Judicial Review: Case Update

Introduction

In this paper, I will review two cases from earlier this year. The first case discusses the issue of costs and what may be considered to be an unreasonable refusal to engage in Alternative Dispute Resolution (ADR) or not. The second case examines the scope and implications of an order that an application for permission to judicial review is totally without merit.

Some considerations regarding costs

1, As a general proposition, an unreasonable refusal to engage in ADR could have costs consequences for a public body. However, in the case of in *R (Crawford) v Newcastle University* [2014] EWHC 1197, the administrative court found that refusing more traditional ADR, or even maintaining silence in the face of an invitation to participate in traditional ADR, might be excused where proceedings that amount to ADR are in hand before an ombudsman.

2. The court found in *Crawford* that where a university student had issued judicial review proceedings against his university while simultaneously pursuing a complaint to the Independent Adjudicator for Higher Education, the university had not been unreasonable in failing to accept his invitation to attempt mediation. The adjudication process was effectively a form of Alternative Dispute Resolution, so it was difficult to characterise a failure to engage in a different and further form of mediation as unreasonable.

3. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, it had been established that the court may depart from the usual rule that costs follow the event where the successful party has unreasonably refused to engage in Alternative Dispute Resolution (ADR). At para 16, Dyson LJ named a list of factors relevant to determining whether there has been an 'unreasonable refusal':

> *"…whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."*

4. The fact situation in *Crawford* is worth examining in order to appreciate the ruling. The background was that the C was a medical student who had twice failed his examinations and was complaining about improper marking and had demanded a resit from university (U).

5. While C was inviting the U to engage in mediation, he had simultaneously been pursuing a complaint before the adjudicator. Both parties had fully engaged with the adjudication process, whose issue was the same as that in the judicial review proceedings. The reality of the situation was that the adjudication process had been a form of ADR.

6. The court found that the fact that U's solicitors had agreed in principle to ADR did not amount to an unqualified acceptance that it was appropriate, especially as there had been no proposal from C as to what mediation might achieve. To the extent that it had been proposed to resolve whether C's final examination had been correctly marked, that matter had already been pursued before the adjudicator, so it was difficult to see how U was being unreasonable in not engaging in a different and further form of ADR. There had been nothing further to mediate beyond the substance of C's claim that he was entitled to his degree because his final paper had been wrongly marked. He had already been allowed to re-sit his final year.

7. The court further reasoned that C's case in mediation was to seek an outcome different from that which was sought in the judicial review proceedings: the objective of the former was to persuade U to allow C a second re-sit, whereas the purpose of the latter was to attack the content of a handbook (with guidance on marking). There had, therefore, been no reasonable prospect of the mediation succeeding.

8. The court noted that U had been discourteous in not responding to C's mediation invitation. Silence might be unreasonable and lead to costs sanctions even if an outright refusal to participate would have been justified on reasonable grounds. However, the court found that that was not an invariable rule; the burden remained on a claimant to show that the failure to respond had been unreasonable. U's solicitors had responded. It could not be said that U had refused to engage in ADR because it had engaged with the adjudication process. There was, therefore, no reason to depart from the general costs rule.

Applications that are considered "totally without merit"

9. In *R (Grace) v Secretary of State for the Home Department,* CA [2014] EWCA 1091, the claimant's permission application had been certified as being 'totally without merit'. The judge considered the matter on the papers and gave clear reasons for refusing permission. The claimant (G) was granted permission to appeal so that the Court of Appeal could give guidance on the meaning of the phrase under CPR r.54.12 (7).

10. Since 1 July 2013, CPR 54.12(7) has provided that where a court refuses permission to
apply for judicial review on the papers and records that the application is 'totally without
merit', the claimant may not apply to have that decision reconsidered at a hearing.

11. G was a Jamaican national who had remained in the United Kingdom unlawfully for 10 years before she applied to the respondent for leave to remain. She had issued a claim seeking permission to apply for judicial review after her application had been refused.

12. On appeal, the appellant (G) argued that in the absence of any suggestion of abuse or vexatiousness, the phrase should be strictly construed, and a claim should not be labelled 'totally without merit' unless it was so misconceived that a civil restraint order would be justified if a similar claim were repeated.

13. The court of appeal rejected G's argument. The court noted that it already had a discretion, by virtue of CPR 52.3(4A), to mark an application for permission to appeal as 'totally without merit', thus precluding renewal of the application at an oral hearing. That discretion could be exercised regardless of issues relating to civil restraint. The purpose of CPR 54.12(7) was not simply to prevent repetitive applications by an individual, but to confront the fact that there had been exponential growth in judicial review applications and a significant number of hopeless applications that caused trouble to public authorities and the administrative court.

14. Accordingly, the court propounded that 'totally without merit' simply meant 'bound to fail'. The court noted that the provision was still subject to the safeguard afforded by a claimant's right of appeal and so did not detract from the constitutional importance of the judicial review jurisdiction.

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