DEVOLUTION AND EVOLUTION: JUDICIAL REVIEW IN WALES.

CLIVE LEWIS Q.C.

11 KING'S BENCH WALK

INTRODUCTION

1. This session is intended to describe briefly the current devolution settlement in Wales and two key cases dealing with the nature of the devolution settlement, one Welsh one Scottish. In addition, the session looks at some of the cases involving the Welsh Assembly Government over recent years with a view to assessing the way in which such cases contribute to the development of judicial review.

THE STRUCTURE OF THE DEVOLUTION SETTLEMENT

2. The basic framework of the current devolution settlement is contained in the Government of Wales Act 2006 ("GOWA").

Institutions

3. The legislation provides for an elected body, the National Assembly for Wales with, at present, 60 members, 40 elected by the traditional first past the post method for Assembly constituencies (which are the same as the Westminster constituencies) and 20 elected on a regional basis by a system of proportional representation.

4. Since 2006, the Assembly has had power to make laws, known as Assembly Measures, but only in a limited number of specific areas where legislative competence has been conferred upon the Assembly by GOWA or by Order in Council.

5. Following a referendum in March 2011, the Assembly will now acquire power to make laws for Wales, known as Assembly Acts, in the 20 areas listed in Schedule 7 to GOWA. These areas range from agriculture through economic development and education, to local government, social welfare, planning and the Welsh language.

6. In summary, Bills will be submitted to the Assembly for approval and then, when given Royal Assent, will become Acts of the Assembly. The Assembly may make any provision in the specified areas that could be made by an Act of Parliament. There are certain restrictions, most notably that provisions are outside the legislative competence of the Assembly if they are incompatible with Community law or Convention rights.

7. Subordinate legislation made by the Welsh Ministers may also, depending on the statutory provisions conferring the functions or the Order in Council transferring the functions to the Welsh Ministers, need to be laid before the Assembly, or require Assembly approval, or to be subject to annulment by the Assembly. Statute also confers upon the Assembly specific functions to consider and approve particular measures or plans.

The Welsh Assembly Government

8 GOWA provides for a Welsh Assembly Government comprising the First Minister, the Welsh Ministers, the Deputy Welsh Ministers and the Counsel General. The First Minister and the Welsh Ministers are collectively referred to as the Welsh Ministers. Functions may be conferred or imposed upon the Welsh Ministers either directly by statute or by an Order in Council transferring functions to the Welsh Ministers. Functions are exercisable on behalf of the Crown. The likelihood is that the *Carltona* principle applies to the Welsh Ministers, as they are Her Majesty's Ministers exercising functions on behalf of the Crown, so that decisions do not need to be taken personally by the relevant Welsh Minister but may be taken by civil servants acting on behalf of the Welsh Ministers. Certain functions may be made exercisable by the Welsh Ministers and Ministers of the Crown jointly or by the Welsh Ministers after consultation with Ministers of the Crown.

9 A wide array of statutory duties and powers have been conferred upon the Welsh Ministers. They take a wide range of administrative decisions in areas such as agriculture, education, health, social care and planning and the environment. They also have power to do anything which they consider appropriate to achieve the promotion or improvement of the economic, social or environmental well-being of Wales. The Welsh Ministers also have powers to make subordinate legislation in a wide range of fields. The Welsh Ministers may be, and have been, designated for the

purposes of making regulations for the purpose of implementing any European Community law obligation. The Welsh Ministers have no power to make, confirm or approve any subordinate legislation or do any other act in so far as that would be incompatible with either European Community law or Convention rights. Furthermore, if the Secretary of State considers that action proposed by the Welsh Ministers would be incompatible with any international obligation, he may direct that he proposed action is not taken.

Case law

10 Two cases, one Welsh, one Scottish, deal with the approach to be taken to statutes such as GOWA and to the scope of judicial review in relation to legislative acts of the devolved institutions.

11 The Scottish case, *Axa General Insurance v The Lord Advocate* [2011] CSIH 31, concerned an Act of the Scottish Parliament providing that asbestos related pleural plaques and other asbestos related conditions were personal injury actionable under Scottish law. Insurance companies challenged the legislation. They claimed that Acts of the Parliament could be judicially reviewed on all the usual grounds – i.e not only to determine if the measure was within the legislative competence of the Scottish Parliament but also on ordinary common law grounds such as irrationality or procedural unfairness. The Counsel General was given permission to intervene to make submissions on GOWA.

12 The Court of Session held that legislation of the Scottish Parliament was sui generis. It was law "essentially of a primary nature" rather than subordinate legislation – but Acts of the Scottish were not to be equated to Acts of the United Kingdom Parliament. The recognition of Acts of the Scottish Parliament as sui generis called for a new approach. The traditional grounds of judicial review were not apt for them. They were open to review on grounds of illegality (i.e. the Act was outside the scope of the powers conferred on the Scottish Parliament). They were not apt for review on

grounds of procedural irregularity or irrationality. There were, however, circumstances where such legislation could be struck down on common law grounds. Possible suggestions were legislation which was disproportionate or which was motived by "bad faith" or improper motive or which excluded the right of the citizen to challenge executive action by judicial review. In the present case, no such case was made out.

13. The second case, *R (Governing Body of Brynmawr Foundation School) v Welsh Ministers* [2011] EWHC 519, concerned section 83 of GOWA. Under that section, the Welsh Ministers may enter into arrangements with a relevant authority (, e.g. a Minister of the Crown or a public authority including a local authority) whereby that body exercises functions of the Welsh Ministers on their behalf. There are exceptions – the functions of making, confirming or approving subordinate legislation cannot be delegated. The Welsh Ministers entered into an arrangement with a local authority whereby the local authority was to exercise the functions of consulting upon and making proposals for reorganising sixth form education at foundation schools. The Governing Body contended that the pre-existing statutory scheme for education gave considerable autonomy to foundation schools and did not envisage local authorities taking steps in relation to foundation schools. They contended that, in accordance with the usual principles of statutory interpretation, the general words of section 83 GOWA should be read subject to that the other statutory scheme and, in that way, as impliedly restricting the powers of the Welsh Ministers to delegate under section 83 of GOWA.

14 The Court held that in considering the scope of the powers conferred and the applicable principles of statutory interpretation, it was appropriate to consider the nature and purpose of the statue under consideration. GOWA, as one of the statutes devolving power from the Westminster Parliament to Wales, Scotland and Northern Ireland, is a major constitutional measure and an essential element of the architecture of the modern United Kingdom. In applying the rules of statutory construction to determine the scope of the powers, the Court would take into account its constitutional status. The argument that the provisions of the earlier statutory scheme

impliedly restricted the scope of the Welsh Ministers powers under section 83 of GOWA failed to take sufficient account of the constitutional nature of GOWA. Provisions of GOWA prescribing how the Welsh Ministers may exercise their functions "should not, absent clear words, be avoided or circumvented by resort to a specific provision in a non-constitutional statute".

THE ADMINISTRATIVE COURT IN WALES

15 Following devolution in 1998, the Administrative Court regularly sat in Wales to hear challenges to decisions of the Welsh Assembly Government. In *R (Deepdocik Limited) v the Welsh Ministers* [2007] EWHC 3347, the Administrative Court emphasised that challenges to decisions made in a devolved area by the Welsh Ministers should generally be heard in Wales. The Administrative Court sits wherever convenient in Wales – cases have been heard in Cardiff, Swansea, Caernarfon and Rhyl. The Court of Appeal sits in Cardiff. There is now a Practice Direction (following the relaunch of the Administrative Court in Wales, and the establishment of regional centres in England).

16 There have been a large number of cases challenging administrative decisions, or subordinate legislation, made by the Welsh Assembly Government over time. There are frequent challenges in some areas of devolved responsibility such as planning and agriculture (where the Welsh Ministers are responsible for administering the common agricultural policy in Wales). Some of these challenges involve determination of the meaning of UK and EU legislation and will be generally applicable or points of common law applicable in England and Wales. Other challenges have reflected the specific policy decisions of the Welsh Ministers – examples being the unsuccessful challenge to the lawfulness of the prohibition on the use of electronic collars on dogs and cats in Wales in *R (Petsafe) v Welsh Ministers* or the successful challenge to the order providing for the destruction of badgers in Wales in *R (Badger Trust) v Welsh Ministers*. Some reflect individual problems in Wales, perhaps the most famous being the case involving the order for slaughter of Shambo, the bullock, owned by the Community of the Many Names of God where the claim was that the order would

violate the rights of the Community to freedom of religion under Article 9 of the European Convention on Human Rights.

17 Dealing with the first category, there are many examples of the Administrative Court in Wales dealing with general UK or EU legislation. The Court of Appeal, in the *Isle of Anglesey County Council v The Welsh Ministers* [2010] Q.B. 163, had to delve into the meaning of the Sea Fisheries Act 1868, to determine whether that Act gave power to make an order granting exclusive rights to fish for mussels which permitted the right to be exercised by other persons. Moving into the present century, the Court of Appeal also had to consider the meaning of the hardship provisions in EU Regulations made in 2005 to determine whether a farmer who had intended to increase his production, but was prevented from doing so, qualified for subsidies under the common agricultural policy (*R (Gwillim) v Welsh Ministers* [2010] EWHC 2946). In one case, the Administrative Court, sitting in Swansea, had to deal with the effect of completion notices served under section 95 of the Town and Country Planning Act 1990 . These were notices requiring development to be completed by a particular time and, if it was not, the planning permission was revoked. The question arose as to what was the status of work done in accordance with the planning permission but not completed before the time provided for in the completion notice. The point had not been decided before. The Administrative Court accepted the arguments of the Welsh Assembly Government that, on a proper construction of section 95, that the parts of the development completed before the relevant time remained lawful. All these are examples of cases where the responsible authority for administering parts of a UK Act of Parliament, or EU legislation, in Wales were the Welsh Assembly Government and the facts (and the decision triggering the legislation) occurred in Wales. The interpretation given to the legislation applies in England and Wales (or wider if the legislation applies more widely).

18 Decisions on the common law also arise for decision in Welsh cases such as the decision in *Condron v National Assembly for Wales* [2007] 2 P & C R 38 on what constituted bias at common law or in *Jefferson v National Assembly for Wales* [2008] 1 WLR 2193 holding that the relevant planning policies in force at the time of an

appeal decision were the ones to be considered (not the ones in force at the time of application or the initial decision).

19 Some challenges, however, arise out of distinct Welsh legislation – initially, subordinate legislation but then Assembly Measures and, soon, Assembly Acts. A good example is *R (Petsafe) v Welsh Ministers* [2010] EWHC 2908 (Admin). There Welsh Ministers legislated to prohibit the use on cats and dogs of electronic collars which administered an electric shock. Primary legislation gave power to make regulations for the purpose of promoting welfare of animals. The Welsh Ministers, however, were the first devolved administration to legislate to outlaw the use of such products. The lawfulness of the order was unsuccessfully challenged on the grounds, amongst others, that the order contravened EU law on the free movement of goods. A number of domestic grounds of challenge were raised, including a claim that ti was irrational not to await the outcome of legislation by DEFRA, the body responsible for making regulations for England. The Administrative Court dismissed that argument as "While other relevant governmental authorities within the United Kingdom have taken a different decision, in Wales it is the Welsh Ministers and the National Assembly for Wales which is responsible". Given the outcome to the consultation exercise, and the advice of the Chief Veterinary Officer for Wales, it was not irrational to decide not to await the outcome of steps taken by the devolved administration in Scotland or the relevant authority for England before making the subordinate legislation for Wales.

20 Similarly, the Welsh Ministers proposed legislation providing for a cull of badgers as part of the process of dealing with bovine tuberculosis in Wales and made the Tuberculosis Eradication (Wales) Order 2009 which authorised a non-selective cull of badgers. The Court of Appeal held that the 2009 Order was unlawful as it applied to Wales whereas the evidence related only to the need for a cull in a specified area and not the whole of Wales. The majority of the Court of Appeal also gave guidance on when, under the primary legislation, an order could be made authorising the culling of badgers.