From enhanced legislative competence to a Welsh Supreme Court justice? Some developments in administrative law affecting Wales

Louise Jones, Guildhall Chambers, June 2017

1. I will consider the impact on Wales of a number of recent decisions with a constitutional or administrative law dimension. I have necessarily been selective and I have sought to concentrate on key decisions that seem to me may be of particular interest to practitioners in Wales.

Miller v Secretary of State for Exiting the European Union [2017] UKSC 5

2. The obvious starting point is the intervention of the Welsh Ministers in *Miller*, probably the most important constitutional law decision of our time. The central constitutional significance of *Miller* is, of course, well-known. The majority in the Supreme Court stopped the UK Government in its tracks in its proposed use of prerogative powers to withdraw from the EU treaties, ruling that an Act of Parliament was required for Article 50 to be triggered. However, the case is of no less interest for the devolution issues that it raised, and these were of considerable importance, so it was hardly surprising that the Welsh Ministers chose to intervene. The devolution issues arose from the contention that the terms on which powers had been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland were such that, unless Parliament provided for such withdrawal by a statute, it would not be possible for formal notice of the UK's withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures. This in turn raised the issue of the role of the Sewel convention.

3. A number of specific questions relating to Northern Ireland were before the Supreme Court, as Northern Ireland has, in the words of the majority, "established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland." (§128). In particular, the issue arose as to whether the consent of the Northern Ireland legislature to an act of parliament that triggered Article 50 was required. The Court looked at the issue more widely, and identified the commonality in the devolution settlements in Northern Ireland, Scotland and Wales,

in: (i) the statutory constraint on the executive and legislative competence of the devolved governments and legislatures that they must not act in breach of EU law – found in sections 108(6)(c) and 80(8) of GOWA; and (ii) in the operation of the Sewel Convention.

4. When enacting GOWA, Parliament had proceeded on the assumption that the UK would be a member of the European Union (which, incidentally, was consistent with the view that Parliament, not the Government through the exercise of its prerogative, would determine whether the UK would remain a member of the EU). For Wales, relations with the EU – like other matters of foreign affairs – are not devolved.[1]

5. As such, the majority in the Supreme Court at §130 said:

> "Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union. The EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations. The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence…." (§130, majority judgment in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5).

6. The particular point of interest here is that withdrawal from the EU will **enhance** the devolved competence. When this is taken in the context of the change in the Wales Act 2017 to the reserved powers model, meaning that the Welsh Assembly can legislate unless a provision relates to a subject which is specifically reserved to the UK Parliament, this would appear to be a step forward for the devolution settlement in Wales. Having said that, the passage of the Wales Act 2017 was not without controversy, and there will be those who feel that the Act could have gone further, for instance, on the question of a separate Welsh jurisdiction. Some of those considerations are discussed further below, but the simple point is that the majority

[1] Judgment was handed down by the Supreme Court on 24.1.17, one week before the Wales Act 2017 came into force, providing, *inter alia*, for a move from a conferred powers model to a reserved powers model (akin to Scotland). Foreign affairs are now a reserved matter.

judgment in *Miller* and the Wales Act 2017 seem to be pointing in the same direction: towards enhanced devolved competence.

7. The other hugely interesting point discussed in *Miller* was the Sewel Convention. This was discussed in the context of the issue of whether the consent of the Northern Ireland Assembly was a legal requirement before an Act of the UK Parliament to trigger Article 50 was passed. The Supreme Court concluded that the consent of the Northern Ireland Assembly was not such a legal requirement.

8. The Sewel Convention, named after a former Minister of State in the Scotland Office, was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature. In the case of Wales, section 107(5) of GOWA originally provided that section empowering the Welsh Assembly to make laws "does not affect the power of the Parliament of the United Kingdom to make laws for Wales". But, arising from a debate in the House of Lords on the clause that represents the equivalent position in the Scotland Act 1998, the convention is that Westminster would not normally legislate with regard to devolved matters with the consent of the Welsh Assembly. The convention was embodied in a Memorandum of Understanding between the UK government and the devolved governments originally in December 2001. Again, with the advent of the Wales Act 2017 (which was still before the UK Parliament at the time of the *Miller* judgment), the Sewel convention has now found a statutory footing: s2 of the Act provides that s107 is to be amended to state that: "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly".

9. The majority judgment noted the recent / shortly intended legislative recognition of the Convention, but nonetheless reminded us that the courts of law cannot enforce a political convention (relying on, for example, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645). The majority judgment said:

> "Even with the legislative changes, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognizing the contention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts."

In short, the majority held that the purpose of the legislative recognition of the convention was to entrench it as a convention.

10. This meant that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the UK's withdrawal from the EU (as had been recognised by the Lord Advocate and the Counsel General for Wales in argument). By extension, this meant that Northern Ireland Assembly also did not have a legal veto on the same.

11. The Supreme Court (the minority judgments agreed with the majority insofar as the Sewel Convention issue was concerned) did recognise the important role of the Sewel Convention in facilitating harmonious relationships between the UK Parliament and the devolved legislatures, but this did not change the position on the nature and effect of the Convention, nor on the position that courts of law cannot enforce a political convention.

12. Does this undermine the value of s2 of the Wales Act 2017? Perhaps only time will tell, but, despite its limitations, it is undoubtedly valuable that the Sewel Convention has been recognised on a more formal footing, especially in the context of the enhanced legislative competence that Wales should now enjoy.

***R (oao Aron Wyn Jones) v Denbighshire County Council* [2016] EWHC 2074 (Admin)**

13. In *Aron Wyn Jones*, a Divisional Court consisting of Hickinbottom J as he then was and Jarman J heard only the second claim in the Administrative Court in which submissions were made in the Welsh Language. All core documents were lodged in

Welsh, and counsel used Welsh or English as they chose during the course of the hearing.[2]

14. The substantive challenge was to the decision of Denbighshire County Council to close two maintained primary schools in the Ruthin area. The Claimant was successful, and press reporting seems to suggest that the Council has now backed down from its proposals, and if so, the Claimant has enjoyed not only theoretical legal success, but also a practical result! The first school in question was a Welsh medium primary school, a category with the highest provision of teaching in the medium of Welsh. The second was a dual stream primary school, which meant that teaching in Welsh and English existed side-by-side, with a choice existing between either mainly Welsh medium or mainly English medium provision. The Council proposed the replacement of these two schools with a new voluntary controlled primary school, to be established by the Diocese of St Asaph, operating on a dual stream basis. The Claimant, a former pupil of the Welsh medium primary school, objected particularly to the Welsh-English bilingual teaching environment of the proposed new school.

15. The Divisional Court considered the statutory provisions in Part 3 of the School Standards and Organisation (Wales) Act 2013. These provisions, *inter alia*, required Welsh Ministers to publish a School Organisation Code, which in turn defines schools according to Welsh medium provision – that set out the definitions applicable in this case of 'Welsh Medium Primary School' and 'Dual Stream Primary School'. The Code also set out both compulsory requirements and guidelines to be followed unless there was justification for departure. Part 3 of the Code reflects the requirements for consultation, and this in turn reflected the common law on consultation (originating *inter alia* from *R v Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168): the Code proceeded on the basis that, in certain circumstances, an informed response to a consultation cannot be made without the consultees being privy to a relevant assessment of the impact of the proposal on the Welsh language and/or community.

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[2] *R (oao Welsh Language Commissioner) v National Savings and Investments* [2014] EWHC 488 (Admin)

16. The Council had split its proposal into two phases, the first intending to see the new area school using both sets of existing buildings, but the second phase would see the school consolidated on a new site in the Llanfair / Pentrecelyn area, in a new build. The first ground of challenge was that the Council had failed to take into account a material consideration, namely the language and community impact of the Council's preferred option, i.e. the creation of a new school ultimately on a single site. The Divisional Court found that the impact on the language and community of the permanent arrangement was clearly relevant to the decision as to whether to take the first step of using both sets of buildings in phase one. The Court said:

> "Moving to a single site category 2 school may not only adversely affect some communities – precisely which, we accept possibly being dependent upon where the new single site school is located – but also language. "Use of the Welsh language" here includes not just the narrow issue of academic linguistic competence (which, the Council say, should not be adversely affected by dual streaming), but also the use of the Welsh language outside the classroom (which, as the Council appears to accept, may be adversely affected). The evidence is that there is a real risk that Phase 2 will result in such adverse effects."

17. The same error transposed into a failure adequately to consult, as the consultation was inevitably flawed through failing to ask about the language and community impact of establishing a new school on a single site. There was also an error in the consultation process for the failure to suggest alternatives to the proposals.

18. As well as being significant for being a case heard at least in part in Welsh, the decision in this case will plainly be one for Welsh Local Authorities, considering any changes to the provision of education in their area, to have in mind. There will be a need for considerable care in the approach taken to the consultation exercise, and there is clearly a need for the impact on language and community to be taken into account at every proposed stage of a change of provision.

R (oao Tilley) v Vale of Glamorgan Council [2016] EWHC 2272 (QB)

19. Another interesting recent case has been *Tilley v Vale of Glamorgan Council,* which was the second claim for judicial review concerning the organization of libraries in the Vale. The first challenge had been to a Council resolution of March 2015 which had invited expressions of interest to run a community library, but Laing J had found this

challenge to be premature where no closure decisions had been made, and interest had been expressed by local groups in developing community-led library services. The Council had been entitled to consult on its preferred option of community-led libraries without inviting views from the consultees on any alternative proposals or referring to the disadvantages of community-led libraries. At §64, Laing J said:

> "The statutory guidance from the Welsh Assembly Government on section 5 (Local Government Improvement Wales Programme for Improvement 2010) suggests that the consultation obligation imposed by section 5 attaches to proposals of a general, strategic character, rather than specific service-level proposals. Nonetheless, I will assume, without deciding, that section 5 imposed a statutory obligation on the Council to consult about its library proposals. I accept that a statutory obligation to consult may be detailed and precise (although the obligation imposed by section 5, as it happens, is not). But given the broad statement of the law in Coughlan, I do not consider that the reason why an authority consults (ie whether it is obliged to do so by statute, or chooses to) can make any difference in principle to the content of that obligation. In particular, it does not, in principle, determine whether or not there was an obligation to consult on alternatives. Whether there is an obligation to consult on alternatives will depend on the facts of the case in hand, and, in particular, on whether there are any realistic alternatives (...)."

20. The Council then made a decision to agree to establish five community libraries, including one at Rhoose. The savings that would be made from the review of the provision of library services were approximately £500,000. Expressions of interest for the running of each of the five proposed community libraries were received by the Council, and none of them were closed.

21. The second challenge concerned the decision for Rhoose Library to become a community led library. The grounds of challenge included a rationality challenge on the question of whether there would be sufficient volunteers available to staff a community library at Rhoose, and it was alleged inter alia that the Council had failed to comply with its duty under section 7 of the Public Libraries and Museums Act 1964: that section imposes a duty on every library authority to provide a comprehensive and efficient library service for those wishing to make use of the same. Lewis J rejected the rationality challenge: he found no error of law in the Council's assessment of the proposals for the operation of the community library at Rhoose. There was also a PSED challenge, and a challenge based on a duty that was said to be placed on the Council to have regard to the best interests of the child as a primary consideration, which it was said to have failed to do. These both failed.

22. On the challenge under the 1964 Act, section 1 of that Act imposes a duty of superintending and promoting the improvement of the public library service provided by a local authority, and security the proper discharge by local authorities of their functions in relation to libraries as library authorities: the exercise of that function has been transferred to the Welsh Ministers in respect of library authorities in Wales. The Welsh Ministers meet that duty through the Welsh Public Library Standards, which set out, through a grid which considers population density; percentage of households; and distance from library, that in a case where population density is between 1.1 and 19.9 persons per hectare, then 75% of households should be within 2.5 miles (or 10 minutes travelling time by public transport) of a library, or within ¼ of a mile of a library stop. It was contended on the part of the Claimant that the library at Rhoose was bound to fail, and/or would not constitute the provision of a comprehensive and efficient library service.

23. Lewis J held that the decision to establish five community libraries did not mean that there was a situation where the Council was failing to provide a comprehensive library service. But the Council had also considered the position even if the community libraries were left out of account, and if assessing the standard by reference to the administrative area of the Council, so that 75% of households within the authority's administrative areas were within 2.5 miles (or 10 minutes by public transport) from a library, that standard was met. Further, Lewis J held that the Welsh Public Library Standards have to be read in the context of the 1964 Act, which makes clear that it is the local authority area that is the relevant standard. There was no basis for concluding that the library service would fail to meet the requirements of a comprehensive and efficient library service for its area.

R (oao Jewish Rights Watch, t/a Jewish Human Rights Watch) [2016] EWHC 1512 (Admin)

24. This case concerned a challenge by JHRW to the passing of resolutions by three local authorities, Leicester City Council, Gwynedd Council and City and Council of Swansea, where the resolutions were critical of the State of Israel and its policies. JHRW argued that the resolutions were the result of the Councils deliberately

involving themselves in an area of foreign policy which they knew was controversial, and they claimed that the Councils singled Israel out for different treatment than that adopted in respect of other countries, and failed to consider the effect of the resolutions on the Jewish community. They sought the quashing of the resolutions on two legal bases: the PSED (s149 Equality Act 2010) and the Councils' legal duties as public authorities (s17 LGA 1988).

25. The challenge to the resolution of Swansea Council was hopelessly out of time. There were no records of the debate that had taken place, leading to a resolution that the Council noted with regret that Veolia (which was involved in building a light railway in Israel) is involved in (or will be seeking) contracts with the City & County of Swansea. The resolution called on the Leader and Chief Executive to support the position of the UN in regards to the Israeli settlements in East Jerusalem, so long as to do so would not be in breach of any relevant legislation. In October 2014, Gywnedd Council had passed a resolution that called for a trade embargo with Israel in light of the latest attacks on Palestinians living in the Gaza Strip, confirming and underlining the Council's decision not to invest in Israel or its establishments. The evidence at the hearing was that the call for a trade embargo was directed to Central Government. Leicester City Council had passed a resolution in similar terms.

26. The Administrative Court (Simon LJ and Flaux J) held that whilst it is clear that a public authority must comply with its PSED, this is more easily applied to a formal and developed policy than it is to resolutions of a local council following debate. The Court did not exclude the possibility that the duty may arise in relation to Council motions following a debate but said it is likely only to arise where a resolution is closely focused and the policy will be directly implemented. No breach of the PSED was identified. The challenge in relation to s17 LGA 1988 was confined to Leicester and Swansea, but the Court found the evidence to be clear: the Council resolutions did not override, or even affect, the lawful exercise of its public functions in relation to public supply or works contracts, and no contracts or potential contracts were affected by the resolutions.

27. The case raises an interesting question about the boundary between a local authority policy and a resolution, and the hinterland between the two may prove a fertile area of challenge in years to come.

Secretary of State for Justice v MM; Welsh Ministers v PJ [2017] EWCA Civ 194

28. I mention this case briefly as it was an appeal brought by the Welsh Ministers heard earlier in 2017. These joined appeals raised the issue of deprivation of liberty in two contexts: in the case of MM, where a mental health patient who is detained by a criminal court seeks to be conditionally discharged into circumstances that deprive him of his liberty; and in the case of PJ, where a mental health patient detained in a non-criminal context seeks to be moved from hospital under a community treatment order which has the effect of depriving him of his liberty. Both appeals were allowed by the Court of Appeal, which considered the nature and extent of the powers of the First Tier Tribunal in England, and the Mental Health Review Tribunal for Wales, which hear appeals from mental health patients. On the issues in these appeals, there was no distinction between these bodies.

29. The 'Welsh' case was PJ, who is a patient who has capacity to make decisions about the restriction of his liberty. He is diagnosed with a mild learning disability, an autism spectrum disorder and what is described as a significant impairment in his behaviour. He was detained following criminal convictions, and then again under section 3 MHA. He was made the subject of a community treatment order ("CTO") which substantially restricted his liberty. He applied under section 2 MHA to the Mental Health Review Tribunal for Wales, who refused his discharge. The Court of Appeal found that the purpose of the CTO scheme is to provide a balance between the protection of the public and the receipt of medical treatment by the patient without his continued detention in hospital, and that the responsible clinician retains the ultimate power to detain as it would conflict with the purpose of CTOs if the responsible clinician could only restrict freedom of movement. The Court said that the scheme in place provides both practical and effective protection of a patient's Convention rights. The MHRTW analysed the CTO scheme as taking precedence over human rights issues – it would have been better to reason that the statutory framework contains all the safeguards

that are required and that the safeguards can be rad compatibly with human rights jurisprudence. The remedy for breach of the safeguards is judicial review.

Direction of travel

30. The above cases show a significant range in the way that decisions of public bodies in Wales or affecting Wales are challenged. From challenges being heard in the locality through the medium of Welsh to interventions of the Welsh Ministers in the Supreme Court in London, constitutional and administrative law in Wales continues to raise a wide range of interesting and important questions. It is very much to be welcomed that the practice of Administrative Court cases being heard in the region from which the facts arise appears to be increasingly firmly established. But in a report produced by Dr Sarah Nason at Bangor University, published in November 2015, 'Understanding Administrative Justice in Wales', she suggested that analysis of the number of claims issued in the Administrative Court (across England and Wales) from 2013 to 2015 showed that the number of claims issued per head of population was lower in Wales than in other regions.[3]

31. The Wales Act 2017 of course brings significant changes but it stops short of establishing a separate jurisdiction for Wales. Those in favour of a separate jurisdiction might argue that Wales is perhaps the only country in the world with a full law-making legislature operating without its own jurisdiction. But whilst the UK Government has, so far, rejected proposals for a separate jurisdiction for Wales, it has established a 'Justice in Wales' working group to consider the practical implications of jurisdictional change. This was a topic tackled by Cardiff University's Wales Governance Centre in a report produced in September 2016, 'Justice in Wales: Principles, Progress and Next Steps'. [4] The Report considered the practical implications for the administration of justice in Wales of the introduction of a reserved powers model of devolution. In anticipation of the Wales Act 2017, the report noted that, with the move to the reserved powers model, there was likely to be increased

3 http://adminjustice2015.bangor.ac.uk/documents/full-report.pdf, §8.10

4 http://sites.cardiff.ac.uk/wgc/files/2016/09/Justice-in-Wales-Sept-2016.pdf

divergence between the laws and policies of England and Wales. It proposed a number of key principles that it suggested the 'Justice in Wales' working group should actively promote. These included:

- Creating a MOJ 'Welsh Centre of Expertise';
- Establishing a Standing Commission on Justice in Wales;
- Establishing a fully operational High Court Office in Wales;
- Guaranteeing Welsh representation on justice institutions, including the UK Supreme Court;
- Publishing separate data and performance indicators on the administration of justice in Wales.

32. On the question of having a Welsh judge always appointed to the Supreme Court (in the same way that there is secured representation for a Scottish / Northern Irish judge), Lord Neuberger has previously commented that this might be difficult in terms of maintaining the requirement for the range of judicial expertise across subject-areas which is required by the Constitutional Reform Act 2005; the Act requires that the judges of the constitution of the Supreme Court have between them "knowledge of, and experience of practice in, the law of each part of the United Kingdom". In practice, where there is a Welsh reference, the Court has sought to co-opt a Welsh Justice, which has been relatively straightforward whilst John Thomas has been the Lord Chief Justice. In 2014, Lord Neuberger continued to query whether there was a sufficient body of specifically Welsh law to justify the appointment of a Welsh Judge. He accepted, however, that the position is changing, and indeed may be changing fast.[5] That was in 2014, and with the Supreme Court's judgment in Miller, a growing body of Administrative Court decisions in Wales, and the general direction of travel indicated by the Wales Act 2017, perhaps the time is ripe for a reconsideration of this position. Perhaps we can even hope for a time when the Supreme Court will sit from time to time in Cardiff (as it did recently in Edinburgh).

[5] Lord Neuberger's speech at the Legal Wales Conference 2014, 'The UK Constitutional Settlement and the Role of the UK Supreme Court', 10 October 2014. Available at: https://www.supremecourt.uk/docs/speech-141010.pdf