totally without merit’, there should be no right to ask for an oral renewal?’

6. No reasonable objection can be made to an effective sift of claims. Nor to the proper allocation of judicial resources. Surely though, the most important question for the would-be reformer is: ‘What is the evidence that the current process fails to achieve those ends?’

THE RESPONSE
7. Despite the unusually short time for a consultation of this importance, the Constitutional and Administrative Law Bar Association (ALBA) brought its expertise to bear on the proposals. In a careful and detailed paper[3] they highlighted the following:

a. The unacceptably short time frame for consultation

b. A total absence of empirical or statistical justification for the proposals; the flimsy evidence

c. The flawed understanding of JR upon which the reforms were based

d. The absurd characterisation of substantive outcomes as ‘the same’ where one was the result of a lawful process and the other an illegal process

e. The injury caused to the rule of law if JR is treated as ‘a kind of bothersome red tape’, when it is in fact a constitutional mechanism to balance the executive’s power

f. The true benefits of JR – better decision making and democratic legitimacy

8. Leigh Day summarised the consultation as being: ‘confused,... rushed and ill-thought out, and ... completely lacking in any evidence-base supporting the purported rationale for change’.

9. An institution with no lesser reputation than the Bingham Centre for the Rule of Law concluded that:

‘...the Consultation Paper displays insufficient recognition of the place of judicial review within the constitution of the United Kingdom, and inadequate sensitivity to the mutual respect, as between the political and judicial branches, that is needed in order to maintain the delicate balance of power that sustains our uncodified constitution’

CRITICISMS OF ‘TOTALLY WITHOUT MERIT’

10. The value of the TWM ‘veto’ was examined carefully in ALBA’s response.

11. Firstly, they pointed out, there was no evidence that TWM cases were choking the system. The consultation nonetheless invited that conclusion by focusing on the number of claims which fail at the permission stage. Critically though, this wrongly equates failure with an unjustifiable attempt: failure to obtain permission does not mean a claim is devoid of merit, just that on balance the decision goes in the respondent's favour.

12. Secondly, what was proposed by government as a minor correction to the system was in fact a profound change. For decades the oral renewal hearing has been ‘as of right’. The centrality of oral hearings to the legal process is not some recent fashion. Quoting Laws LJ it reminded us that:

‘oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it’ [4]

13. In John v Rees [1970] Ch 345, 402, Megarry J observed about the argument "it will make no difference":

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswered charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

14. Furthermore, academic research has echoed the value of an oral renewal:

“Consistent across both [claimant and defendant] groups of solicitors was an emphasis on the importance of the right to renew orally as a check on the quality of decision taking at the written stage.”[5]

15. Characterising oral renewal as an administrative drain, the proposals deny their importance to legitimate claimants. The figures show huge variation between judges in the grant of permission upon oral renewal (between 11% and 46%). The claimant should therefore be given the opportunity to respond to harsh permission decisions face to face. This is certainly the case if deputy High Court judges with limited experience are sifting cases.

16. ALBA concluded thusly: ‘We oppose this proposal in its entirety and cannot suggest any cases for which it would be appropriate.’

CARRY ON REGARDLESS

17. 252 responses to the consultation were received. In April 2013 Mr Grayling launched the government response with these words:

‘There was a body of support for my proposals, mainly among businesses and public authorities. But most of the responses we received were opposed to reform. There was criticism of the consultation procedure and the lack of evidence, and some saw the proposals as a serious attack on the rule of law.

I do not accept these criticisms…’

18. Not daunted by the fact that 74% of the respondents were against the TWM test[6], on 1st July 2013 CPR parts 52 and 54 were amended to introduce the power. CPR 54.12(7) provides:

Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision be reconsidered at a hearing.

19. Rule 23.12 provides:

If the court dismisses an application (including an application for permission to appeal or for permission to apply for judicial review) and it considers that the application is totally without merit –

(a) the court’s order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order.

20. To the severe TWM designation there is no ‘right of reply’, a concession that practitioners and some of the senior judiciary advocated in their responses.
21. The only route open to a TWM claim is a paper appeal to the Court of Appeal under r52.15(1A):

(1) Where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal.

(1A) Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court or where permission to apply for judicial review has been refused and recorded as totally without merit in accordance with rule 23.12 –

(a) the applicant may apply to the Court of Appeal for permission to appeal;

(b) the application will be determined on paper without an oral hearing.

(2) An application in accordance with paragraphs (1) or (1A) must be made within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review.

(3) On an application under paragraph (1), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review.

(4)...

WHEN IS AN APPLICATION ‘TOTALLY WITHOUT MERIT’

22. One justification for introducing the TWM test was that it is ‘already applied and well understood by judges’. Since 2006 Part 52.3(4A) has empowered the Court of Appeal, if declining (paper) permission to appeal as TWM, to order there should be no reconsideration at a hearing. This power was in 2012 expanded to other appellate civil judges.

23. The test has also seen use in immigration JRs challenging removal, where judges can declare an application to be ‘clearly without merit’. (CPR 54 PD 18.4)

24. The test for permission in judicial review is that a case be ‘arguable’. How much less than arguable must an application be before it is TWM?

25. One senior practitioner considered that the answer should be informed by the parallel duty to consider a civil restraint order (CRO). In April Paul Bowen QC wrote:

‘Something more than ‘unarguable’ is required, but what? I suggest that the finding of TWM should not be made unless the claim is so hopeless or misconceived that a civil restraint order would be justified if applications were persistently made.’

26. He referred to Bhamjee v Forsdick (Note) [2004] 1 WLR 88 in which a civil restraint order was said to be appropriate where the:

‘Litigant's conduct has a hallmark of one who is content to indulge in the course of conduct which evidences an obsessive resort to litigation and a disregard of the need to have reasonable grounds...

27. In that case Lord Bingham's earlier description of 'vexatious conduct' was a 'useful indicator':
'The hallmark of a vexatious proceeding is in my judgement that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'[9]

28. Given that Part 23 binds consideration of TWM and vexatiousness together, it seems logical that the test for one would inform the other. However, this interrelationship was considered in a Scottish judgement of the Inner House.

29. Evaluating what was meant by ‘totally without merit’ in section 2(4)(a) Legal Profession and Legal Aid (Scotland) Act 2007 Lord Kingarth decoupled it from the notion of ‘abuse’ and rejected the submission that the CRO test assisted:

‘... It is always tempting but usually unhelpful to seek to put a gloss on the language of a statute, and I do not think it helpful to seek to import notions of ‘abuse of process’ into the clear language of this Act....’[10]

30. The judge was also opposed to limiting TWM to cases brought in bad faith, a feature seen in the notion of abuse.

31. He concluded however:

‘... It is entirely clear from the language used, and the context in which it is used, that section 2(4)(a) does indeed provide a complainant with a low threshold to meet to avoid rejection of his or her complaint before investigation'

32. Lord Reed (now of the Supreme Court) also delivered a short judgement in that case agreeing with Lord Kingarth generally but remaining silent on the specific issue.

33. In Lord Malcolm's opinion the test applied to:

‘... complaints which, on their face, are obviously unworthy of any consideration or investigation .... It covers hopeless complaints where it is clear that further enquiries could make no difference....

The hurdle set by the phrase ‘totally without merit’ is very low. While not exact, the nearest equivalent which occurs to me is the ‘clearly unfounded’ test for certification of an asylum claim under section 94 of the Nationality, Immigration and Asylum Act 2002, around which there is a developed jurisprudence. It stresses that certification should be granted only if it is absolutely clear that, if put before an immigration judge, the claim would be bound to fail. Anything more than a fanciful prospect of success, perhaps after and depending upon the outcome of appropriate investigations, would prohibit certification: see AK (Sri Lanka) [2009] EWCA (Civ) 447'[11]

WHAT WILL THE CONSEQUENCES BE?

34. Some claims are devoid of merit. Obviously, these cases should not proceed. The concern of practitioners[12] however is not that bad cases will be cut, but that the scalpel will be wielded imprecisely.
35. Isn’t it possible that the new power could be used by an inexperienced but resolute judge as a way of saying ‘I really can’t see the point of this case?’ The emphatic vocabulary however does not tell us whether or not the point might be seen by a more experienced tribunal.

36. The test will no doubt be litigated in the JR context, but before it is, it hangs over potential claimants. And with uncertainty comes difficulty advising. Anecdotally, there have been cases where a legal team has advised the client of their solid merits of the case, only to be TWM’d.

37. True that there is an appeal route, but by the time the Court of Appeal gets the papers there have already been two decisions going against the claimant. The single LJ then has to work extremely hard to resist the inertia of the negative history and the finding that this is not only not a good claim, but one devoid of any merit.

CONCLUSION

38. It is regrettable that a significant change to an important constitutional safeguard has been forced through despite the lack of need and in the face of articulate opposition.

39. Some comfort can be taken from the fact that the TWM hurdle is very low and presumably not hard to overcome.

40. Careful monitoring of how the new test is applied will be needed.

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[2] The comparative value of these figures is disputed.
[6] Noting without further comment that ‘Support for the proposals was much lower among respondents who were members of the legal profession.’ [1]


[11] Ibid, para 49