

LEGAL WALES CONFERENCE: 8 OCTOBER 2009

Administrative Justice in Wales: A New Dawn?

The Hon Sir Gary Hickinbottom

I had a call from Winston Roddick. Would I speak at the Legal Wales Conference? I said I would be pleased and honoured to do so. I did not fully appreciate then that he had in mind that I spoke after a galaxy of more informed, more able and more eminent speakers: and at a time when the thoughts of those going home are drifting towards a cup of tea and perhaps a biscuit on their own sofa: and the thoughts of those staying are more persistently moving towards the bar.

However, here I am: and I am however delighted to speak at and close this conference.

In doing so, I have three aims. First, I would like to consider where we currently stand in the evolution of Legal Wales, with particular reference (as my title suggests) to the field of public law. Second, in doing so, I hope to pick up some of the themes of previous speakers we have heard today. And third - vitally - I aim to finish on time.

Some of the current challenges faced by the justice system in Wales are held in common with England. For example, ready access to justice is an issue for us all. For anyone in Carlisle or Manchester or Leeds, or Plymouth or Bristol, to be required to issue and prosecute, or defend, claims in London may not only be inconvenient and expensive, but in some cases may altogether deny a person the ability to use the institutions of justice that are essential for the enforcement or defence of rights. The Lord Chief Justice, who I am delighted has been able to attend today, is a true supporter of regionalisation in England which has seen, amongst other things, the expansion of work outside London and specifically the establishment of Administrative Court offices in Leeds, Manchester and Birmingham.

And that same feature - local access to justice - is equally important in Wales. For someone living in Caernarfon or Haverfordwest, London is distant - and not only in

geographical terms. I recall that when I was a parking adjudicator in London, I dealt with a case in which it was alleged that a car registered to someone living on Anglesey had been parked on a double yellow line in Camden. The written representations from the farmer who owned the car of that registration mark - yn yr iaith - said that he had never left Anglesey. His car had never left Anglesey. He had no intention of ever leaving Anglesey: nor had his car. That seemed to me to have about it the ring of truth.

But in Wales, unlike the regions of England, there is now an added factor, of great importance. In Wales, there is a separate government which, for the people of Wales, is empowered in relation to a wide variety of important devolved matters, such as health and education. Within the scope of those areas, the laws of Wales are different from those in the rest of the United Kingdom: and they continue to diverge, at an exponential rate, as the Welsh Assembly Government gains not only powers but confidence.

Of course, many functions - and important functions - are reserved to Westminster. Again to take just two, back-to-back examples, taxation and welfare benefits. That means, as with any devolved government, there are issues not only in respect of the devolved functions themselves, but also in the relationship between functions which are devolved and those which are reserved, and the relationship between the people and institutions exercising and administering each.

That leads me to justice. Of course, under the devolution settlement justice is a reserved function. However, merely to leave it there would be simplistic and misleading. Typical of our constitution - in which, rather than proving the rule, exceptions are the rule - substantial parts of the justice function are in fact already devolved. There has never been any recent doubt - and certainly not since the reforms culminating in the Tribunals, Courts and Enforcement Act 2007 - that tribunals form part of the justice system: and a not insignificant part in terms of caseload or the nature of the areas they cover. However, perhaps on the anachronistic basis that tribunals were a mere adjunct to the administration, it was part of the devolution settlement that where a substantive function (such as health or education) was devolved, any relevant tribunal was also devolved. That means that a dozen tribunals

in Wales, including MHRT Wales and SENT Wales, are devolved and administered by the Welsh Assembly Government.

As I have already indicated, that leads to challenges not only for the discrete devolved tribunals and their respective administrators, but also in respect of the relationship between those parts of the justice system which are effectively devolved and those which are not. Those are challenges which confront us all.

We all at this conference have our own constituencies, but everyone here has an interest in Legal Wales. Those interests have differing aspects: and I am delighted to see here today representatives from the Welsh Assembly Government, local government in Wales, legal academics and what might be described as “the commercial sector”, i.e. the legal professions – as well as the Court Service and Tribunal Service, and the judiciary. We all have individual interests which we promote: but we are a particularly potent and effective force for the good of justice when brought together. That is why Legal Wales and this conference are so important.

Despite our disparate backgrounds and what we each do within the justice system, is there any paramount or cohering aim? As a judge, I retain the view - I hope not seen as too old-fashioned - that my primary function is to sit on cases, and decide them. However, I also have a legitimate interest in ensuring that the service offered to the public by the justice system as a whole is optimised: and, as a member of Legal Wales, it is optimised for the people of Wales. The justice system is not a hypothetical construct - it is a vital, living part of our constitution, that directly touches individual people and their rights, on a daily basis. It is those people that we - and the justice system - serve. When looking at the current challenges and opportunities that face us in Wales, it seems to me that that is something that we must all bear constantly in mind.

So what challenges do we each immediately face? I have time to mention only a few examples.

The Welsh Assembly Government faces the challenge of how best to service the devolved tribunals within its compass. That may well involve issues of internal efficiency for the government: but, as I have said, more importantly, issues as to how ultimate users can best be served. As recognised in the Leggatt Report nearly a decade ago¹, leaving aside the requirements of Article 6 of the European Convention on Human Rights, members of the public have real and understandable concerns if the tribunal in which they seek to challenge a government decision is administered, controlled and paid for by the very decision-maker whose decision they wish to challenge. In Westminster, that issue has been addressed by the transfer of tribunals from “sponsoring departments” into the control of the Ministry of Justice, and the placing of the tribunals judiciary under a judicial and patently independent head in the form of the Senior President of Tribunals. Whilst of course that precise model may not be appropriate for Wales, it is to be hoped that the Welsh Assembly Government will consider ways appropriate to Wales to ensure that tribunals are, and are seen by users to be, entirely independent of the government departments and decision-makers whose decisions they consider and review.

There are also challenges for the Welsh Assembly Government in the relationship between the devolved tribunals and those which are reserved. Again, these are issues for the government itself: but it seems to me clear that the administrative arm of tribunals in Wales (and those they serve) would benefit from close - closer - liaison with the Tribunals Service, the body that administers reserved tribunals on behalf of the Ministry of Justice. For example, in a country of such relatively sparse population such as Wales, accommodation for tribunals would surely benefit from an integrated approach, whereby the usage rate of available accommodation facilities are maximised by tribunals whether devolved or reserved. Similarly with other resources, such as staff and indeed judges. That holistic approach could of course be taken further. HMCS now has its own discrete “regional” structure for Wales. However, the Tribunal Service and many individual reserved tribunals are organised in such a way that Wales is incorporated in a region including part of England. This is purely for administrative convenience, as is shown by the fact that no two tribunals have exactly the same regional borders. It is said - and has been said to me by senior civil

¹ Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users - One System, One Service, 16 August 2001.

servants in the last couple of weeks - that this is administratively necessary, because Wales is insufficiently large for individual tribunals (and indeed collectively as the Tribunal Service) to be a discrete administrative unit. For example, it would be so small that appropriate civil servants would not be attracted to senior posts, or gain other benefits of bulk. Of course there is an administrative downside to the current arrangement because a region based in (say) Bristol is responsible for the strategic and practical implementation of issues which are unique to Wales, such as language issues.

For my own part, I am unconvinced that, so far as administration is concerned, bigger is necessarily in all circumstances better. But even if it were, we - I mean of course the governments in Westminster and Wales - could, I would hope, think more laterally than that. For example, as Lord Justice Thomas in his seminal paper to the Administrative Justice Conference here in Cardiff two years ago suggested, by merging the Tribunals Service in Wales and HMCS Wales, that would result in a sufficient administrative bulk to attract the right people and have the efficiencies considered attendant upon size: and also be able to focus effort on Welsh issues in a coherent and comprehensive way, as opposed to these issues being dealt with by administrative bodies with centres in England with other concerns. There are moves - small steps - towards identifying Wales as a discrete administrative unit in the tribunals' context. The Employment Tribunals, I understand, are moving towards having Wales as a discrete administrative unit. But further thought and consideration of the benefits that may result from such moves would be worthwhile.

Devolution also poses challenges for the professions. In a line of cases, the courts have made clear that cases that involve a challenge to a decision made under devolved powers should be considered by the Administrative Court in Wales². As a matter of principle, that must be right. That is not only because of issues of local access to justice which I have mentioned, but because, where Parliament has decided that decisions in an particular area should be made for the people of Wales in Wales by a

² See, e.g., National Assembly for Wales v Condrion and Miller Argent (South Wales) Limited [2006] EWCA Civ 1573 at [110] and [131]; R (Deepdock Limited and Others) v The Welsh Ministers [2007] EWHC 3347 (Admin); Isle of Anglesey County Council and Another v The Welsh Ministers and Others [2008] EWHC 921 (QBD) at [8]; and R (Condrion) v Merthyr Tydfil County Borough Council and Others [2009] EWHC 1621 (Admin) at [56]-[62].

Welsh devolved authority, it seems to me that it is implicit that it must have been the intention of Parliament that challenges to such decisions should also be made and dealt with in Wales. That applies not only to the Administrative Court, but also to tribunals which hear appeals from devolved tribunals such as the Administrative Appeals Chamber of the Upper Tribunal which hears appeals from MHRT Wales and SENT Wales.

But the wider principle that the people of Wales should have cases which affect them heard in Wales is not new. When the Social Security Commissioners' Office in Cardiff closed in 1986, the then Lord Chancellor gave an assurance to Parliament that any Welsh case would be heard in Wales at the appellant's option. That was later enshrined in a Practice Direction issued to me as Chief Commissioner, and is now embedded in the fabric of the reformed tribunal system. The principle is reflected in the fact that both Divisions of the Court of Appeal, as well as other higher courts and tribunals, now regularly sit in Wales. I regard that, not as cosmetic, but of great substantial importance.

Consequently, there has been an increase in public law work that must and will be heard in Wales: and there will be increasing work in Wales for legal professionals involved in public law. In my view, that has always been inevitable - but the professions in Wales have been slow to take and run with that particular baton. In my view, that has not been because of a lack of expertise, but rather a lack of organisation and commitment to specialist work that will lead to those involved in devolved and local government work giving that work to those who work in Wales. The recent setting up of a civil-only chambers in Cardiff was a small step towards the sort of organisation of the professions in Wales that will give parties the confidence to instruct them. That in turn will give us more experience in the field that will engender the more confidence. The professions here need to strive towards that upward spiral of benefit.

This all poses challenges for judges too. Historically, we have relied upon individual Welsh judges to ensure that the Welsh dimension is considered in matters affecting the judiciary. We have been very fortunate indeed in the judges we have had. Some are here today, and they have followed judges who have had, on any view, enormous

weight and influence. We could all prepare a different list of our own examples, but I suspect Sir Tasker Watkins would feature in all.

However, they have been single voices. The formation of the Association of Welsh Judges is again a step forward. Not only has it introduced an organisation that can speak for all Welsh judges on issues which affect them as Welsh judges, it is also able to compare notes with other, often smaller jurisdictions which have similar issues to us. I was privileged to visit Switzerland with the Association earlier this year, particularly to look at how the courts there deal with multi-lingualism and the relationship between devolved and reserved matters. The trip - for those concerned with such matters, entirely paid for by the judges themselves - was hugely beneficial.

So, returning to the title of this last part of the conference: Administrative Justice in Wales: A New Dawn?”. There is a question mark in the title.

We are in an exciting period for the development of justice in Wales. Of course, it is not an easy period - dealing with fundamental and novel issues, at a time of considerable and, one suspects, long-term financial restraint. But it is certainly full of challenges and opportunities for us all. In that sense, we have a new dawn. We can all appreciate the new hope and opportunities that this presents.

But it is for us to grasp the opportunities that these developments provide. I do not believe that the dawn is false - but we have to face towards it, not turn our backs to it. The opportunities are there for making better the justice system here in Wales: for improving the system for the benefit of those who, by compulsion or voluntary decision, engage in it. We do not know what the immediate future will bring, although clearly it will not bring an era of cakes, ale or free government spending: and it will bring, in the near future, new governments of whatever hue in the Senedd and San Steffan.

The future is full of uncertainties. However, there is much that we can do further to build the foundations of Legal Wales, so that, whatever is built on top, it will be secure. We can ensure that our organisation and institutions, as well as our thoughts and ideas for the future, are in good condition, and are evolving appropriately. We

can consider how justice can be administered in ways different from elsewhere in the UK, to the benefit of the people of Wales: and those areas in which it is appropriate for the administration to be common. I have mentioned a few ideas of my own, only to provoke thinking. Many other ideas have been the subject of this conference, which has done much to engender the sort of debate that can only benefit the justice system here.

I will now hand over to Winston who will formally close the proceedings and give formal thanks to all of those who have made today such a success. I would simply like to end by thanking you all for attending today, and for your active participation, and not least for completing the course by listening to me.