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Administrative Court Office for Wales Reply
Inquiry into the Consideration of Powers: Public Services Ombudsman for Wales

By way of a letter dated the 19th March 2015 I have been asked by the Finance Committee of the National Assembly for Wales to answer specific questions relating to the *Inquiry into the Consideration of Powers: Public Services Ombudsman for Wales*. I write this letter to provide assistance to the committee and to answer those questions to the extent that I am able. Before I turn to those questions it may be of assistance to provide some background information as to the Administrative Court for Wales and the nature of my role to provide context and the limits it places on the answers I may give to the committee.

Background Information – The Administrative Court Office for Wales

The Administrative Court (part of the Queen's Bench Division of the High Court) hears the majority of applications for judicial review[1] and some appeals and applications that arise directly out of a statutory power to challenge a public body's act or omission (commonly referred to as statutory appeals and applications). 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 act of bringing a devolved Government to 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

[1] The Upper Tribunal also has a limited judicial review jurisdiction.

were still generally managed and often heard in London.

The position changed on the 21st April 2009 following the implementation of Civil Procedure Rule Practice Direction 54D.[2] 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 in Cardiff Civil Justice Centre (there are still some exceptions[3]). Those claims can be heard all over Wales. To date the Administrative Court for Wales 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 for Wales. CPR PD 54D allows a litigant to bring his claim in any of the Administrative Courts in England and Wales, and thus a claim against a Welsh public body could be heard in London, Birmingham, Manchester or Leeds. This said, there is a general expectation, following cases such as *R. (Condron) v The National Assembly for Wales,*[4] *R. (Deepdock) v The Welsh Ministers,*[5] and *R (Condron) v Merthyr Tydfil County Borough Council,*[6] that challenges to devolved bodies "*should be heard in Wales unless there are good reasons for their being heard elsewhere.*"[7] 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.

As noted above, the mainstay of the work before the Administrative Court, including the Administrative Court for Wales, is judicial review. There are, however, a number of statutory appeals and applications that are considered in the Administrative Court for Wales. Some of these statutory appeals and applications specifically relate to devolved matters in Wales. Examples 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 s79(15) Local Government Act 2000;[8]
- An appeal against a decision of the General Teaching Council for Wales to make a disciplinary order under r.24 General Teaching Council for Wales (Disciplinary Functions) Regulations 2001;[9]
- Determination of a devolution issue after a reference from a Magistrates' Court under part 2 of schedule 9 of the Government of Wales Act 2006.

This is a short background on the Administrative Court for Wales. For further information see Gardner, D., *Public Law Challenges in Wales: the Past and the Present,* [Jan 2013], P.L. Vol 1, p1.

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[2] Following the recommendations of the 2007 working group report *Justice Outside London.*

[3] See Civil Procedure Rules Practice Direction 54D paragraph 3.1

[4] [2007] 2 P. & C.R. 4.

[5] [2007] EWHC 3347 (Admin)

[6] [2009] EWHC 1621 (Admin)

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

[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] The General Teaching Council was abolished in England by the Education Act 2011 and its functions were transferred to the Teaching Agency, an executive agency of the Department of Education. However, this change did not affect proceedings in Wales and the General Teaching Council for Wales as Education is a devolved subject.

Background Information – The Administrative Court Office Lawyer for Wales

As the Administrative Court Office Lawyer for Wales my role is essentially three fold. Firstly, I provide procedural advice for the Administrative Court Office staff, parties to proceedings in the Administrative Court, and Judges of the Administrative Court. Secondly, I provide legal research assistance for Judges of the Administrative Court. Thirdly, I have limited judicial powers that relate to case management of proceedings in the Administrative Court.[10] My role is not a judicial post or any other form of office holder, I am employed as a Civil Servant by Her Majesty's Courts and Tribunals Service ("HMCTS"), an Executive Agency of the Ministry of Justice ("MOJ"). Finally, I should note that whilst I am employed to act as the primary Administrative Court Office Lawyer for Wales, my role is not restricted to Wales. The other Administrative Court Office Lawyers (one in Birmingham, one in Manchester, one in Leeds, and eight in London) and the two Senior Legal Managers for the Administrative Court Office are able to perform the role in Wales, just as I may be called upon to perform the role in any of the Administrative Court Offices in England.

The result of this background information is that I am required to stress that the content of this letter merely sets out information about current Administrative Court practice and procedure as I understand it. The position may be interpreted differently by the Courts and this letter cannot be considered to be advice or precedent, binding or otherwise. It would be contrary to the Civil Service Code if I was to express any political opinion and I do not seek to do so. Finally, whilst I am a Civil Servant in Government employ, this response should not be taken to express the opinion of the Government or any other person in HMCTS or the MOJ.

With this information and these provisos in mind, I now turn to the specific questions on procedure that I have been asked in the letter of the 19th March 2015.

Does the Court currently have power to stay proceedings to await an Ombudsman's decision?

The Administrative Court does hold a discretionary power to stay any proceedings before it. The power to stay arises out of the Court's inherent jurisdiction to control its own proceedings[11] and thus the Administrative Court may order proceedings be stayed at any stage of the proceedings. This inherent power to stay proceedings is expressly noted in Civil Procedure Rule ("CPR") 3.1(2)(f). Thus, were the Court minded to exercise its discretion, it could stay proceedings to await an Ombudsman's decision.

The Court also has the power to stay the proceedings to which the Administrative Court case relates pending the decision of the Administrative Court.[12] In judicial review proceedings this power is expressly noted at the stage of proceedings where the Court is

[10] See Civil Procedure Rule 54.1A

[11] The Administrative Court, as part of the High Court, is a Superior Court of Record. No matter is deemed to be beyond the jurisdiction of a Superior Court unless it is expressly shown to be so. For more information see the discussion of the differences between inferior and superior Courts *in R v Chancellor of St. Edmundsbury and Ipswich Diocese. Ex Parte White* [1948] 1 K.B. 195.

[12] This power is discussed in *R. v Secretary of State for Education and Science Ex p. Avon CC* [1991] 1 Q.B. 558

considering whether to grant permission to apply for judicial review[13] in CPR 54.10(2), although this is not to say that the Court cannot exercise its inherent jurisdiction to stay those proceedings at any other stage in the Administrative Court proceedings. Thus, were it minded to do so, the Administrative Court could also stay an Ombudsman's decision pending resolution of Administrative Court proceedings.

Notwithstanding the provisions set out in section 9 of the Public Services Ombudsman (Wales) Act 2005, can the Court refuse an application for judicial review if it considers that a more appropriate course of action would be an investigation by the Ombudsman?

To my knowledge there have been no reported decisions on whether the availability of judicial review, or any other proceedings in the Administrative Court, would invoke the bar in s9(1)(c) of the 2005 Act and in what circumstances the Ombudsman should exercise his discretion under s9(2) of the 2005 Act. However, s26(6) Local Government Act 1974 is an analogous provision relating to Commissioners for Local Administration in England. The power of a Local Commissioner to investigate a public body's decision where judicial review is available and/or after that decision had been subject to judicial review proceedings was discussed in *R v Commissioner for Local Administration, ex parte Croydon London Borough Council*[14] and *R. (Umo) v Commissioner for Local Administration in England*.[15] The Court held that the Ombudsman should refuse in his discretion to investigate a complaint where he was satisfied that the Courts were the appropriate forum. The Committee's question does not ask me to discuss s9 of the 2005 Act in detail, and so I go no further than to mention the discretion the Ombudsman has not to investigate. Instead, the question addresses the more general point of whether the Administrative Court may refuse permission to apply for judicial review or a substantive application for judicial review where it considers that a more appropriate course of action would be an investigation by the Ombudsman.

Judicial review is often said to be a remedy of last resort. If there are other methods of challenge available to the claimant, and any of those methods of challenge provide an adequate remedy, the alternative remedy should be exhausted before applying for judicial review. This is a longstanding principle in judicial review and permission to apply for judicial review will generally be refused if the Court considers that there is an adequate alternative remedy.[16]

The question as to whether an adequate alternative remedy may exist in a complaint to an Ombudsman has been discussed in a number of cases, most notably *R. v Lambeth London Borough Council Ex parte Crookes*[17] and *R. (Umo) v Commissioner for Local Administration in England*.[18] Those cases suggest that a complaint to an Ombudsman can be but will not always be an adequate alternative remedy, it will depend on the circumstances of the case. However, as Mr. Justice Coulson noted in *R. (Gifford) v Governor of Bure Prison*;[19] "*For many reasons, and in many cases, the… ombudsman would be the more effective and more efficient remedy than an application for judicial review*."

[13] Under s31(3) Senior Courts Act 1981 the permission of the Court is required before a Claimant may bring a substantive judicial review.
[14] [1989] 1 All ER 1033
[15] [2004] E.L.R. 265
[16] As outlined in *R. v Epping and Harlow General Commissioners Ex p. Goldstraw* [1983] 3 All E.R. 257
[17] (1997) 29 H.L.R. 28 at 38-39
[18] [2004] E.L.R. 265 at paragraph 17
[19] [2014] EWHC 911 (Admin) at paragraph 38

Therefore, the Court may refuse permission to apply for judicial review or dismiss a substantive application for judicial review if it considers that an investigation by the Ombudsman would represent an adequate alternative remedy.

[Do] the current Rules of Court allow for... a reference [by the Ombudsman on a point of law] to be made [to the Administrative Court], or would the rules require amendment?

I am not aware of any provisions that allow for the Ombudsman to make a reference to the Administrative Court.

There are analogous provisions where a point of law is referred to Administrative Court for the opinion of the Court. Two examples are:

- Determination of a devolution issue after a reference from a Magistrates' Court under part 2 of schedule 9 of the Government of Wales Act 2006;
- An appeal by way of case stated from a Magistrates' Court under s111 Magistrates' Courts Act 1980 or the Crown Court under s28 Senior Courts Act 1981.

There has never been a reference under schedule 9 of the Government of Wales Act 2006 and, as such, I am unable to illustrate how a reference procedure to the Administrative Court for Wales would practically work. To my knowledge a reference under schedule 9 of the Government of Wales Act 2006 is the only existing reference procedure in the Administrative Court that relates solely to devolved matters as they affect Wales.

The case stated procedure is a fairly frequently used procedure and it is analogous as it allows the Magistrates' Court or Crown Court to 'state a case', that is to say refer a question on a point of law to the Administrative Court, which the Administrative Court will determine. The procedure applies across England and Wales.

It would appear to me that to create a procedure allowing for the Ombudsman to make a reference to the Administrative Court a simple change of the relevant rules of Court (the CPR) would not be sufficient. The new procedure would require primary legislation, as was the case with the above analogous procedures, and the new procedure would be a statutory application.

Assuming that no reference can be made, can the Ombudsman receive advice or guidance from the Court in any way other than by way of judicial review of a decision he has made?

There is no method by which the Ombudsman, or indeed any public body, can receive guidance from the Administrative Court without bringing proceedings in the Court. This will generally be by way of judicial review, but there are other statutory appeals and application in which proceedings can be brought and guidance can be given.

For the Ombudsman, there are, two potential sources; a judgment of the Administrative Court when considering a judicial review, or a judgment of the Administrative Court when considering an appeal against the decision of the Adjudication Panel for Wales.

which determines disciplinary proceedings against local authority councillors brought by the Ombudsman under s79(15) Local Government Act 2000. Since the establishment of the current Administrative Court for Wales in 2009 there have been two such cases:

- *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin); and
- *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin).

It should be noted that when the Court is dealing with judicial review proceedings or an appeal under s79(15) Local Government Act 2000, the Court is not obliged to give guidance. The Court will deal with the application / appeal in question and the extent to which the Court gives guidance is entirely within the discretion of the Court.

Does the Court hold any statistics relating to the cost of a judicial review hearing?

The Administrative Court Office does not keep statistics relating to costs awards by the Court or costs charged by legal representatives in judicial review proceedings.

Views on the EU Directive Alternative Dispute Resolution

I am unable to give any opinions on this subject.

I hope this advice has been of assistance to the committee. I would be happy to clarify or expand upon any of the above as required.

Yours faithfully

Mr David C. Gardner
Administrative Court Office Lawyer (Wales and the Western Circuit)