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Commission on Justice in Wales / Y Comisiwn ar Gyfiawnder yng Nghymru
Crown Buildings / Adeiladau'r Goron
Cathays Park / Parc Cathays
Cardiff / Caerdydd
CF10 3NQ

Submission to the Commission on the History and Workings of the Administrative Court in Wales

Dear Sir or Madam

I have prepared this submission at the request of the Commission to assist with the Commission's understanding on the history and working of the Administrative Court in Wales. As the Administrative Court Office Lawyer for Wales from the inception of the Administrative Court Office in Wales in 2009 until October 2017, when I joined No5 Barristers Chambers, I hope the Commission will agree I am in a position to assist and that the submission is of use. Unfortunately, the Administrative Court Office in Wales itself is not in a position to assist with this submission, and I understand a direct request to the Head of Devolution at the Ministry of Justice would need to be made for any submission from the Ministry of Justice.

This submission is a short background on the Administrative Court for Wales. For further information on the history of the Court the Commission may be assisted by Gardner, D., *Administrative Law and the Administrative Court in Wales*, 2016, University of Wales Press, Chapter 2.

The Administrative Court in Wales

The Administrative Court is part of the Queen's Bench Division of the High Court. The Court hears the majority of applications for judicial review (the Upper Tribunal also has a limited judicial review jurisdiction). The Court also hears appeals and applications that arise directly out of a statutory power to challenge a public body's act or omission. It is by way of both judicial reviews and statutory appeals and applications that a person may challenge the act or omission of a public body. Judicial review, the mainstay work of the Administrative Court, derives from the ancient prerogative writs whereby citizens directly petitioned the Monarch for relief against the acts done in the Monarch's name. Such applications had been the preserve of the Queen's Bench Division based in London for hundreds of years, although

prior to 1974 they were not contained within the unified judicial review process but by a number of writs (such as the writ of certiorari).

Since 1999, in line with the Government of Wales Act 1998 and the establishment of a devolved Government in Wales, an Administrative Court case could be brought in the Administrative Court in Wales in any case where the claim involved a devolution issue or an issue concerning a Welsh public body, the latter whether or not it involved a devolution issue. Practically, the claims were still generally managed and often heard in London.

The position changed on 21 April 2009 following the implementation of Civil Procedure Rule Practice Direction 54D.¹ Now, the vast majority of judicial reviews and statutory appeals and applications in the Administrative Court may be lodged and administratively handled in the Administrative Court Office for Wales at Cardiff Civil Justice Centre, albeit there are still some exceptions relating to terrorism, proceeds of crime, and disciplinary matters relating to solicitors.² Those claims can be heard all over Wales. The Administrative Court has held hearings in Caernarfon, Cardiff, Carmarthen, Mold, Newport, Port Talbot, Rhyl, Swansea, Welshpool and Wrexham.

This is not to say that matters involving Welsh public bodies *must* be heard in the Administrative Court in Wales. CPR PD 54D allows a litigant to bring a claim in any of the Administrative Courts in England and Wales. The emphasis is on the location of the Claimant to determine the most suitable venue, but the practice direction does not *require* a claim be lodged in any particular Administrative Court Office. Thus, a claim against a Welsh public body or a claim considering a devolution matter could be heard in London, Birmingham, Manchester or Leeds. This said, there is a general expectation, following cases such as *R. (Condrón) v The National Assembly for Wales*,³ *R. (Deepdock) v The Welsh Ministers*,⁴ and *R. (Condrón) v Merthyr Tydfil County Borough Council*,⁵ that challenges to the decision of devolved bodies “*should be heard in Wales unless there are good reasons for their being heard elsewhere.*”⁶ Further, under CPR PD 54D, decisions of any public bodies in England and Wales, including those based in England, can be brought in the Administrative Court for Wales. Indeed, a large number of claims lodged in the Administrative Court Office based in Cardiff Civil Justice Centre relate to the Western Circuit and the office arranges hearings for those cases in South West England.⁷

It is worth noting that of the statutory appeals and applications that are considered in the Administrative Court in Wales, some of these statutory appeals and applications specifically relate to devolved matters in Wales and must be lodged and heard in Wales pursuant to CPR

¹ Following the recommendations of the 2007 working group report *Justice Outside London*.

² See Civil Procedure Rules Practice Direction 54D paragraph 3.1

³ [2007] 2 P. & C.R. 4.

⁴ [2007] EWHC 3347 (Admin)

⁵ [2009] EWHC 1621 (Admin)

⁶ HHJ Hickinbottom (as he then was) in *R. (Deepdock) v The Welsh Ministers* [2009] EWHC 1621 (Admin) at paragraph 20.

⁷ As is the procedure recommended in the Administrative Court Judicial Review Guide 2018 at paragraph 6.6.4.

PD 52D paragraph 27A. They are:

- An appeal against the decision of the Adjudication Panel for Wales, which determines disciplinary proceedings against local authority councillors brought by the Public Services Ombudsman for Wales under s.79(15) Local Government Act 2000;⁸
- An appeal pursuant to s.32(1) of the Education (Wales) Act 2014 against a decision of the Education Workforce Council to make a disciplinary order against an education professional;
- Appeals pursuant to the Welsh Language (Wales) Measure 2011 against a decision of the Welsh Language Tribunal.

In addition to these statutory appeals, the Administrative Court may also be required to determine a devolution issue after a reference from a Magistrates' Court under part 2 of schedule 9 of the Government of Wales Act 2006. To date, to my knowledge, no such reference has ever been made.

Judges of the Administrative Court in Wales

Under the current judicial arrangement, cases in the Administrative Court in Wales are heard by both High Court and Deputy High Court Judges. The latter are typically Circuit or Upper Tribunal Judges who may sit as High Court Judges.⁹ Those Judges sit in both England and Wales and both the High Court Judges as well as the locally based Deputy High Court Judges sit frequently the Royal Courts of Justice in London, as well as in Wales.

Overall judicial responsibility for the Administrative Court in Wales is assumed by the Queen's Bench liaison judge for Wales (who is also the liaison judge for the Midlands and the Western Circuit). Past liaison Judges have included Mr Justice Beatson (as he then was), Mr Justice Hickinbottom (as he then was), Mr Justice Lewis, and Mr Justice Singh (as he then was). The current liaison Judge is Mr Justice Garnham. The liaison judge sits in Wales once every legal term for a period of typically two to three weeks but does sometimes sit in Wales outside those periods when necessary. A visiting High Court judge also sits once a term for a period of two to three weeks, the result being that every legal term the Administrative Court in Wales has four to six weeks of dedicated High Court judge time. There is no specific time set aside for Divisional Court sittings but Divisional Courts are arranged on an ad hoc basis as required. The Deputy High Court judges who sit in Wales are typically local judges who sit as judges in other jurisdictions for the majority of the time.

⁸ When the procedure for disciplining local authority councillors changed in England under the Local Government and Public Involvement in Health Act 2007 and the Localism Act 2011 the changes did not affect Wales as the powers and duties of local authorities and their members is a devolved subject.

⁹ See s.9 Senior Courts Act 1981. Practitioners are also sometimes appointed to sit Deputy High Court Judges but practitioner deputies rarely sit in Wales.

The Administrative Court Office in Wales

The Administrative Court Office in Wales is based in Cardiff Civil Justice Centre. It is a part of Her Majesty's Courts and Tribunals Service ("HMCTS"), an Executive Agency of the Ministry of Justice ("MOJ").

The Administrative Court Office in Wales is staffed by an Administrative Court Office Lawyer (currently Charlotte Murphy) who must be a qualified barrister or solicitor. The Administrative Court Office Lawyer advises the judges, the Administrative Court Office, and the parties on procedure, provides the judges with legal research assistance, and has power to make judicial orders in accordance with CPR 54.1A to ensure proper case management of the cases before the Court. The office further includes a manager and two caseworkers who are responsible for the day to day running of the office and the cases, from issuing of the case, through to listing, and production of any orders. Unlike other Courts, the caseworkers handle every aspect of the claim from start to finish which results in continuity of service. This is made possible, of course, by the relatively low numbers of claims compared to, for example, the County Court where there will be separate staff members for issuing listing, and production of orders.

Statistics

There has been a steady, year on year, rise in the number of cases filed in the Administrative Court Office in Wales.¹⁰ The number of claims, it must be conceded, is comparatively low. For example, when compared to the most prolific regional Administrative Court, Birmingham, the numbers pale in comparison, with Birmingham issuing 722 claims in 2012 to Cardiff's 187. One possible explanation may be that the variation can be put down to population size. In 2012 it is estimated that Wales had a population of 3,074,100²² whereas the Midlands had an estimated population of 10,210,300,²³ creating an obviously smaller pool of potential claimants in Wales. Nonetheless, the availability of the Administrative Court Office in Wales does appear to be increasing the number of claims brought in Wales. Between 2009 and 2013, in non-immigration judicial reviews, there was a 20 per cent increase in claims brought by solicitors in Wales, a 15 per cent increase in claims brought by litigants in person, and a 14 per cent increase in claims against Welsh local authorities.¹¹ Thus, the availability of local administration and local hearings appears to be providing greater local access to justice. The *Justice Outside London Report*, which recommended the establishment of Administrative Court Offices outside of London,¹² did expressly observe that claim numbers were likely to be smaller in Wales.¹³ Further, the number of claims dealt with is rising, although it should be noted that large numbers do come from the Western Circuit. Whilst the statistics give an appreciation of the access to justice based need for

¹⁰ See Annex F of Gardner, D., *Administrative Law and the Administrative Court in Wales*, 2016, University of Wales Press for statistics on the Administrative Court in Wales

¹¹ Nason and Sunkin, 'The Regionalisation of Judicial Review' (2013) 76(2) MLR 223 at 235. The author would also recommend the Commission consider the continuing and excellent research of Dr Nason, who will likely be able to give more recent versions of these figures.

¹² <https://www.judiciary.uk/publications/summary-of-main-recommendations/>

¹³ *Justice Outside London*, paragraph 90.

decentralised Administrative Courts it should be noted that the *Justice Outside London Report* firmly concluded that it was access to justice and constitutional reasons that justified and, indeed, required an Administrative Court in Wales.

In terms of the most recent statistics, the below were provided by the Administrative Court Office at the Court User Meeting held at Bristol Civil Justice Centre on 12 June 2018:

Cardiff Office Annual Receipts

	2017	2016	2015
ACO	144	133	131
UTIAC	92	97	116
Total	236	230	247

These statistics show an increase in Administrative Court Office claims but a decrease in judicial review brought in the Upper Tribunal Immigration and Asylum chamber, which is run from the same office as the Administrative Court Office in Wales.

The Future

There are a number of potential futures for the Administrative Court in Wales. The current format and function as the Court that considers challenges against the decisions of public bodies in Wales as well as the Court of first instance to determine points of law in Wales, of course, remains an option. The Commission may, however, wish to consider the potential that the Administrative Court in Wales and administrative law in Wales offer in a redesigned justice system for Wales.

A consideration that the Commission may wish to consider is the efficacy and appropriateness of the fact that Welsh administrative law cases can be lodged and dealt with in England. The author questions whether this truly reflects the constitutional status of the Court and the effect of the devolution settlement.¹⁴ The devolution settlement in Wales continues to evolve. As part of that the jurisdiction of the Administrative Court in Wales also continues to evolve. As greater legislative and executive autonomy comes to Wales it may be that a fully decentralised system of checks and balances must also be developed. It is submitted that it should be an accepted principle that any legal business that involves Welsh institutions is conducted in Wales. It, therefore, appears logical that the next step in decentralisation (and perhaps devolution) for the Administrative Court in Wales is to remove

¹⁴ For further argument see paragraph 2-19 Gardner, D., *Administrative Law and the Administrative Court in Wales*, 2016, University of Wales Press

the possibility of judicial checks in the Administrative Court outside Wales, with any such cases to be automatically transferred to the Administrative Court Office in Wales if they are lodged elsewhere. Such a system would preserve the access to justice provisions of CPR PRD 54D whilst strengthening constitutional autonomy for Wales.

The Commission may also wish to consider whether the administrative law system as currently practiced in Wales is the most effective and accessible method of ensuring that the public have proper access to justice. The author poses the question as to whether an administrative law code or act for Wales would be desirable. That question requires greater analysis than this submission allows, but the Commission may wish to consider the author's publication in *Statute Law Review* which discusses this possibility, D. Gardner, 'An Administrative Law Code for Wales: Benefits to Reap and Obstacles to Overcome', 2018, SLR¹⁵ and in the paper by Sarah Nason and David Gardner, 'The Administrative Court and Administrative Law in Wales and Comparative Perspectives' in Nason. S (ed), *Administrative Justice in Wales and Comparative Perspectives*, 2017, University of Wales Press.

The author is happy to explain or clarify any points in this submission as required.

A handwritten signature in dark ink, appearing to read 'D. C. Gardner', with a long, sweeping horizontal line extending to the right.

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¹⁵ <https://academic.oup.com/slr/advance-article-abstract/doi/10.1093/slr/hmy003/4880596>. Print publication pending.