

THE TRIBUNAL SYSTEM IN WALES: MAP AND UPDATE ON JURISDICTIONS

The tribunal landscape in Wales is complex and diverse. Some tribunals are reserved, some devolved. There are citizen and state tribunals, i.e. most tribunals, social security, tax etc. There are the alien and state tribunals, (immigration and asylum, asylum support) and party and party (employment). Each tribunal has varying degrees of formality and its own procedures. The Tribunals procedure Committee, chaired by a High Court Judge, makes procedure rules for both the UT and FtT. The Senior President for Tribunals (SPT) may make directions as to the practice and procedure of both UT and FtT. Some tribunals operating in Wales are UK-wide such as, for example, social security and immigration and asylum. Some are England and Wales-wide, such as employment and others are devolved with responsibility resting with the Welsh Government. It is clear that devolution of executive powers has had an impact on administrative justice in Wales. Whilst Wales currently has no separate justice system nor is the administration of justice a devolved function nevertheless because some devolved tribunals in Wales are administered by the WG itself, in one sense part of the justice system has undergone a process of devolution in Wales.

The reserved tribunals are now part of Her Majesty's Courts and Tribunals Service (HMCTS), formerly the Tribunals Service and Courts Service. HMCTS is an executive agency of the Ministry of Justice (MOJ), charged with administering courts and tribunals. The Tribunals Service was presided over by Lord Justice Carnwath as its Senior President of Tribunals. He of course will shortly be taking up his appointment as a Justice of the Supreme Court – their gain is our loss.

Albeit administered from London, there is regionalisation of many of these UK-wide tribunals in Wales. This regionalisation provides for Welsh sensitivities and differences to be respected and accommodated meaningfully and, of course, linguistic considerations are an important aspect of the administration of justice in Wales.

Citizen and state tribunals deal with issues which are fundamental to the people of Wales. These include social security, welfare, health, education, tax etc. To give you some idea of the scales of appeals there were approximately 25,000 social security appeals last year and about 1,500 mental health review tribunal appeals in Wales.

The Tribunals, Courts and Enforcement Act 2007 (TCE) created the Upper Tribunal (UT) and First-tier Tribunal (FTT). The UT is a superior court of record, independent of government or other public authority. Both UT and FTT are divided into a number of chambers which exercise discrete areas of jurisdiction. The UT was initially described as the alter ego of the High Court.

It is clear that Parliament's wish that the UT relieve the higher courts of some of its JR work is now endorsed, indeed welcomed, by the judges of the High Court and Court of Appeal. There is a commitment for closer working between the Administrative Court and the UT, which reflects the senior judiciary's confidence in UT judges. Consistency of approach is key; anything less in the IAC will not secure buy in from the Home Office or appellants.

The transfer of JR work has been problematic in the IAC. Only a small percentage of cases have been transferred – fresh claims and some age assessment appeals.

A recent situation arose where approximately 80 unsuccessful asylum seekers were to be returned to Sri Lanka on a chartered flight. Applying its expertise and country knowledge, two UT judges sat with prompt speed and determined the issue – i.e. risk on return – so that the appeals could be decided prior to the departure of the flight. This is an illustration of how responsive the UT can be to such a situation which requires a technical knowledge. The expertise of the UT allows a speedy and authoritative determination of such issues in a fast moving area of law. Lady Hale has in more than one case recognised the expertise and specific knowledge of expert and specialist tribunals.

Although the UT lacks the inherent jurisdiction and remedies of the High Court, it has the jurisdiction to inquire whether the decision was one made in “accordance with the law”.

Two Supreme Court cases considered whether unappealable decisions of the UT were reviewable by the High Court in England or by the Court of Session in Scotland. These cases were crucial to the viability of the structure created by the 2007 legislation.

There were two claimants in the English case - *Cart and MR (Pakistan)* [2011] UKSC 28, and one claimant in the Scottish case - *Eba v Advocate General for Scotland* [2011] UKSC 29. The claimant in each case sought a judicial review of the refusal of permission by the UT to appeal to the UT a FTT decision.

Part 1 of the TCE Act which established a new unified tribunal structure created a right of appeal to the Court of Appeal in England and Wales, or Northern Ireland, or the Court of Session in Scotland “on any point of law arising from a decision made by the UT other than an excluded decision” – (S13(1)(2)). Excluded decisions include any application for permission or leave to appeal (S13(8)(c)).

The Supreme Court unanimously dismissed the two English appeals on a different basis from that adopted in the Divisional Court and the Court of Appeal. It (Lady Hale giving the leading judgement) decided that permission for judicial review should only be granted where the criteria for a second-tier appeal apply, that is where there is an important point of principle or practice or other compelling reason to review the case.

The scope of judicial review is an artefact of the common law whose *raison d'être* is to maintain the rule of law in a proportionate manner. The question is “what level of independent scrutiny outside the tribunal structure is required by the rule of law?”

The Supreme Court considered that the adoption of the second-tier approach was a reasonable and proportionate restriction upon the availability of JR of the refusal by the UT of permission to appeal to itself.

The enhanced tribunal structure deserved a more restrained approach to JR than was the practice hitherto.

The Supreme Court also dismissed the Scottish appeal (Eba) on similar grounds. As Lord Hope said “The issue is not one about access to the remedy, which remains the citizen’s right, or the purpose for which the supervising jurisdiction may be exercised, but one of how best to tailor the scope of the remedy according to the nature and expertise of the UT and the subject matter of the decisions that have been entrusted to it by Parliament.

Lord Phillips said that where a statute provides a structure under which a superior court or tribunal reviews the decisions of an inferior court or tribunal, common law judicial review should be restricted so as to ensure, in the interest of making the use of limited judicial resources, that this does not result in a duplication of judicial process which is unnecessary to satisfy the demands of the rule of law.

My own jurisdiction has certainly “enjoyed” (if that is the word) a multiplicity of appeal rights – one has to ask if that was necessary to satisfy the demands of the rule of law.

The judges appointed to both UT and FTT are appointed by the Judicial Appointments Commission (JAC). They take the judicial oath and there is a statutory safeguard of judicial independence. The judges of the devolved tribunals in Wales do not benefit from this protective structural umbrella. They are not part of the Senior President for Tribunals’ responsibility nor under his protection and they do not take the judicial oath nor, as I understand it, do they have a judicial title.

Judicial independence of course is the bedrock of a democratic society. The tribunals operating in Wales are concerned that judicial independence, enshrined in the TCE Act for tribunals within the HMCTS umbrella be safeguarded. In January 2010, the Welsh Committee of the Administrative Justice Tribunals Council (AJTC) published the report of its “Review of Tribunals Operating in Wales”. Its purpose was to test whether observations that the tribunals system in Wales was complex and fragmented were so in reality. The Welsh tribunal landscape could best be described as complex and fragmented as it consisted of a patchwork of tribunals which had evolved in an ad-hoc way prior to devolution, thereby lacking a coherent structure in strategic development planning. The Review published recommendations designed to promote a more integrated and coherent system of administrative justice which is responsive to the needs of users and to establish above all an independent and impartial tribunal administrative justice system in Wales. The most pressing issue remains the lack of separation of powers between devolved tribunals and the department or body whose decision is appealed. The Review concluded that most Welsh tribunals were not sufficiently independent from the departments or agencies whose decision they were considering. For the non-devolved tribunals, post-Leggatt, the situation has been largely addressed and remedied by the creation of first the TS and now HMCTS.

In respect of the key finding that there needs to be separation of powers, it must be noted the justice is not a devolved function and therefore there is no equivalent to the Ministry of Justice in Wales. There is considerable support for the view that an appropriate ministerial responsibility in Wales should be considered.

The AJTC's Welsh Committee recommended that responsibility for all Welsh tribunals should be transferred to a focal point within the WG which had no specific departmental responsibility or remit. Its establishment in the department of the First Minister and Cabinet was perceived as an encouraging signal. However, the transfer of policy and administrative responsibility for devolved tribunals in Wales to this office has been slow, but there is progress. This slow pace reflects a lack of resources, I believe, rather than any lack of commitment on the part of the Welsh Government. Margaret McCabe is the committed and energetic head of the administrative justice unit. However it was disappointing that the office was subsequently relocated to the Permanent Secretary's Division. Regardless of assurances from the First Minister that democratic accountability for the unit would remain in his hands and that it would continue to receive his active attention and interest, there is unease by the judiciary at this action and the message it sends.

I am happy to report that there has been positive progress however since the AJTC's review in 2010. This is attributable in large part to the commitment and resolve of the Administrative Justice Unit. On 1 April 2011 the Special Educational Needs Tribunals for Wales, the Registered School Inspectors Appeals Tribunal and the Registered Nursery Inspectors Appeal Tribunal all transferred to the Administrative Justice Unit. In the first half of 2012, it is anticipated that responsibility for the administration of the Adjudication Panel for Wales, the Mental Health Review Tribunal for Wales, the Agricultural Lands Tribunal and the Residential Property Tribunal will all transfer to this central unit.

Two tribunals whose administrative support is not currently provided by the WG are the subject of an in-depth feasibility study. They are the Valuation Tribunals for Wales and the School Admission and School Exclusion panels.

It seems that the Traffic Penalty Tribunal will be excluded because the Traffic Management Act of 2004 provides that enforcement authorities must provide administrative support.

In 2010 the Council of Europe renewed the commitment of all European member states to the highest level of protection of judicial independence in the constitutions and fundamental laws of all member states. The UK and all its constituent governments is, of course, included in this commitment. It is fundamental that the WG recognise the crucial importance of independence in all areas of judicial activity. Judicial activity extends to judicial appointments, the handling of judicial complaints, the provision of judicial training as well as decision-making itself. The WG will need to be careful that it is not out of line with other parts of the UK, including the islands on this issue. Not only is the reality of judicial independence the cornerstone of a properly functioning democracy, so also is it imperative that it must be perceived as such. The WG needs to take steps to distance the judiciary from the danger of ministerial and departmental interference or influence. An independent and transparent process for the appointment, discipline and removal of Welsh judges is essential. The lack of any consistent and formal process or mechanism in Wales for handling any improper pressure to judicial activities is troubling. I welcome the work that is underway in respect of complaints handling.

Tribunal judges who are accused of judicial misconduct have such complaints handled in accordance with the Constitution Reform Act of 2005 and the Judicial Complaints (Tribunals) (No 2) Rules of 2008. These provisions do not extend to tribunal judges of devolved tribunals in Wales. Whilst the expedient solution may be to extend application of these provisions to Wales, there is a need to have regard to the individual cultural Welsh identity. Political and cultural nuances must be taken into account. To import English solutions without any accommodation for national differences may not be acceptable in all judicial quarters. However, whilst flexible adjustment to the national identity of Wales and its language is key, the safeguarding of judicial independence is not negotiable. There are useful analogies to consider elsewhere, namely Northern Ireland, Scotland and the Channel Islands. It might be argued that Wales appears to be out of line with its neighbouring jurisdictions. This causes real concern to tribunal judges in Wales.

The WG will need to address these concerns. Training is an area where the WG is yet to respond meaningfully to concerns raised about the provision for training needs. The proper training of the judiciary in the courts and tribunals of England and Wales is a statutory responsibility for both the Lord Chief Justice and the Senior President of Tribunals. Safeguarding a high standard of judicial performance is key to maintaining public confidence in the administration of justice and consistency of training through our tribunals is crucial.

The Judicial College, which came into existence on 1 April 2011, is committed to providing high quality training. Although the College is only directly responsible for the judges and members of reserved tribunals across England and Wales, it is clear that devolved tribunals in Wales need to be supported to the same extent as their judicial colleagues who sit in non-devolved tribunals. It is worth noting the fact that onward rights of appeal from some devolved Welsh tribunals lie to the Upper Tribunal, whose judges have UK-wide jurisdiction and benefit from the training provided by the Judicial College. Despite troublesome funding issues, I hope there will be a satisfactory outcome which ensures that legal and non-legal members of devolved Welsh tribunals enjoy the benefits of training afforded by the Judicial College. I welcome the setting up of a Welsh Training Committee and note that the Welsh Committee will be chaired by a High Court Judge, Mr Justice Rod Evans. That committee will liaise inter alia with the Tribunals Committee. I very much hope that the MOJ and WG officials can work together to this end despite the current financial pressures which constrain them. A recent appointee to the Board of the Judicial College is a Welshman- UTJ Andrew Grubb. He will increase tribunal representation on the board.

The AJTC's Welsh Committee published its latest annual report in November 2011. Albeit that it reported on what had changed it also noted with regret that some of the concerns raised in its 2010 Review had yet to be addressed.

One of the Review's recommendations was far greater co-operation and collaboration between tribunals sitting in Wales. A Welsh Tribunals Contact Group (WTCG) which I chair has been set up. Its membership comprises both reserved and devolved tribunal judges. Margaret McCabe and her colleagues provide valuable administrative support for the group which has focussed particularly on the issue of training needs exploring the scope for joint training. There are other areas and activities of interest and concern where an agreed approach is not only mutually supportive but can also deliver economies of scale and provide consistency where appropriate. Appraisals, complaint handling, cross-ticketing, joint training on generic matters and diversity issues are some of the areas. It is clear that multi-jurisdictional co-operation is key. Cross-ticketing in both the FtT and UT is an exciting prospect despite the obvious challenge of so doing in expert jurisdictions.

Ultimately, the paramount concern is for the independence of the judiciary. In this regard the devolved tribunal judges in Wales are particularly vulnerable because of the absence of appropriate judicial or ministerial protection.

The Constitutional and Legislative Affairs Committee's inquiry into the establishment of a separate Welsh jurisdiction is now considering the responses thereto. I note that the Welsh Government issued its Consultation Document on a separate legal jurisdiction on Tuesday. It would be inappropriate for me to comment on whether or not a separate jurisdiction for Wales is desirable – that is a political question but what must be safeguarded in any changes that lie ahead is the independence of the judiciary from government. In a recent address on threats to judicial independence, Lady Justice Hallett concluded thus: “I conclude with some remarks from the Lord Judge LCJ at the 16th Commonwealth Law Conference in Hong Kong in April 2009(8) because I cannot put it any better”. Needless to say neither can I!

“In a democratic country all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it. Ultimately, however, it is the judges who are the guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist. The judge therefore cannot be out for popularity. He or she cannot please everyone. He should never try to please everyone. That includes the judge himself. He should never use his office to confirm his predilections or to allow his prejudices to gain some kind of spurious judicial respectability. However, because he is not accountable to the electorate as members of the legislature are, he is entitled to apply the relevant law, but only the relevant law, and although he must be aware of

his powers, it is critical to the independent exercise of his responsibilities that he should fully recognise the limitations of his power. Having been entrusted with huge power, judges have an ultimate responsibility to see that when exercising the power vested in them, they use it lawfully in precisely the same way as they ensure that political and other powers vested in other institutions of the State are exercised lawfully. Without independence and without respect for judicial independence these desirable, indeed elementary facets of a civilised society are threatened. At the same time no individual, or group of individuals, not even any judge, however high his office, has any dispensing power – that is, the power to set aside or disregard the law”.