



JUDICIARY OF
ENGLAND AND WALES

ADMINISTRATIVE COURT IN WALES
Challenges and Opportunities

Swansea University
19 November 2014

His Honour Judge Jarman QC

1. It is a great honour for me to be asked to deliver the second Administrative Court for Wales Lecture and in doing so to tread somewhat warily in the footsteps of Mr Justice Hickinbottom, the liaison judge of the Court, who delivered the first such lecture in Cardiff earlier this year. It is very much to be hoped that that was the first of many.
2. It is now five years since the Court was established in Wales, as it was in three regional centres in England. In Wales in particular, the pace of change in the legal world during that time, and indeed since Hickinbottom J's lecture, has continued to be breathtaking. The increasing divergence between the law applicable in England, and that applicable in Wales, will have to be grappled with by citizens, lawyers and the Courts of both countries.
3. In his address to the Legal Wales Conference in Bangor last month, The President of the Family Division, Sir James Mumby, considered the respective legislative provisions in the two countries governing the important topic of the welfare of children. Some of the provisions now emerging from the two legislatures do not differ substantially, but the President pointed to an example where they do- namely serious case reviews. He ventured the opinion that the Welsh regime here is more developed and much better than the English.
4. Such divergence is likely to occur in all 20 fields of law now devolved to the Welsh Ministers. A number of Assembly Acts, Measures and secondary legislation have been passed in recent months which have far reaching consequences for the citizen. I will mention just two. In May, the Social Services and Well-being (Wales) Act 2014 was enacted, which includes provision to reform and integrate social services law with a view to improving the well-being outcomes for people who need care and support, and carers who need support. In September, the Housing (Wales) Act 2014 was enacted which introduces a compulsory registration and licensing scheme for private rented sector landlords and agents. It places a stronger duty on local authorities to prevent homelessness and to provide sites for Gypsies and Travellers where needed.

5. The Supreme Court in July of this year determined a reference by the Attorney General for England and Wales as to whether the Agriculture Sector (Wales) Bill 2013 was within the legislative competence of the National Assembly for Wales insofar as it sought to regulate agricultural wages. The only sources for such competence relied upon by the Assembly were section 108 of and Schedule 7 to the Government of Wales Act 2006 which gives it the competence to make legislation which “relates to” agriculture amongst other matters. The court held that provided the Bill fairly and realistically does so relate, which the court considered it did and is not within an exception, then it does not matter whether it might also be capable of being classed as relating to a subject which has not been devolved, such as employment and industrial relations. Such an interpretation is likely to add to, rather than detract from, the impetus for change and divergence.
6. The current legislative programme of the Welsh Government shows that the pace and scope of change and divergence is increasing. For example, it includes the Renting Homes Bill. That follows closely the Law Commission’s recommendations to simplify radically the law relating to renting homes by providing only two forms of rental occupation of residential property, namely the secure contract and the standard contract. The Government in Westminster has rejected the recommendations for England.
7. The current 12th programme of Law Reform of the Law Commission, now under the Chairmanship of Sir David Lloyd Jones, which runs from July 2014, includes planning and development control in Wales. The Commission points to the very complex position in Wales, with some but not all of the recent English Legislation applicable in Wales, but some applying to Wales only. Last month, the Welsh Government introduced in the Assembly the Planning (Wales) Bill which aims to reform development plan making in Wales. But as the Commission points out, that will not fundamentally address the handling of planning applications or development management, and its project will consider the merits of a simplified system that is suitable for the needs of Wales. It emphasises that Wales is a smaller country than England, with different types of land use and a close connection between government bodies. A simplified planning system here has the potential to promote economic growth, housing supply, and environmental protection.
8. This is a timely development for Wales, because in April 2014 the new Planning Court, which forms part of the Administrative Court in Wales, came into being here as well as in London and the English regional centres. The Planning Court will deal with all judicial reviews and statutory challenges involving planning permission, appeals, enforcement, compulsory purchase orders, highways and rights of way. Amendments to Part 54 of the Civil Procedure Rules set out tighter time limits to combat what has been seen as unacceptable delays in the planning process to which judicial review claims and statutory applications can give rise. Under the new regime substantive hearings are to take place within 6 months of issue. These time limits underline the need for the law to be easily accessible to citizens, to those who represent them, as well as to those who determine disputes.

9. These few examples should give a taste of the pace of change and divergence, which has implications for users of the Administrative Court as much as any other court. Before I turn in more detail to the challenges faced by such users, it may be helpful to remind ourselves of the framework of the court and its work. The term “administrative” has certain bureaucratic connotations, but the court is concerned with the lawfulness of action or inaction by the state in respect of its citizens. It was just before I started practice, almost 40 years ago, that the Law Commission in its Report on Remedies in Administrative Law criticised the procedural tangles which were all too commonplace in seeking what were then called prerogative orders against Crown bodies.
10. Following that report, and also legislative changes in Australia and other countries of the Commonwealth to provide judicial review of decisions of the administration, changes were made to the rules of procedure in this jurisdiction to provide a similar remedy. Again, that term can be somewhat misleading. The court does not review the merits of the decision, which is a matter for other bodies, but reviews rather the decision making process, in order to determine whether the decision was arrived at lawfully.
11. This limited scope of the proper review by courts of decisions of state bodies has been the subject of numerous observations at the highest judicial level. I shall refer to only one, that of Lord Bingham in a case which came from North Wales, namely *Chief Constable of the North Wales Police v Evans* in 1982. Mr Evans was a probationer police officer in Llangefni, who was forced to resign by his Chief Constable as a result of various rumours about his private life, including that before he had become a probationer he had lived on what was described as a hippy commune near Bangor. The Chief Constable did not give him a chance to answer the rumours. Nor did he give reasons for his decision. The House of Lords held that each of these failures amounted to a breach of the rules of natural justice and declared the decision unlawful. It was emphasised that the court could not interfere with the decision simply because it felt that the same was unfair or unreasonable. Lord Bingham said:

“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

12. Those are very strong words, which illustrate a very important principle. That case also illustrates another feature of challenges to administrative actions, namely that the outcome is likely to affect not only the parties themselves but also the wider public. The decision in the *Evans* case was important to the parties but it was also important to the citizens of North Wales concerned with the effective policing of their community. It is clearly desirable that where practicable such outcomes should be decided locally so that those members of the public who may be interested can attend the hearing far more easily than if it were held in London.
13. Before 2009 this could be arranged when a High Court Judge was sitting in Wales. I recall appearing here in Swansea before the then Presiding Judge in

Wales, Maurice Kay J, as he then was. He has just retired as Vice President of the Court of Appeal Civil Division. The case involved judicial review of the grant by the local authority of a competitive tendering contract for cleaning services. It was, as I recall, the first judicial review hearing in Wales.

14. But more often than not in those days a judicial review hearing meant a journey to London, a journey which many members of the local community could not make. An example is an application in 2004 to erect two rows of wind turbines on Mynydd Margam, not far from here. The proposal was very controversial. There was a hearing before a planning inspector locally which was very well attended and fiercely fought. The inspector rejected the application, but the power company appealed to the Administrative Court and on that occasion the hearing, in which I appeared, took place in London. No member of the public attended. In the event, the appeal was dismissed, but it was less than satisfactory that a decision taken locally could have been potentially overturned elsewhere.
15. One of the main reasons for the establishment of the Administrative Court in Wales, and in the regions in England, was to improve access to justice. Its success has gone a long way to addressing this problem. Although the office is based in Cardiff, the court can and does sit throughout Wales as far as practicable. The office shares a common computer system with London and identical procedures are adopted. High Court judges sit in Wales regularly and six senior judges based in Wales are authorised to sit as judges of the High Court to hear cases in Wales as well as in London.
16. Any claim started in Cardiff will normally be heard in Wales, and although claims from Wales may be started in another Administrative Court, for example London, the general expectation is that proceedings will be administered and determined where the claimant has the closest connection, subject to a number of considerations set out in the relevant practice directions 54D. Most cases where the claimant has the closest connection to Wales are now issued in Cardiff. Those that are not are usually transferred. However, for whatever reason, some are not and the lesson must be that if the parties wish their cases to be dealt with and heard in Wales then the claim should be issued in Cardiff.
17. It is notable however, that appeals from the decisions of criminal courts in Wales in respect of regulatory offences are lodged in a divisional court in London, whether the appeal is lodged by the defendant or the prosecuting authority. I will not comment on individual cases, but I mention this lest there is a perception that such cases must be heard by a divisional court. Divisional courts, consisting of not less than two judges, are held when rules of court or statutory provision requires a case to be heard by such a court. Paragraph 3 of Practice Direction 54D, which I have already mentioned sets out a limited number of exceptions to the rule that claims may be lodged in Cardiff and will normally be heard in Wales, one class of which is proceedings which must be heard by a divisional court. There is no general requirement for criminal cases to be heard by the divisional court, and I will come to examples such cases which have been heard in Wales. Moreover, again as I shall explain in due course, a divisional court can and has sat in Wales.

18. Against that background, what are the biggest challenges facing the Administrative Court in Wales at the present time? In my view, and it is a personal view, by far the biggest challenge is something I have already alluded to, namely the accessibility of the law applicable in Wales. The ever increasing complexity and volume of law is a feature of most modern jurisdictions, not just in Wales. But in Wales, there are added dimensions. The first is the history of devolution in Wales, which means that some Welsh Legislation is based on pre-devolution statutes. The Welsh Government's drafting guidance now provides that where practicable, legislation should be drafted on a standalone rather than amendment principle, but this is not always practicable. The second is that as yet there is no comprehensive publication of law in an updated form. The third is the right of the citizen to access law in the language of choice, Welsh or English. This problem impacts particularly on the Administrative Court in Wales and the family courts and some tribunals in Wales.
19. In England, commercial publishers have over many decades developed well established publication networks. But it is not just in the larger jurisdictions that this is possible. Some states in Australia, for example, have developed such networks. There is wide consensus between the Welsh Government, the Counsel General, practitioners, academics and the judiciary in Wales that this problem now needs to be urgently and effectively addressed. In its current programme, the Law Commission has described this problem as becoming more serious and has included an advisory project to consider ways in which earlier legislation could be simplified and made more accessible, and how in the future legislation may be drafted in such a way as to reduce the problem.
20. What is currently being done in Wales to address the problem? Welsh Legislation is now available in both languages on the National Archive site legislation.co.uk. The Welsh Government works with the Archive to clear the backlog of updating legislation. Moreover the website now shows a list of legislation which applies exclusively or primarily to Wales, and another list which may contain provisions which apply to Wales. This resource however at present has its limitations.
21. Those are welcome developments as far as they go. However, it must be remembered that many litigants in the Administrative Court as in other courts, do not have available to them public funding for lawyers and cannot afford lawyers themselves. Persons who represent themselves appear in the court with increasing regularity, sometimes on the most complex matters. Great efforts are being made by practitioners, academics and students to promote schemes for giving free legal advice or at least assistance to persons who need it. The lawyer in the Administrative Court Office in Cardiff, David Gardner and members of the office staff there readily give help to litigants and professionals as to procedure and practice. At the Civil Justice Centre in Cardiff we are fortunate to have an office of the Personal Support Unit, whose volunteers give help and support to litigants who represent themselves. They give moral support by attending hearings with litigants and help with documentation. Their support is invaluable to all concerned.

22. What court staff or the PSU cannot do, is to give legal advice. This is sometimes difficult for litigants to understand, and busy court staff are often pressed for such advice. It is my experience that what some litigants who bring claims in the Administrative Court really want is for the administrative decision which affects them, or the law relating to it, to be explained to them in a way which they understand. An easily accessible narrative of the law is likely to assist not only in those pursuing or dealing with such claims, but also in reducing the number of unmeritorious claim being lodged in court. Such a narrative is also likely to assist practitioners and indeed the judiciary and to promote the overriding objective of dealing with cases justly and at proportionate cost.
23. The Welsh Government has been working with commercial publishers, and with practitioners and academics to provide a narrative on Welsh Legislation. Progress has not been as swift as had been hoped, but this is an ambition which is essential to achieve.
24. Not everyone has easy access to the internet. Textbooks, available otherwise than on line, will remain a valuable resource. The law schools in Wales have an important part to play in maximising the potential of that resource in addressing this particular problem. The University of Wales Press are publishing a series of textbooks under the title Public Law in Wales. The series editors are chaired by Professor Thomas Watkin, former first Welsh Legislative Counsel. This very important series It has already published texts by academics and practitioners alike such as the rights of the child in Wales and Environmental Law and Policy in Wales and plans to publish further texts, for example, The Administrative Court in Wales, Planning Law and Practice in Wales, and Legislating in Wales. Such publication is greatly to be encouraged.
25. Last, and I hope not least, the judiciary is aware acutely aware of the problem and is taking steps to do what it can to help. The Association of Judges of Wales has established a legislative sub- committee to monitor and report upon the progress of legislation in Wales. The Family Liaison Judge in Wales, Mr Justice Moore in September chaired a conference in North Wales organised by the Law Society Wales to raise awareness in relation to the impact of such legislation. As I have already indicated, the President included the topic in his address to the Legal Wales Conference last month, and Sir David Lloyd Jones chaired a session there particularly on the problem of accessibility. The Lord Chief Justice is also acutely aware of the problem, which he described in an address to the Cardiff Business Club last month as one which has been growing for ten years but for which a solution has yet to be found.
26. The Counsel General has addressed the National Assembly on the need for laws to be accessible intelligible and clear. As he has acknowledged, such need is an essential part of the rule of law. This is no less true of the laws coming from the UK Parliament, as they apply to Wales as much as they apply elsewhere. The citizen of both countries is entitled to look to the legislatures of both countries in the expectation that that need will be fulfilled. A citizen in England may for example have property in Wales, or a relative in care in Wales, or a child living in Wales, and is as much entitled to know of the law applicable here as there. In my view there is no one solution. There is clear

scope for both legislatures to fulfil that need. However, the rest of us should not be complacent and we must all continue to play our part.

27. The next challenge I wish to focus on is the breadth of claims dealt with in the Administrative Court, in Wales as elsewhere. It may be questioned, in an era of increasing specialisation, whether this is sustainable. To some extent the need for greater specialisation has already been recognised. I have already mentioned the establishment of the Planning Court as part of the Administrative Court. Similarly, from November of last year most challenges to Immigration and Asylum decisions which were formerly dealt with by way of judicial review have been transferred from the Administrative Court to the Upper Tribunal. This has happened in Wales as well as in England.
28. The breadth of the work which remains in the Administrative Court however remains remarkable. Allow me to illustrate this by reference to just a few examples of the type of claims which have been determined in Wales in the last year or so.
29. IN *R(UK Recyclate Ltd and other v Secretary of State for the Environment Food and Rural Affairs and the Welsh Ministers* 2013 Hickinbottom J sitting in Cardiff decided that the respective ministers had properly transposed an EC Directive dealing with collection of recyclables into the Waste (England and Wales) Regulations 2011, which allowed local authorities to decide whether the separate collection of recyclables was both necessary and practicable. The decisions in question allowed the roadside collection of domestic recyclable waste which the householder had co-mingled. This made more work for recycling companies who challenged the decision, but who did not succeed. This is a good example of how a decision of the court can affect the lives of most of us.
30. In *Heesom v Public Services Ombudsman for Wales and the Welsh Ministers* 2013 The same judge sat at Mold to hear an appeal from the Adjudication Panel for Wales which decided that the appellant had committed breaches of Clywd County Council's code of conduct by failing to show respect for the council's officers. As it was an appeal, the court emphasised that the general principles of appeal rather than of administrative law applied. Accordingly the appeal would be allowed if the decision of the panel was wrong and the starting point was that the decision was correct unless it was shown to be wrong. 7 of the 9 allegations of misconduct upheld but the disqualification from being a member of any council of 2 ½ years imposed by the panel was reduced to 18 months.
31. During the same year Cranston J sat at Port Talbot heard challenges by two Welsh speaking women prisoners released on licence, in *R (Griffiths & Coll) v Secretary of State for Justice*. The challenge was made on the basis that there are no approved premises in Wales for the accommodation of women so released, so the claimants were likely to be accommodated many miles from their families. The court found that the Secretary of State for Justice had not assessed whether there was a disadvantage, how significant it was and what might be done to mitigate any such disadvantage and accordingly had breached his equality duty. Both these claims were filed in London but were transferred to be heard in Wales.

32. In a more recent case, *R (Bentham) v Governor of HMP Usk and Prescoed and Secretary of State for Justice* 2014 Wyn Williams J, sitting in Cardiff, dealt with the challenge of another prisoner being released against a condition imposed upon his release which excluded him from his home town and thus from his family home. The reason that such a condition was imposed was to prevent a chance encounter between him and the family of the person he had killed by his dangerous driving. The court determined that such a blanket ban was not necessary to prevent a chance encounter and that less stringent conditions which allowed him to visit but not to stay at the family home and not to go into the town centre was sufficient to provide for that risk.
33. The final case I shall mention here is one which I took part in with Hickinbottom J as judges of the Divisional Court which sat in Cardiff earlier this year. *R (Welsh Language Commissioner) v National Savings Investments and the Welsh Ministers* involved a challenge by the Commissioner to a decision by NS&I to withdraw its Welsh language scheme. The court found that the latter, as a crown body was not obliged under the Welsh Language Act 1993 to maintain the scheme, but had failed to consult with the Commissioner before removing her power under the scheme to object to any amendments, and she had a legitimate expectation of being consulted. Accordingly the decision was quashed. It was the first case in the Administrative Court to receive documents and oral submissions in the Welsh as well as the English language, as each party preferred.
34. That summary should be enough to give a flavour of the breadth of cases which the court regularly hears and determines. In this regard it is worth remembering that in the majority of claims which the court deals with, judicial review claims, the court is not the decision maker, but is concerned with the legality of the decision according to well established principles. Viewed in that light, the ambit of the work is not as wide as might first appear. Having said that, the number of statutory appeals and application is steadily growing in Wales as elsewhere.
35. However, that leads on the third challenge, and the final one I shall mention here, and that is the access to public law legal services outside London. In an article called *Justice Outside London* published recently in the periodical *Judicial Review*, Sarah Nason of Prifysgol Bangor University examined 5 years of the “Regional” Administrative Courts., based on analysing all claims received for the five year period from 1 May 2007. The trend is one of general increase in the number of claims, although the picture is complicated by the transfer of Immigration and Asylum cases to the Upper Tribunal, and in Cardiff, by that office gaining formal responsibility in 2013/14 for administering claims from the south west of England.
36. The research shows however that the number of claims per population continues to be lower outside London and the south east of England. Particularly in Wales and the Midlands. Previous research which she had co-authored showed that caseloads outside London are largely driven by the location and litigation strategies of specialist legal services. The most recent research shows that there is a relatively high proportion of education claims

issued in Cardiff, which suggests the author, may also be attributed to the location and litigation strategy of specialist advisers. Having said that, the overall spread of topics in Wales is more varied than in the English Regional Centres with keynote topics being planning, education and reviews of county court judgments.

37. The trend towards the unrepresented litigant is also confirmed. In about 50 per cent of what was termed ordinary civil judicial review claims analysed, the claimant remained unrepresented throughout. The overall findings suggested that litigation outside London is characterised by the activities of a small number of solicitors who are specialists in one or two subject areas, and by litigant in person claims. It was said that legal aid reforms may also be partially behind the general trend of increase in unrepresented litigation in the Administrative Court and decrease in the instruction of local practitioners.
38. If those conclusions are right, then the challenge must be to local practitioners to provide public law services so as to give a meaningful choice to users as to how and where to access such services and to promote access to justice. This will become more and more important in Wales as the law applicable here increasingly diverges from that in England. In my opinion, the need for such services to be specialist in the particular area of challenge can be overstated. For reasons I have endeavoured to set out, the focus of inquiry in judicial review claims is the legality of the decision making process rather than whether a body, even a specialist body, came to the right decision.
39. Those are some of the challenges. After all that, you may be wondering whether there are any opportunities. In my opinion there are, as I hope may already be obvious to some extent from the examples I have given.
40. First, parties may have their case, wherever it comes in the wide breadth of Administrative Court work including criminal cases (with a few very limited exceptions), managed and heard locally.
41. Second, in many of these cases particularly where there are heritage cultural or environmental issues there is a greater public interest in a local hearing.
42. Third, the Administrative Court Office in Cardiff has a dedicated lawyer and dedicated staff who have built up an expertise in dealing with claims from beginning to end, who are accessible and willing and able to give assistance.
43. Fourth, there is a pool of senior judges based in Wales who regularly deal with such cases. When a higher level of seniority is needed this is arranged.
44. Fifth, the average timescale for the hearing of cases in Wales, as in the regional centres in England, is far less than that in London, indeed about a third less.
45. Sixth, parties who wish to exercise their right to use the Welsh Language can readily do so in cases managed and heard in Wales. It is remarkable that this right was exercised for the first time in the Administrative Court only a few months ago. Parties who wish to exercise this right are encouraged to do so.

46. Seventh, it is clear that there remains an opportunity for local practitioners to provide legal services in the area of public law. Previous research by Sarah Nason, had identified an unmet demand for public law remedies outside London, where issues suitable for redress by judicial review and other claims in the Administrative Court are not the subject of claims for reasons which include demographic factors, access to legal services, and possibly distance from the nearest court. Respondents to the research confirmed that opening local centres had increased convenience and reduced costs for their clients.
47. Her most recent research, and more is planned, suggest that there remains some unmet demand. The indication is that the number of civil judicial review cases, other than immigration and asylum cases, is almost half in Wales per head of population than that in the North West of England, and less than a third of that in London. Only in the Midlands is this figure lower. In immigration and asylum cases per head of foreign born resident population, the figure in Wales is by far the lowest and is less than a sixth of that in London.
48. This research also found that there has been over the last five years a general trend of increase in the instruction of counsel based outside London. That is consistent with my own experience of hearing such cases in Wales and in London. Some cases need a high degree of specialist representation, but many do not. Recently however, that trend has taken a downward turn, and Sarah Nason speculates whether recent legal aid reforms are having an impact.
49. I am conscious that these are difficult times for legal practitioners. They are also interesting times, particularly in Wales, and speaking for myself I feel that it is a privilege as well as a challenge to be working in such times.

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