



TRIBIWNLYS Y GYMRAEG
Rhif yr Achos: TyG/WLT/18/2

ALED POWELL
(Ceisydd)

v

COMISIYNYDD Y GYMRAEG
(Atebydd)

PENDERFYNIAD Y TRIBIWNLYS

Natur y cais

Cais o dan reol 28 o Reolau Tribiwnlys y Gymraeg 2015 i ddileu'r cais ar y sail ei fod naill ai:

- i. heb fod, bellach, o fewn awdurdodaeth y Tribiwnlys,
- ii. heb ddatgelu seiliau rhesymol, neu
- iii. yn camddefnyddio proses y Tribiwnlys.

Penderfyniad y Tribiwnlys

Mae'r Tribiwnlys yn dyfarnu:

- a) nad oes gan y Tribiwnlys awdurdodaeth, o dan adrannau 103 a 104 o Fesur y Gymraeg (Cymru) 2011, i ystyried cais am adolygiad o benderfyniad gan y Comisiynydd os nad yw'r penderfyniad bellach yn weithredol, er enghraifft am fod y Comisiynydd ei hun wedi gwrthdroi'r penderfyniad hwnnw;
- b) er i gais y Ceisydd, ar y cychwyn, syrthio o fewn awdurdodaeth y Tribiwnlys, mae'r Comisiynydd, wedi hynny, wedi gwrthdroi'r penderfyniadau y mae'r cais yn ymwneud â hwy; canlyniad hynny oedd dod ag awdurdodaeth y Tribiwnlys mewn perthynas â'r penderfyniadau hynny i ben, a byddai



WELSH LANGUAGE TRIBUNAL
Case No: TyG/WLT/18/2

ALED POWELL
(Applicant)

v

WELSH LANGUAGE COMMISSIONER
(Respondent)

THE DECISION OF THE TRIBUNAL

Nature of the application

Application under regulation 28 of the Welsh Language Tribunal Rules 2015 to strike out the application on the ground that it is either:

- i. no longer within the jurisdiction of the Tribunal,
- ii. discloses no reasonable grounds, or
- iii. is an abuse of the Tribunal's process.

The Tribunal's Decision

The Tribunal determines as follows:

- a) that the Tribunal has no jurisdiction, under sections 103 and 104 of the Welsh Language (Wales) Act 2011, to consider an application for a review of a decision by the Commissioner if the decision is no longer effective, for example because the Commissioner has herself reversed that decision;
- b) although the applicant's application did, initially, fall within the jurisdiction of the Tribunal, the Commissioner has, since then, reversed the decisions to which the application relates; the result of this was to bring the jurisdiction of the Tribunal in

parhau i'w ystyried yn gamddefnydd o bwerau'r Tribiwnlys;

- c) Rhaid, felly, ddileu cais y Ceisydd, o dan reol 28(2)(b) o Reolau Tribiwnlys y Gymraeg 2015.

RHESYMAU

Cyflwyniad

1. Yn ei llythyrau at y Ceisydd, y ddau'n ddyddiedig 16 Chwefror 2018, hysbysodd y Comisiynydd y Ceisydd ei bod wedi penderfynu peidio â chynnal ymchwiliadau i ddwy gŵyn (cyfeirnodau CSG301 a CSG302) a wnaed gan y Ceisydd i'r Comisiynydd ar 7fed a'r 11eg o Ragfyr 2017. Roedd y ddwy gwyn yn ymwneud â honiadau gan y Ceisydd bod ei gyngor lleol wedi methu â chydymffurfio â'u dyletswyddau o dan safonau'r Gymraeg, mewn perthynas ag arwyddion cyhoeddus.
2. Yn y ddau achos, y rheswm a roddwyd gan y Comisiynydd am beidio ag ymchwilio i'r gŵyn oedd ei bod eisoes wedi agor "ymchwiliad eang i gydymffurfiaeth y Cyngor â safonau gosod arwyddion" ac y byddai agor ymchwiliadau i'r cwynion diweddaraf yn golygu "ymchwilio i'r un methiant ag sydd eisoes yn destun ymchwiliad gennyf" ac felly'n "ddefnydd anghymesur o adnoddau ac yn debygol o fod yn dyblygu gwaith sydd eisoes yn mynd rhagddo."
3. Roedd y Ceisydd yn ymwybodol o fodolaeth yr ymchwiliad a oedd eisoes ar droed (ymchwiliad CSG237). Yn wir, mae'n ymddangos mai nifer o gwynion yr oedd ef wedi gwneud i'r Comisiynydd y flwyddyn flaenorol oedd wedi sbarduno'r Comisiynydd i agor yr ymchwiliad hwnnw. Mae ei Hysbysiad Cais yn dyfynnu llythyr ato oddi wrth y Comisiynydd ar 21 Mehefin 2017 a oedd yn esbonio:

"Rwyf wedi penderfynu felly i beidio â chynnal ymchwiliad unigol i bob un o'ch cwynion yn unigol; yn hytrach rwyf wedi penderfynu

relation to those decisions, to an end and to continue to consider it would be an abuse of the Tribunal's process;

- c) Therefore, the Applicant's application must be struck out under regulation 28(2)(b) of the Welsh Language Tribunal Rules 2015.

REASONS

Introduction

1. In her letters to the Applicant, both dated 16 February 2018, the Commissioner informed the Applicant that she had decided not to conduct investigations into two complaints (reference numbers: CSG301 and CSG302) made by the Applicant to the Commissioner on 7th and 11th December 2017. Both complaints involved allegations by the Applicant that his local council had failed to comply with its duties under Welsh language standards, in relation to public signs.
2. In both cases, the reason given by the Commissioner for not investigating the complaint was that she had already opened "a broad investigation into the Council's compliance with signage standards" and that opening investigations into the latest complaints would mean "investigating the same failure that is already subject to an investigation by me" and was therefore "a disproportionate use of resources and likely to duplicate work that is already proceeding."
3. The Applicant was aware of the existence of the investigation that was already afoot (investigation CSG237). Indeed, it appears that it was a number of complaints that he had made to the Commissioner the previous year that had prompted the Commissioner to open that investigation. His Notice of Application quotes from a letter to him from the Commissioner on 21 June 2017 which explained:

"I have decided, therefore, not to conduct an individual investigation into each of your complaints separately; rather I have decided

defnyddio eich tystiolaeth i agor ymchwiliad cyffredinol i gydymffurfiaeth y Cyngor â'r safonau perthnasol o dan adran 71 Mesur y Gymraeg.”

4. Yr un, felly, oedd rheswm y Comisiynydd dros beidio â chynnal ymchwiliad i gwynion CSG301 a CSG302 a'r rheswm a roddwyd i'r Ceisydd dros beidio â chynnal ymchwiliadau i'w gwynion cynharach, sef y byddai cynnal ymchwiliadau i gwynion penodol y Ceisydd yn dyblygu gwaith yr ymchwiliad “cyffredinol” - CSG237 – yr oedd y Comisiynydd eisoes wedi cychwyn.

5. Nid oedd y Ceisydd wedi ceisio herio'r penderfyniad gan y Comisiynydd, ym Mehefin 2017, i beidio ag ymchwilio i'w cwynion unigol ond yn hytrach i'w cynnwys fel rhan o ymchwiliad cyffredinol i ymddygiad y cyngor mewn perthynas ag arwyddion. Ond erbyn Chwefror 2018 roedd agwedd y Ceisydd wedi newid, gan arwain at y cais hwn at y Tribiwnlys. Roedd hynny am ei fod wedi disgwyl y byddai'n cael ei drin, mewn perthynas ag ymchwiliad CSG237, fel “person a chanddo fuddiant” ac felly'n cael mewnbwn i'r broses o setlo cylch gorchwyl yr ymchwiliad. Ond nid yw'r Comisiynydd yn derbyn bod gan y Ceisydd hawl i gael ei drin fel “person a chanddo fuddiant” mewn perthynas â'r ymchwiliad hwnnw. Ym mharagraff 16 o Ddatganiad Achos y Comisiynydd mae'n esbonio nad yw'r Ceisydd, yn ei barn hi, yn “person a chanddo fuddiant” (fel a ddiffinnir gan adran 110 o'r Mesur) gan nad yw ymchwiliad CSG237 yn ymchwiliad “yn dilyn cwyn” a wnaed gan y Ceisydd ond, yn hytrach, yn ymchwiliad a agorwyd gan y Comisiynydd ar ei liwt ei hun.

6. Roedd y Ceisydd hefyd yn anhapus fod ymchwiliad CSG237 yn cymryd cymaint o amser i'w gwblhau, ac yn cael ei drin gan y Comisiynydd fel rheswm dros wrthod ymchwilio i gwynion newydd yn erbyn y cyngor dan sylw mewn perthynas ag arwyddion cyhoeddus. Cadarnhaodd y Comisiynydd ar 7 Mehefin 2018, mewn

to use your evidence to open a general investigation into the Council's compliance with the relevant standards under section 71, Welsh Language Measure.”

4. The Commissioner's reason for not holding an investigation into complaints CSG301 and CSG302 was therefore the same as the reason given to the Applicant for not investigating his earlier complaints, namely that conducting investigations into the Applicant's individual complaints would duplicate the work of the “general” investigation - CSG237 - which the Commissioner had already commenced.

5. The Applicant had not tried to challenge the Commissioner's decision, in June 2017, not to investigate his individual complaints but rather to include them as part of a general investigation into the behaviour of the council in relation to signs. But by February 2018 the Applicant's attitude had changed, leading to this application to the Tribunal. That was because he had expected that he would be treated, in relation to investigation CSG 237 as an “interested person” and thus would have input into the process of settling the remit of the investigation. But the Commissioner does not accept that the Applicant has a right to be treated as an “interested person” in relation to that investigation. In paragraph 16 of the Commissioner's Case Statement she explains that the Applicant, in her opinion, is not an “interested person” (as defined by section 110 of the Measure) since investigation CSG237 is not an investigation which “follows a complaint” made by the Applicant, but rather an investigation opened by the Commissioner on her own initiative.

6. The Applicant was also unhappy that investigation CSG237 was taking so much time to complete and was being treated by the Commissioner as a reason for refusing to investigate new complaints against the council in question in relation to public signs. The Commissioner confirmed on 7 June, in response to a request from the Tribunal for

ymateb i gais gan y Tribiwnlys am wybodaeth am statws ymchwiliad CSG237, nad oedd yr ymchwiliad eto wedi dod i ben, a hynny, yn ôl paragraff 6 o Ddatganiad Achos y Comisiynydd, bron i bedwar mis ar ddeg ar ôl i'r Comisiynydd benderfynu agor yr ymchwiliad.

7. Penderfynodd y Ceisydd, felly, wneud cais i'r Tribiwnlys am adolygiad o benderfyniadau diweddaraf y Comisiynydd i wrthod ymchwilio i gwynion, gan ddadlau nad oedd "sail gyfreithiol gadarn" i ymchwiliad CSG237, gan fod modd y Comisiynydd o gynnal yr ymchwiliad hwnnw yn ei amddifadu o'i hawliau fel "person a chanddo fuddiant" mewn perthynas ag ef.
8. Derbyniodd y Tribiwnlys Hysbysiad Cais y Ceisydd ar 16 Mawrth 2018 ac ar 21 Mawrth 2018 rhoddodd y Tribiwnlys ganiatâd i'r Ceisydd i wneud y cais, yn unol ag adran 103(4) o'r Mesur.
9. Wedi iddi gael ei hysbysu bod y Ceisydd wedi cael caniatâd i herio sail gyfreithiol ei phenderfyniadau i beidio a chynnal ymchwiliadau i gwynion CSG301 a CSG302, ysgrifennodd y Comisiynydd at y Ceisydd, ar 13 Ebrill 2018, yn ei hysbysu ei bod hi wedi ail-ystyried y penderfyniadau hynny. Teimlai y byddai'r achos Tribiwnlys a gychwynnwyd gan y Ceisydd yn golygu "cryn cost ac amser" iddi ac i'w staff ac y byddai'n "llai costus a gwastraffus" pe bai'n cytuno, wedi'r cyfan, i agor ymchwiliadau i gwynion CSG301 a CSG302. Yn sgil hynny, gofynnodd i'r Ceisydd dynnu ei gais i'r Tribiwnlys yn ôl. Nid oedd y Ceisydd yn fodlon gwneud hynny, gan ei fod am i'r Tribiwnlys ystyried y ffordd yr oedd y Comisiynydd wedi arfer ei swyddogaethau – yn benodol, y ffordd yr oedd hi wedi dibynnu ar fodolaeth ymchwiliad CSG237 fel rheswm dros wrthod ymchwilio i gwynion newydd yn erbyn yr un cyngor. Nid oedd (ac nid yw) y Comisiynydd yn derbyn bod y ffordd y bu'n cynnal ymchwiliad CSG237 yn groes i ofynion y Mesur ac, yn wir, mae hi wedi cyflwyno i'r Tribiwnlys Ddatganiad Achos sydd yn hawlio

information regarding the status of investigation CSG237 that the investigation had not come to an end and that, according to paragraph 6 of the Commissioner's Case Statement, almost fourteen months after the Commissioner decided to open the investigation.

7. The Applicant therefore decided to apply to the Tribunal for a review of the Commissioner's latest decisions to refuse to investigate complaints, arguing that there was no "firm legal basis" to investigation CSG237, since the Commissioner's way of conducting that investigation was depriving him of his rights as an "interested person" in relation to it.
8. The Tribunal received the Applicant's Notice of Application on 16 March 2018 and on 21 March 2018 the Tribunal granted permission to the Applicant to make the application, in accordance with section 103(4) of the Measure.
9. After she was notified that the Applicant had been granted permission to challenge the legal basis of her decisions not to conduct investigations into CSG301 and CSG302, the Commissioner wrote to the Applicant on 13 April 2018, informing him that she had reconsidered those decisions. She felt that the Tribunal case which the Applicant had commenced would mean "considerable cost and time" to her and her staff and that it would be "less costly and wasteful" if she agreed, after all, to open investigations into complaints CSG301 and CSG302. As a result, she asked the Applicant to withdraw his application to the Tribunal. The Applicant was not willing to do so, as he wanted the Tribunal to consider the way in which the Commissioner had exercised her functions - specifically, the way she had relied on the existence of investigation CSG237 as a reason for refusing to investigate new complaints against the same council. The Commissioner did not (and does not) accept that the way she conducted investigation CSG237 was contrary to the requirements of the Measure, and indeed, she

ei bod wedi ymddwyn o fewn ei phwerau o dan y Mesur.

10. Mae'r Tribiwnlys wedi derbyn oddi wrth y Comisiynydd gopi o gylch gorchwyl ymchwiliad CSG237. Nid yw'n rhoi manylion o unrhyw honiad penodol o fethiant i gydymffurfio â safon neu safonau. Yn hytrach, o dan y pennawd "Disgrifiad o'r amheuaeth o fethiant i gydymffurfio â safonau", ceir y rhestr o honiadau cyffredinol canlynol:

"Amheuaeth o fethiant i gydymffurfio â safonau'r Gymraeg wrth osod arwyddion ers y diwrnod gosod; gan gynnwys:

Amheuaeth fod y Cyngor wedi gosod arwyddion Saesneg yn unig wrth:

- Adnewyddu arwydd sydd â diben o fod yn barhaol
- Gosod arwydd dros dro penodol – hynny yw arwydd ar gyfer digwyddiad ar adeg a man penodol
- Gosod arwydd dros dro cyffredinol – hynny yw arwydd sydd yn gallu cael ei ail defnyddio (megis arwydd safonol ar gyfer gwaith ffordd ac ati)

Amheuaeth fod y Cyngor wedi gosod arwyddion ble nad y testun Gymraeg sydd yn y safle ble mae hwnnw yw'n debygol o gael ei ddarllen yn gyntaf wrth:

- Adnewyddu arwydd sydd â diben o fod yn barhaol
- Gosod arwydd dros dro penodol – hynny yw arwydd ar gyfer digwyddiad ar adeg a man penodol
- Gosod arwydd dros dro cyffredinol – hynny yw arwydd sydd yn gallu cael ei ail defnyddio (megis arwydd safonol ar gyfer gwaith ffordd ac ati)

Amheuaeth fod y Cyngor wedi gosod arwyddion ble nad yw'r testun Cymraeg ar arwyddion yn gywir o ran ystyr a mynegiant."

has submitted to the Tribunal a Case Statement asserting that she has acted within her powers under the Measure.

10. The Tribunal has received from the Commissioner a copy of the terms of reference of investigation CSG237. It does not give details of any specific allegation of failure to comply with a standard or standards. Rather, under the heading "Description of failure to comply with standards", there is a list of the following general allegations:

"Suspicion of failure to comply with Welsh language standards when erecting signs since the compliance date, including:

Suspicion that the Council has erected English only signs when:

- Renewing a sign that is intended to be permanent
- Erecting a specific temporary sign – i.e. an event sign for a specific date and location
- Erection of a general temporary sign – i.e. a sign that can be re-used (such as a standard sign for road works etc)

Suspicion that the Council has erected signs where the Welsh text was in the position where it was likely to be read first when:

- Renewing a sign that is intended to be permanent
- Erecting a specific temporary sign – i.e. an event sign for a specific date and location
- Erection of a general temporary sign – i.e. a sign that can be re-used (such as a standard sign for road works etc)

Suspicion that the Council has erected signs where the Welsh text on the signs is not correct in terms of meaning and expression."

Y cais hwn

11. Yn ogystal ag amddiffyn natur ymchwiliad CSG237, a'r ffordd y bu hi'n cynnal yr ymchwiliad hwnnw, mynnodd y Comisiynydd, yn ei Datganiad Achos, na ddylai'r Tribiwnlys, yn sgil ei phenderfyniad i wrthdroi'r penderfyniadau a oedd yn wrthrych y cais, fwrw ymlaen gyda'r achos. Dadlai mai cwestiwn academig yn unig, erbyn hyn, oedd cywirdeb y penderfyniadau gwreiddiol. Mewn ebost at y Tribiwnlys dyddiedig 7 Mehefin 2018, aeth cynrychiolydd y Comisiynydd (Mr Emyr Lewis) cam ym mhellach, gan ddadlau nad oedd barnu ar gyfreithlondeb penderfyniad a oedd eisoes wedi'i wrthdroi nid yn unig yn amhriodol ond nad oedd hyd yn oed o fewn pwerau'r Tribiwnlys. (Trafodir manylion ei ddadl isod.) Yn unol â hynny, gwnaed cais i'r Tribiwnlys ddirwyn yr achos i ben trwy ddefnyddio ei phwerau o dan reol 28.

12. Penderfynwyd y cais o dan reol 28, gan Lywydd y Tribiwnlys, yn unol â pharagraff 5(f) o Gyfarwyddyd Ymarfer 3 y Tribiwnlys. Cyflwynodd y ddau barti eu dadleuon yn ysgrifenedig.

Y dadleuon

13. Pwysleisia Mr Lewis (ar ran y Comisiynydd) natur cyfyngedig pwerau'r Tribiwnlys wrth ystyried cais am adolygiad o benderfyniad y Comisiynydd i beidio a chynnal ymchwiliad i gŵyn. Fe'u diffiniwyd gan adran 104 o'r Mesur. Unig swyddogaeth y Tribiwnlys, o dan yr adran honno, yw cadarnhau penderfyniad y Comisiynydd neu'i ddi-ddymu. Os nad oes penderfyniad bellach yn bodoli (gan ei fod eisoes wedi'i wrthdroi gan y Comisiynydd ei hun) nid oes modd i'r Tribiwnlys arfer y swyddogaeth honno ac felly nid oes gan y Tribiwnlys swyddogaeth i ymchwilio i'r mater ym mhellach. Atgyfnerthir y ddadl honno, yn ôl Mr Lewis, gan y ffaith fod adran 104(2) yn gosod dyletswydd ar y Tribiwnlys, os yw'n di-ddymu penderfyniad y Comisiynydd, i "anfon yr achos yn ôl at y Comisiynydd gyda

This application

11. As well as defending the nature of investigation CSG237, and the way in which she conducted that investigation, the Commissioner asserted, in her Case Statement, that the Tribunal should not, as a result of her decision to reverse the decisions that were the subject of the application, proceed with the case. She argued that the correctness of the original decisions was now merely an academic question. In an e-mail to the Tribunal dated 7 June 2018, the Commissioner's representative (Mr Emyr Lewis) went a step further, arguing that to adjudicate on the legality of a decision that had already been reversed was not only inappropriate but that it was not even within the Tribunal's powers to do so. (The details of his argument are discussed below.) Accordingly, an application has been made to the Tribunal to terminate the case using its powers under rule 28.

12. The application under rule 28 has been decided by the President of the Tribunal, in accordance with paragraph 5(f) of the Tribunal's Practice Direction 3. Both parties submitted their arguments in writing.

The arguments

13. Mr Lewis emphasises (on behalf of the Commissioner) the limited nature of the Tribunal's powers when considering an application for a review of the Commissioner's decision not to conduct an investigation into a complaint. They are defined by section 104 of the Measure. The Tribunal's only function, under that section, is to confirm the Commissioner's decision or to annul it. If a decision no longer exists (because it has already been reversed by the Commissioner herself) it is not possible for the Tribunal to exercise that function and thus the Tribunal has no function to look into the matter further. That argument is reinforced, according to Mr Lewis, by the fact that section 104(2) places a duty upon the Tribunal, if it annuls the Commissioner's decision to "remit the case to

chyfarwyddyd ar gyfer ei ailystyried.” Nid yw'r ddyletswydd honno'n gwneud unrhyw synnwyr os nad oes bellach penderfyniad a all gael ei ail-ystyried. Mae'n rhaid casglu, felly, nad oedd yn fwiad, trwy'r Mesur, i roi i'r Tribiwnlys bŵer i ystyried achos oni bai fod hynny'n medru arwain at ddiddymu penderfyniad a oedd eto'n bodoli. Mewn geiriau eraill, nid oes gan y Tribiwnlys bŵer i wneud penderfyniadau datganiadol pur. Gall esbonio ym mha ffordd y gweithredodd y Comisiynydd tu hwnt i'w phwerau wrth ddod i benderfyniad, a rhoi cyfarwyddiadau iddi ar sut i osgoi ail-adrodd y camgymeriad hwnnw. Ond rhaid i hynny ddigwydd yng nghyd-destun penderfyniad penodol sydd eto mewn grym.

14. Beth pe bai dadl Mr Lewis yn anghywir, a bod awdurdodaeth y Tribiwnlys yn estyn yn ddigon pell i'w alluogi i ystyried cyfreithlondeb penderfyniad sydd, erbyn hynny, wedi'i ddiddymu? Mae Mr Lewis yn dadlau na fyddai'n briodol, hyd yn oed os nad oedd rhwystr cyfreithiol ar wneud hynny, i'r Tribiwnlys treulio amser yn ystyried mater a oedd o ddiddordeb academaidd yn unig.

15. Mewn ymateb, mae'r Ceisydd yn pwysleisio nad yw'r Comisiynydd eto wedi cyfaddef bod ei modd o gynnal ymchwiliad CSG237 yn ddiffygiol. Mae'r anghydfod rhyngddo ef a'r Comisiynydd mewn perthynas â'r modd hwnnw'n dal yn fyw, felly, er gwaethaf ei phenderfyniad i wrthdroi ei phenderfyniadau i beidio ag ymchwilio i gwynion CSG301 a CSG302. Crêd fod gallu'r Tribiwnlys i ystyried a thrafod rhesymau'r Comisiynydd dros y penderfyniadau hynny'n goroesi penderfyniad y Comisiynydd i wrthdroi y penderfyniadau hynny gan y dylid dehongli swyddogaethau'r Tribiwnlys o dan y Mesur mewn ffordd haelfrydig.

the Commissioner with directions for its reconsideration.” That duty makes no sense if there is no longer a decision that can be reconsidered. It must be concluded, therefore, that it was not intended, via the Measure, to give the Tribunal power to consider a case unless it could lead to annulling a decision which still exists. In other words, the Tribunal does not have power to make purely declaratory decisions. It can explain in what way the Commissioner acted beyond her powers in reaching a decision, and give her directions as to how to avoid repeating that error. But that must happen in the context of a specific decision which is still in force.

14. What if Mr Lewis' argument is wrong, and the Tribunal's jurisdiction extends far enough to enable it to consider the legality of a decision that has, by then, been revoked? Mr Lewis argues that it would not be appropriate, even if there were no legal obstacle to doing so, for the Tribunal to spend time considering a matter that was of academic interest only.

15. In response, the Applicant emphasises that the Commissioner has still not admitted that her method of conducting investigation CSG237 is defective. The dispute between him and the Commissioner in relation to that method remains a live one, therefore, notwithstanding her decision to reverse her decisions not to investigate complaints CSG301 and CSG 302. He believes the Tribunal's ability to consider and discuss the Commissioner's reasons for those decisions survives the Commissioner's decision to reverse those decisions as the Tribunal's functions under the Measure should be interpreted in a generous way.

Asesiad

16. Mae cais y Ceisydd, ac ymateb y Comisiynydd, yn codi nifer o gwestiynau cyfreithiol pwysig mewn perthynas ag ymchwiliad CSG237, sef:

- i. a ddylid trin y Ceisydd fel “person a chanddo fuddiant” mewn perthynas ag ymchwiliad CSG237?;
- ii. a ddylid cyfrif ymchwiliad CSG237 yn ymchwiliad dilys o dan adran 71 o'r Mesur, sef ymchwiliad “a yw person wedi methu â chydymffurfio â gofyniad perthnasol” gan nad yw'r cylch gorchwyl yn cynnwys manylion o unrhyw honiad penodol o fethiant felly, er bod y Comisiynydd wedi penderfynu cynnal yr ymchwiliad yn sgil nifer o gwynion penodol a wnaed gan y Ceisydd?;
- iii. i ba raddau y gellid cyfiawnhau gwrthod ymchwilio i gwynion a wnaed gan y Ceisydd yn Rhagfyr 2017 ar sail ymchwiliad a agorwyd ym mis Ebrill 2017?

17. Fel mae'r Ceisydd yn derbyn, nid oes gan y Tribiwnlys bŵer cyffredinol i oruchwyllo'r ffordd y cynhelir ymchwiliad gan y Comisiynydd. Byddai'n rhaid i'r Ceisydd, pe bai am herio dull y Comisiynydd o weithredu, fynd i'r Uchel Lys am rwymedi. Ond nid yw'r Ceisydd yn ceisio gofyn i'r Tribiwnlys ymyrryd yn ymchwiliad CSG237 ond yn hytrach yn dadlau bod gwendidau cyfreithiol yr ymchwiliad hwnnw yn rhai mor sylfaenol fel na ddylid caniatáu i'r Comisiynydd ddefnyddio ei fodolaeth fel rheswm digonol dros wrthod ymchwilio i gwynion newydd.

18. Ni fyddai'n deg i ddod i unrhyw gasgliad mewn perthynas ag ddilysrwydd cyffredinol ymchwiliad CSG237 heb i'r Comisiynydd gael y cyfle i esbonio ac i amddiffyn ei dull o weithredu mewn perthynas â'r ymchwiliad hwnnw. Ond mae'r hyn a ddaeth yn hysbys am natur yr ymchwiliad hwnnw, ers i'r Ceisydd gael caniatâd i wneud ei gais, wedi atgyfnerthu barn y Tribiwnlys, wrth roi'r

Assessment

16. The Applicant's application, and the Commissioner's response, raise a number of important legal questions in relation to investigation CSG237 namely:

- i. should the Applicant be treated as an “interested person” in relation to investigation CSG237?;
- ii. should investigation CSG237 be considered a valid investigation under section 71 of the Measure, namely an investigation into “whether a person has failed to comply with a relevant requirement” given that the terms of reference do not include details of any specific allegation of such a failure, although the Commissioner has decided to conduct the investigation as a result of a number of specific complaints made by the Applicant?;
- iii. to what extent could refusing to investigate complaints made by the Applicant in December 2017 be justified on the basis of an investigation opened in April 2017?

17. As the Applicant accepts, the Tribunal does not have general power to oversee the way in which the Commissioner conducts an investigation. The Applicant, should he wish to challenge the Commissioner's method of proceeding, would have to seek a remedy in the High Court. But the Applicant is not seeking to ask the Tribunal to intervene in investigation CSG237 but is arguing, instead, that the legal flaws in that investigation are so fundamental that the Commissioner should not be allowed to use its existence as a sufficient reason for refusing to investigate new complaints.

18. It would not be fair to reach any conclusion in relation to the general validity of investigation CSG237 without the Commissioner being given the opportunity to explain and defend her method of proceeding in relation to that investigation. But what has become evident regarding the nature of that investigation, since the Applicant was granted permission to make his application, has reinforced the

caniatâd hwnnw, bod yr amgylchiadau'n datgelu rhesymau cryf, o bwysigrwydd cyffredinol, pam y dylai'r cais gael ei glywed, os yw hynny o fewn awdurdodaeth y Tribiwnlys.

19. Ni fyddai'r ffaith fod y penderfyniadau dan sylw bellach wedi'u gwrthdroi yn rheswm digonol, o angenrheidrwydd, dros beidio bwrw ymlaen gyda'r achos. Fel y dywedodd yr Arglwydd Slynn yn R v Secretary of State for the Home Department, ex parte Salem [1999] UKHL 8:

“The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

20. Gan nad yw'r Comisiynydd, wrth wrthdroi ei phenderfyniadau, wedi derbyn bod unrhyw nam ar y penderfyniadau hynny, erys ansicrwydd ynglŷn â'r cwestiynau cyfreithiol a restrir ym mharagraff 16 uchod. Mae'n bosibl y bydd y Comisiynydd yn dymuno, yn y dyfodol, i ddilyn yr un trywydd, mewn perthynas â chwynion lluosog yn erbyn un corff, ag a wnaeth trwy sefydlu ymchwiliad CSG237 a thrwy wrthod ymchwilio i gwynion tebyg newydd. Os oes gan y Tribiwnlys y pŵer i ystyried penderfyniad i beidio ag ymchwilio i gŵyn, hyd yn oed ar ôl i'r penderfyniad gael ei wrthdroi gan y Comisiynydd o'i gwirfodd, byddai'r amgylchiadau'n cyfiawnhau arfer y pŵer hwnnw. Rhaid ystyried, felly, dadl y Comisiynydd nad oes gan y Tribiwnlys bŵer felly.

21. Rhoddir i'r Tribiwnlys, o dan adran 103(2) swyddogaeth i “adolygu” penderfyniad y Comisiynydd i beidio ag ymchwilio i gŵyn.

Tribunal's view, when granting that permission, that the circumstances reveal strong reasons, of general importance, why the application should be heard, if that is within the Tribunal's jurisdiction.

19. The fact that the decisions in question have now been reversed would not necessarily be sufficient reason for not proceeding with the case. As stated by Lord Slynn in R v Secretary of State for the Home Department, ex parte Salem [1999] UKHL 8:

“The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

20. As the Commissioner, when reversing her decisions, has not accepted that those decisions were deficient in any way, uncertainty remains regarding the legal questions listed in paragraph 16 above. It is possible that the Commissioner will, in the future, wish to follow the same path, in relation to multiple complaints against one body, as she did by establishing investigation CSG237 and by refusing to investigate similar, new complaints. If the Tribunal has the power to consider a decision not to investigate a complaint, even after the decision has been reversed by the Commissioner voluntarily, the circumstances would justify exercising that power. Therefore, consideration must be given to the Commissioner's argument that the Tribunal has no such power.

21. The Tribunal is given, under section 103(2), a jurisdiction to “review” the Commissioner's decision not to investigate a complaint. It

Mae'n ymddangos bod y term "adolygu" yn cael ei ddefnyddio mewn ffordd gyfreithiol dechnegol, fel sy'n cael ei gadarnhau gan is-adran (3) sy'n darparu bod yn rhaid i'r Tribiwnlys ymdrin â chais am adolygiad o'r fath "fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol." Natur yr adolygiad sydd mewn golwg, felly, yw un sy'n cymhwyso'r un egwyddorion ac sy'n cael eu cymhwyso gan yr Uchel Lys wrth ystyried cais am adolygiad barnwrol yn unol ag adran 29 o Ddeddf Uwchlysoedd 1981 a Rhan 54 o'r Rheolau Gweithdrefn Sifil. Ond wrth ddarparu bod yn rhaid i'r Tribiwnlys ymdrin â chais am adolygiad fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol mae adran 103(3) o'r Mesur yn datgan yn glir bod hyn "yn ddarostyngedig i adran 104".

appears that the term "review" is used in a technical, legal way, as is confirmed by sub-section (3) which provides that the Tribunal must deal with an application for such a review "as if it were an application for judicial review made to the High Court." The nature of the review in question, therefore, is one that applies the same principles as are applied by the High Court in considering an application for a judicial review in accordance with section 29 of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules. But in providing that the Tribunal must deal with an application for a review as if it were an application to the High Court for a judicial review, section 103(3) of the Measure states clearly that this "is subject to section 104".

22. Effaith adran 104 yw gosod cyfyngiad ar ehangder y pŵer a fyddai gan y Tribiwnlys pe na bai'r geiriau "yn ddarostyngedig i adran 104" yn bod. Adran 104, a'r adran hwnnw yn unig, sy'n diffinio'r hyn y gall y Tribiwnlys wneud ar ôl iddo ddod i benderfyniad ar gais. (Am ryw reswm, mae adran 103 yn cyfeirio at "benderfyniad" y Comisiynydd tra bod adran 104 yn sôn am ei "dyfarniad" ond mae'n ymddangos mai yr un yw ystyr y ddau air yn y cyd-destun hwn.) Er bod adran 126(1) yn rhoi i'r Tribiwnlys "yr un pwerau, hawliau, breintiau ac awdurdod â'r Uchel Lys" mae hyn "mewn perthynas â'r materion a grybwyllir yn is-adran (2)" yn unig, sef presenoldeb tystion a'u holi, cyflwyno ac archwilio dogfennau a materion eraill sy'n "gysylltiedig â swyddogaethau'r Tribiwnlys" ("incidental to the Tribunal's functions" yn Saesneg) ac nid yw'n ymddangos bod adran 126 yn ychwanegu at swyddogaethau sylfaenol y Tribiwnlys nac, felly, yn ychwanegu at y pwerau a roddir i'r Tribiwnlys gan adran 104.
22. The effect of section 104 is to set a limit on the breadth of the power the Tribunal would have if the words "subject to section 104" did not exist. Section 104, and that section alone, defines what the Tribunal can do after it has reached a decision on an application. (For some reason, section 103 refers to the Commissioner's "decision" whilst section 104 mentions her "determination" but it appears that both words have the same meaning in this context.) Although section 126(1) gives the Tribunal "the same powers, rights, privileges and authority as the High Court" this is "in relation to the matters mentioned in sub-section (2)" only, namely the attendance of witnesses and their questioning, the production and inspection of documents and other matters that are "incidental to the Tribunal's functions" and it does not appear that section 126 adds to the basic functions of the Tribunal, nor, therefore, does it add to the powers given to the Tribunal by section 104.
23. Mae adran 104(1) yn darparu y "caiff" y Tribiwnlys (a) gadarnhau dyfarniad y Comisiynydd neu (b) diddymu dyfarniad y Comisiynydd. Os bydd y Tribiwnlys yn diddymu dyfarniad y Comisiynydd mae is-adran (2) yn darparu bod yn rhaid i'r Tribiwnlys anfon yr achos yn ôl at y
23. Section 104(1) provides that the Tribunal "may" (a) affirm the Commissioner's determination or (b) annul the Commissioner's determination. If the Tribunal annuls the Commissioner's determination, sub-section (2) provides that the Tribunal must remit the case to the Commissioner with directions for its

Comisiynydd gyda chyfarwyddyd ar gyfer ei ail-ystyried. Mae'n glir, felly, bod y Mesur, wrth gyfeirio at "ddiddymu" dyfarniad y Comisiynydd yn cyfeirio at ddyfarniad neu benderfyniad sy'n dal i fodoli. Oni bai am hynny, ni fyddai'r gorchymyn i anfon y mater yn ôl at y Comisiynydd yn gwneud unrhyw synnwyr.

24. A yw'r defnydd o'r gair "caiff" ("may" yn Saesneg) yn is-adran (1) yn awgrymu bodolaeth pŵer neu bwerau ychwanegol, gan gynnwys y pŵer i ddatgan bod penderfyniad y Comisiynydd wedi bod tu allan i'w phwerau ond heb ddiddymu'r penderfyniad hwnnw, gan fod y penderfyniad, er enghraifft, eisoes wedi'i wrthdroi gan y Comisiynydd? Mewn geiriau eraill, a yw is-adran (1) yn rhoi dwy enghraifft o'r gorchymynion y gall y Tribiwnlys wneud ond heb gyfyngu ar allu'r Tribiwnlys i wneud gorchymynion eraill lle bo hynny'n briodol? Nid yw'n ymddangos i'r Tribiwnlys mai dyna yw dehongliad cywir adran 104(1). Yr hyn a geir yno yw dewis deul rhwng dau fath o orchymyn, gan orfodi'r Tribiwnlys i ddewis y naill neu'r llall yn sgil ei benderfyniad ar gyfreithlondeb dyfarniad y Comisiynydd. Dyma'r unig ddau beth y "caiff" y Tribiwnlys wneud o dan yr amgylchiadau. Mae patrwm yr is-adran yn awgrymu'n gryf y byddai bodolaeth unrhyw drydydd dewis wedi cael ei wneud yn glir trwy'i restru ochr yn ochr â'r dewisiadau eraill.

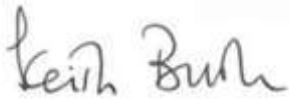
25. Ym marn y Tribiwnlys, felly, mae'n ymhlyg yn adran 104 o'r Mesur mai'r unig "benderfyniad" neu "ddyfarniad" y caiff y Tribiwnlys ymdrin ag ef yw un sy'n dal yn weithredol. Unwaith y bydd y Comisiynydd yn gwrthdroi penderfyniad i beidio ag ymchwilio i gŵyn daw swyddogaeth y Tribiwnlys i ben. Mae'r dehongliad hwn yn hollol gydnaws â phwrpas y Tribiwnlys sef nid i ddisodli'r Uchel Lys yn gyffredinol mewn perthynas â gweithredoedd y Comisiynydd ond, fel yr awgryma Mr Lewis yn ei sylwadau ysgrifenedig, i gynnig rhwymedi i Geisydd pan fo'r Comisiynydd wedi gwrthod ymchwilio i'w gŵyn.

reconsideration. It is clear, therefore, that the Measure, in referring to "annulling" the Commissioner's determination is referring to a determination or decision that still exists. If that were not the case, the order to remit the matter to the Commissioner would make no sense.

24. Does the use of the word "may" in sub-section (1) suggest the existence of an additional power or powers, including the power to declare that a decision of the Commissioner was outside her powers, but without revoking that decision, as the decision, for example, has already been reversed by the Commissioner? In other words, is sub-section (1) giving two examples of the orders which the Tribunal can make but without limiting the Tribunal's ability to make other orders where appropriate? It does not appear to the Tribunal that this is a correct interpretation of section 104(1). What is found there is a binary choice between two types of order, forcing the Tribunal to select one or the other in the light of its decision on the legality of the Commissioner's determination. These are the only two things the Tribunal "may" do under the circumstances. The pattern of the sub-section suggests strongly that the existence of any third option would have been made clear by listing it alongside the other options.


25. In the Tribunal's view, therefore, it is implicit in section 104 of the Measure that the only "decision" or "determination" the Tribunal may deal with is one that is still effective. Once the Commissioner has reversed a decision not to investigate a complaint the Tribunal's function ceases. This interpretation is totally in keeping with the purpose of the Tribunal which is not to supersede the High Court in general in relation to the Commissioner's actions, but, as Mr Lewis suggests in his written submissions, to offer an Applicant a remedy when the Commissioner has refused to investigate his or her complaint.

26. Mae'r sefyllfa, wedi i'r Comisiynydd gwrthdroi ei phenderfyniadau gwreiddiol, yn syrthio'n glir o dan reol 28(2) o Reolau Tribiwnlys y Gymraeg 2015, sef nad yw'r cais, bellach, o fewn awdurdodaeth y Tribiwnlys, ni fyddai'n ddefnydd priodol o broses y Tribiwnlys i barhau i'w ystyried, ac nid oes dewis gan y Tribiwnlys ond ei ddileu.



Keith Bush CF
Llywydd y Tribiwnlys
9 Gorffennaf 2018

26. The situation, following the Commissioner's reversal of her original decisions, clearly falls under rule 28(2) of the Welsh Language Tribunal Rules 2015, namely that the application is no longer within the jurisdiction of the Tribunal, it would not be a proper use of the Tribunal's process to continue to consider it, and the Tribunal has no option but to strike it out.



Keith Bush QC
President of the Tribunal
9 July 2018