



TRIBIWNLYS Y GYMRAEG
Rhif yr Achos: TyG/WLT/19/1

CURON WYN DAVIES
(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



WELSH LANGUAGE TRIBUNAL
Case No: TyG/WLT/19/1

CURON WYN DAVIES
(Applicant)
v.
WELSH LANGUAGE COMMISSIONER
(Respondent)

TRIBUNAL DECISION

Nature of application

Application under Rule 28 of the Welsh Language Tribunal Rules 2015 to strike out the application on the grounds that either:

- I. It is, or is no longer, within the jurisdiction of the Tribunal
- II. Discloses no reasonable grounds
- III. Is otherwise an abuse of the Tribunals process.

Decision of the Tribunal

The Tribunal confirms that:

- a) The Tribunal does not have authority under section 103 and 104 of the Welsh Language (Wales) Measure 2011 to consider the application to review the

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 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.

decision of the Commissioner not to carry out an investigation if the decision is no longer effective e.g. on the basis that the Commissioner himself has changed that decision;

- b) whilst initially the Applicants application had fallen within the authority of the Tribunal, the Commissioner has subsequently overturned the decision that the application relates to; this brings the Tribunals jurisdiction and authority in relation to the decision to an end, and that to continue with the matter would be an abuse of the Tribunals power and process;
- c) the Applicants application is struck out under Rule 28 (2)(b) of the Welsh Language Tribunal Rules 2015.

RHESYMAU

REASONS

Cyflwyniad

1. Ym mis Ionawr 2019 gwnaeth y Ceisydd nifer o gwynion i'r Comisiynydd yn honni nifer o fethiannau gan ei gyngor lleol i gydymffurfio â'i ddyletswyddau dan safonau'r iaith Gymraeg. Yr oedd y safonau dan sylw ymysg y rhai a bennwyd yn yr Hysbysiad Cydymffurfio a gyflwynwyd i'r cyngor gan y Comisiynydd ar 30 Medi 2015. Yr unig gŵyn sy'n berthnasol i'r cais cyfredol oedd cwyn fod adran Gwasanaethau Parcio'r cyngor, wrth ohebu â'r Ceisydd, wedi defnyddio fersiwn Saesneg o'i gyfeiriad. Yr oedd hyn er gwaetha'r ffaith ei fod wedi rhoi gwybod i'r cyngor yn flaenorol ei fod yn dymuno i unrhyw ohebiaeth y byddai'n ei derbyn gan y cyngor fod yn y Gymraeg. Cred y Ceisydd fod y cyngor, drwy weithredu yn y modd hwn, wedi methu â chydymffurfio â'i ddyletswydd dan safon 2 yn yr Hysbysiad Cydymffurfio perthnasol, dyletswydd a ddaeth i rym ar 30 Mawrth 2016.
2. Er i'r Comisiynydd gytuno i gynnal ymchwiliadau i sawl un o gwynion y Ceisydd, penderfynodd beidio â gwneud hynny yng nghyswllt y gŵyn a amlinellwyd uchod. Felly ni fu unrhyw ganfyddiad ffurfiol gan y Comisiynydd fod y cyngor wedi torri'r safon dan sylw. Nid yw'r cyngor yn un o'r partïon yn y cais hwn, sy'n ymwneud yn unig â phenderfyniad y

Introduction

1. In January 2019 the Applicant made a number of complaints to the Commissioner alleging a number of failures by his local council to comply with its duties under Welsh language standards. The standards in question were amongst those specified in the Compliance Notice served on the council by the Commissioner on 30 September 2015. The only complaint which is relevant to the current application was a complaint that the council's Parking Services department had, when corresponding with the Applicant, used an English version of his address. This was despite the fact that he had previously made it known to the council that he wished any correspondence which he received from the council to be in Welsh. The Applicant believes that by acting in this way the council failed to comply with its duty under standard 2 in the relevant Compliance Notice, a duty which came into force on 30 March 2016.
2. Although the Commissioner agreed to conduct investigations into several of the Applicant's complaints, she decided not to do so in relation to the complaint outlined above. There has therefore been no formal finding by the Commissioner that the council was in breach of the standard in question. The council is not a party to this application, which relates solely to

Comisiynydd i beidio â chynnal ymchwiliad. Nid yw'r cyngor, hyd yma, wedi cael cyfle i herio'r gŵyn, ac nid oes dim a benderfynir gan y Tribiwnlys ar y cam hwn yn effeithio ar hawl y cyngor i wneud hynny os bydd y gŵyn hon, neu un debyg, yn destun ymchwiliad gan y Comisiynydd.

3. I ddibenion y cais hwn, mae'n berthnasol nodi, fodd bynnag, fod y Comisiynydd, wrth roi ei rhesymau dros benderfynu peidio ag ymchwilio i gŵyn y Ceisydd, wedi derbyn, fel sail i'r rhesymau hynny, fod yr arfer yr oedd y Ceisydd wedi cwyno amdano yn anghyson â dyletswydd y cyngor dan y safon berthnasol. Yr oedd ei rhesymau dros wrthod ymchwilio i'r gŵyn yn ymwneud â'r ffaith ei bod yn debyg i gŵyn flaenorol gan aelod arall o'r cyhoedd, a oedd eisoes wedi bod yn destun ymchwiliad gan y Comisiynydd, a oedd wedi cadarnhau'r gŵyn. Yr oedd rhesymau'r Comisiynydd dros beidio ag ymchwilio i gŵyn y Ceisydd yn ymwneud â'r camau gorfodaeth yr oedd hi wedi eu cymryd yn erbyn y cyngor o ganlyniad i'r gŵyn flaenorol.

4. Yr oedd llythyr y Comisiynydd at y Ceisydd dyddiedig 19 Mawrth 2019 yn cyfeirio at y ffaith ei bod hi, dan adran 77(3)(a) Mesur y Gymraeg (Cymru) 2011, wedi ei gwneud yn ofynnol i'r cyngor, mewn perthynas â'r gŵyn flaenorol, baratoi "cynllun gweithredu" sy'n gynllun "i ddiben atal parhad neu ailadrodd methiant (y

the decision of the Commissioner not to conduct an investigation. The council has not, as yet, had any opportunity to contest the complaint and nothing decided by the Tribunal at this stage affects the right of the council to do so if this complaint, or a similar one, is investigated by the Commissioner.

3. For the purpose of this application it is relevant to note, however, that the Commissioner, when giving her reasons for deciding not to investigate the Applicant's complaint, accepted, as a basis for those reasons, that the practice of which the Applicant had complained was inconsistent with the council's duty under the relevant standard. Her reasons for refusing to investigate the complaint related to the fact that it was similar to an earlier complaint by another member of the public, which had already been investigated by the Commissioner and which the Commissioner had upheld. The Commissioner's reasons for not investigating the Applicant's complaint related to the enforcement action which she had taken against the council as a result of the earlier complaint.

4. The Commissioner's letter to the Applicant dated 19 March 2019 referred to the fact that she had, under section 77(3)(a) of the Welsh Language (Wales) Measure 2011, required the council, in relation to that earlier complaint, to prepare an "action plan" which is a plan "for the purpose of preventing the continuation or

cyngor) i gydymffurfio â'r gofyniad perthnasol.” Aeth y Comisiynydd ymlaen i ddatgan fod y cyngor wedi paratoi'r cynllun gofynnol ac mai un o'r camau arfaethedig a oedd wedi'u cynnwys ynddo oedd:

“Sicrhau fod tendrau newydd ar gyfer meddalwedd TG a ddefnyddir i greu llythyrau a biliau yn ystyried y gofyniad i gynnwys opsiwn i'r system ddangos fersiynau Cymraeg a Saesneg o gyfeiriadau preswyl (cyf.)”

Esboniodd y Comisiynydd bod y cynllun gweithredu yn ei gwneud yn ofynnol i'r cam uchod gael ei gymryd erbyn 5 Medi 2019. Aeth ymlaen i ddatgan, yng ngoleuni'r ffeithiau hynny:

5. “(I) ystyrir na fyddai cynnal ymchwiliad (h.y. i gŵyn y Ceisydd) yn ddefnydd effeithlon o adnoddau ac na fyddai cynnal ymchwiliad, pe byddai methiant arall yn cael ei ganfod, yn debygol o'm harwain i osod camau gweithredu gwahanol i'r rhan a osodwyd eisoes (cyf.)
6. Yn ei Rybudd o Gais (dyddiedig 9 Ebrill 2019) yr oedd y Ceisydd yn ceisio herio penderfyniad y Comisiynydd ar ddwy sail:
 - i. nad oedd y cynllun gweithredu presennol (yr oedd yn ofynnol dan adran 80 y Mesur iddo fod wedi cael ei gymeradwyo gan y Comisiynydd) yn darparu sail gyfreithlon dros wrthod ymchwilio i gŵyn newydd y Ceisydd. Mae'r Ceisydd yn nodi fod y dyfyniad o'r cynllun gweithredu'n ymddangos fel pe bai'n awgrymu fod y

repetition of (the council's) failure to comply with the relevant requirement.” The Commissioner went on to state that the council had prepared the required plan and that one of the proposed steps included in it was: “Ensure that new tenders for IT software used to create letters or bills take account of the requirement to include an option for the system to show Welsh and English versions of residential addresses (trans.)”The Commissioner explained that the date by which the action plan required the above step to be taken was 5 September 2019. She went on to state that in the light of those facts:

5. “(I)t is considered that conducting an investigation (i.e. into the Applicant's complaint) would not be an effective use of resources and that conducting an inquiry would not, if a further failure were to be established, be likely to lead me to impose enforcement action different from (that) already imposed (trans.)
6. In his Notice of Application (dated 9 April 2019) the Applicant sought to challenge the Commissioner's decision on two grounds:
 - i. That the existing action plan (which was required by section 80 of the Measure to have been approved by the Commissioner) did not provide a lawful basis for refusing to investigate the Applicant's fresh complaint. The Applicant points out that the quotation from the action plan seems to imply a

cyngor wedi cael problemau wrth ddefnyddio fersiynau o gyfeiriadau yn y ddwy iaith. Heb o leiaf weld y cynllun gweithredu cyflawn mae'n anodd deall sut yn union y mae'r weithred y cyfeirir ati'n ymwneud â chydymffurfio â'r safon, ond mae'r Ceisydd yn nodi mai ymwneud â methiant i ddefnyddio fersiwn Cymraeg o'i gyfeiriad yn unig y mae ei gŵyn ef. Os mai caniatáu i lythyrau gario cyfeiriad mewn un iaith yn unig y mae'r trefniadau cyfredol, yna pam na ddylai'r iaith honno fod y Gymraeg? Mae'n ofynnol i'r Comisiynydd dan adran 3(3)(c) y Mesur i ystyried yr egwyddor na ddylai'r iaith Gymraeg gael ei thrin yn llai ffafriol na'r Saesneg. Er hynny, ymddengys fod y Comisiynydd wedi cytuno i sefyllfa sy'n goddef defnyddio fersiynau o gyfeiriadau yn Saesneg yn unig. Mae'r Ceisydd yn dadlau fod hyn yn groes i ddyletswyddau statudol y Comisiynydd, a bod y Comisiynydd, drwy seilio ei phenderfyniad i beidio ag ymchwilio i'w gŵyn ar y cynllun gweithredu, wedi cymryd camau y tu hwnt i'w phwerau. Gan mai diben cynllun gweithredu, fel y nodir yn adran 77(3)(a) y Mesur, yw "atal parhad neu ailadrodd" methiant i gydymffurfio â gofyniad safon, mae'r Ceisydd yn cwestiynu a oes modd i'r Comisiynydd ddibynnu'n gyfreithlon ar gynllun sy'n caniatáu i fethiant barhau am fisoedd neu flynyddoedd, i gyfiawnhau penderfyniad i

difficulty encountered by the council in using versions of an address in both languages. Without at least seeing the full action plan it is impossible to understand exactly how the action referred to relates to compliance with the standard, but the Applicant points out that his complaint relates only to a failure to use a Welsh language version of his address. If the current arrangements only permit letters to be addressed in one language, then why should that language not be Welsh? The Commissioner is required by section 3(3)(c) of the Measure to have regard to the principle that the Welsh language should be treated no less favourably than the English language. Yet it appears that the Commissioner has agreed to a state of affairs that tolerates the continued use of English-only versions of addresses. The Applicant argues that this is contrary to Commissioner's statutory duties and that in basing her decision not to investigate his complaint on the action plan the Commissioner has acted beyond her powers. Since the purpose of an action plan, as set out in section 77(3)(a) of the Measure, is "preventing the continuation or repetition" of a failure to comply with a requirement of a standard, the Applicant questions whether a plan which permits a failure to continue for months or years can lawfully be relied upon by the

beidio â chynnal ymchwiliad i gŵyn newydd fod y methiant i gydymffurfio â'r gofyniad yn parhau.

- ii. Hyd yn oed os caniateir trin y ddarpariaeth berthnasol yn y cynllun gweithredu yn berthnasol o ran penderfynu a ddylid ymchwilio i gŵyn newydd a' peidio, mae'r Ceisydd yn dadlau ei bod yn afresymol ei thrin fel rheswm terfynol dros beidio â gwneud hynny. Mae'r Comisiynydd wedi tybio'n anghywir, beth bynnag fyddai canlyniad ymchwiliad pellach, na fyddai ganddi unrhyw sail dros gymryd unrhyw gamau gorfodi a oedd yn mynd y tu hwnt i'r rhwymedigaethau a osodwyd ar y cyngor gan y cynllun gweithredu. Unwaith eto, mae diffyg copi cyflawn o'r cynllun gweithredu yn ei gwneud yn amhosibl asesu'r holl opsiynau a allai ddod i'r amlwg o ganlyniad i ymchwiliad, ond pe byddai'n cael ei ddatgelu, er enghraifft, nad oedd y cyngor ar y trywydd cywir i gydymffurfio â'r cynllun gweithredu, fe allai hyn achosi i'r Comisiynydd gymryd camau cadarnach yng nghyswllt canfyddiad newydd o fethiant i gydymffurfio â'r safon.

7. Cafodd caniatâd i wneud y cais ei wrthod yn wreiddiol gan y Llywydd (ar 12 Ebrill 2019). Yna defnyddiodd y Ceisydd ei hawl i ofyn am i'r mater gael ei ailystyried gan banel y Tribiwnlys.

Commissioner to justify a decision not to conduct an investigation into a fresh complaint that the failure to comply with the requirement is continuing.

- ii. Even if it is permissible to treat the relevant provision of the action plan as relevant in deciding whether to investigate a fresh complaint, the Applicant argues that it is irrational to treat it as a conclusive reason for not doing so. The Commissioner has wrongly assumed that whatever the outcome of a further investigation she would have no basis for taking any enforcement action which went beyond the obligations imposed on the council by the action plan. Again, the lack of a copy of the full action plan makes it impossible to assess the full extent of the options that might come to light as a result of an investigation, but if it were revealed, for example, that the council were not on track to comply with the action plan, this might cause the Commissioner to take stronger action in relation to a fresh finding of failure to comply with the standard.

7. Permission to make the application was initially (on 12 April 2019) refused by the President. The Applicant then exercised his right to ask for reconsideration by a Tribunal panel.

8. Fodd bynnag, fe wnaeth y Ceisydd hefyd gais i'r Tribiwnlys, ar 1 Mai 2019, am orchymyn dan reol 32(4) y Rheolau dylai'r Comisiynydd, cyn i'r Tribiwnlys ailystyried y mater, ddatgelu copi o'r cynllun gweithredu yn ei gyfanrwydd. Gan ystyried pwysigrwydd y cynllun gweithredu i benderfyniad y Comisiynydd, yr oedd y Tribiwnlys, wrth ystyried y Cais yn wreiddiol, wedi cymryd yn ganiataol, ac yn gyfeiliornus, fod gan y Ceisydd gopi o'r ddogfen eisoes. Cyn ystyried y cais i'r cynllun gweithredu gael ei ddatgelu, gofynnodd y Tribiwnlys i'r Ceisydd pa gamau yr oedd wedi eu cymryd i gael gafael ar gopi o'r cynllun gweithredu heb orchymyn. Daeth i'r amlwg fod y Ceisydd wedi gwneud cais i'r Comisiynydd ddatgelu copi mewn ymateb i gais dan Ddeddf Rhyddid Gwybodaeth 2000, ond fod y Comisiynydd wedi gwrthod y cais. Wrth wneud hynny, yr oedd y Comisiynydd wedi dibynnu ar y cyfyngiad ar ddatgelu gwybodaeth yn adran 22 y Mesur ac ar benderfyniad y Tribiwnlys Haengyntaf (y Siambr Reoleiddio Gyffredinol) dyddiedig 15 Awst 2017 (cyf: EA/2017/0046). Dylid nodi bod y penderfyniad hwnnw'n ymwneud â hawliau aelodau o'r cyhoedd dan Ddeddf 2000 ac nad yw'n ymwneud â datgelu tystiolaeth berthnasol yn ystod gweithgaredd y Tribiwnlys hwn, lle y mae'r Comisiynydd yn un o'r partion.
8. However, the Applicant also, on 1 May 2019, applied to the Tribunal for an order under rule 32(4) of the Rules that the Commissioner should, before the Tribunal reconsidered the matter, disclose a copy of the full action plan. Given the importance of the action plan to the Commissioner's decision, the Tribunal, when giving initial consideration to the Application had wrongly assumed that the Applicant already had a copy. Before considering the application for disclosure of the action plan, the Tribunal asked the Applicant what steps he had taken to obtain a copy of the action plan without an order. It then emerged that the Applicant had requested the Commissioner to disclose a copy in response to a request under the Freedom of Information Act 2000 but that the Commissioner had rejected the request. In doing so, the Commissioner had relied on the restriction on disclosure of information in section 22 of the Measure and on the decision of the First-tier Tribunal (General Regulatory Chamber) dated 15 August 2017 (ref: EA/2017/0046). That decision relates, it should be noted, to the rights of members of the public under the 2000 Act and does not relate to the disclosure of relevant evidence in the course of the proceedings of this Tribunal to which the Commissioner is a party.

9. Mewn gwrandawriad ar 12 Mehefin 2019, rhoddodd y Tribiwnlys ganiatâd i'r Ceisydd wneud y cais, yn unol ag adran 103(4) y Mesur.
10. Wedi i'r Comisiynydd gael ei hysbysu fod y Ceisydd wedi cael caniatâd i herio sail gyfreithiol y penderfyniad i beidio â chynnal ymchwiliad i gŵyn y Ceisydd, ysgrifennodd y Comisiynydd at y Ceisydd ar 23 Gorffennaf 2019, yn ei hysbysu ei fod wedi ailystyried y penderfyniad hwnnw. O ganlyniad, gofynnodd i'r Ceisydd dynnu ei gais i'r Tribiwnlys yn ôl. Nid oedd y Ceisydd yn fodlon gwneud hynny ac mewn ymateb i gais y Comisiynydd i wrthod y Cais, nododd ei resymau mewn e-bost dyddiedig 29 Gorffennaf 2019. Yr oedd eisiau i'r Tribiwnlys ystyried y ffordd yr oedd y Comisiynydd wedi ymarfer ei swyddogaethau a heb agor ymchwiliad cyfreithlon - yn benodol:-
- Mewn materion blaenorol pan oedd y Comisiynydd wedi newid y penderfyniad ac wedi cytuno i ymchwilio, yr oedd yr ymchwiliad yn un hirfaith ac ni wnaed cynnydd. Mae'n herio a yw'r Comisiynydd yn newid y penderfyniad er mwyn osgoi gwrandawriad yn unig ac yna beidio â chynnal yr ymchwiliad fel yr awgrymwyd.
 - Nid oedd y Comisiynydd wedi pennu'r cylch gorchwyl eto, a gallai wyro oddi wrth y ddau fater a godwyd gan y Ceisydd, sef methiant i gydymffurfio â'r safonau a chydymffurfio â'r Cynllun Gweithredu.
 - Nid oedd cofnod wedi ei roi ar y Gofrestr eto, fel yr oedd yn ofynnol i'r Comisiynydd.
9. The Tribunal at a hearing on 12 June 2019 granted permission to the Applicant to make the application, in accordance with section 103(4) of the Measure.
10. After the Commissioner was notified that the Applicant had been granted permission to challenge the legal basis of the decision not to conduct an investigation into the Applicants complaint, the Commissioner wrote to the Applicant on 23 July 2019, informing him that he had reconsidered that decision. As a result, he asked the Applicant to withdraw his application to the Tribunal. The Applicant was not willing to do so and in response to the Commissioners application to dismiss the Application stated his grounds in an email dated 29 July 2019. He wanted the Tribunal to consider the way in which the Commissioner had exercised his functions and had not opened a lawful investigation – specifically:-
- In previous matters when the Commissioner had changed the decision and agreed to investigate, the investigation was prolonged and did not progress. He challenges whether the Commissioner is changing the decision merely to avoid a hearing and then not undertaking the investigation as suggested.
 - The Commissioner had not yet set the Terms of reference and could deviate from the two issues raised by the Applicant namely the failure to comply with the standards and compliance with the Action Plan.

- Nid oedd y Comisiynydd wedi tynnu'r hysbysiad dan adran 94 y Ddeddf yn ôl eto, lle yr oedd wedi cadarnhau ei bod yn gwrthod ymchwilio, ac o'r herwydd, yr oedd yn parhau i fodoli.
- Fod y Comisiynydd wedi methu â chydymffurfio â gorchymyn y Tribiwnlys i ddarparu copi o'r Cynllun Gweithredu a osodwyd ar Gyngor Sir Caerdydd ac nad oedd wedi gofyn i'r gorchymyn gael ei roi o'r neilltu dan reol 27 y Rheolau. Gofynnodd y Ceisydd i'r Tribiwnlys ystyried y pwerau dan reol 33(1)(b) os nad oedd y Comisiynydd wedi cydymffurfio â'r gorchymyn nac wedi gofyn iddo gael ei roi o'r neilltu.

- No entry had yet been placed on the Register as required of the Commissioner.
- The Commissioner had not yet withdrawn the notice under section 94 of the Act, when she confirmed that she refused to investigate, and as such it was still in being.
- That the Commissioner had failed to comply with the order of the Tribunal to provide a copy of the Action plan imposed on Cardiff City Council and had not requested that the order be set aside under rule 27 of the Rules. The Applicant asked the Tribunal to consider the powers under rule 33(1)(b) if the Commissioner had not complied with the order or requested it be set aside.

Y cais hwn

Nodwch, os gwelwch yn dda, fod Comisiynydd newydd wedi dod i'r swydd wrth i'r mater hwn fynd rhagddo. O ganlyniad, mae rhan gyntaf manylion yr achos yn cyfeirio ati "hi" a'r rhan ddiweddaraf ato "ef" sef y Comisiynydd presennol Aled Roberts.

1. Ysgrifennodd y Comisiynydd at y Tribiwnlys ar 24 Gorffennaf 2019 a gwnaeth gais i'r Tribiwnlys ddileu cais y Ceisydd am adolygiad, gan ddadlau nad oedd gan y Tribiwnlys awdurdodaeth i ystyried y penderfyniad gwreiddiol mwyach neu, fel arall, y byddai parhau i ystyried penderfyniad a oedd eisoes wedi cael ei wrthdroi yn gamddefnydd o bwerau'r Tribiwnlys. Yn unol â hynny, mae cais

This application

Please note that during the progress of this matter a new Commissioner came into post. As such the earlier part of the case details refer to "she" and the latter to "he" as the current Commissioner is Aled Roberts.

1. The Commissioner wrote to the Tribunal on 24 July 2019 and applied to the Tribunal to strike out the Applicant's Application for a review, arguing that the Tribunal no longer had jurisdiction to consider the original decision or, alternatively, that it would be an abuse of the Tribunal's powers to continue to consider a decisions that had already been reversed. Accordingly, an application has been made to

wedi ei wneud i'r Tribiwnlys ddirwyn yr achos i ben gan ddefnyddio'i bwerau dan reol 28.

2. Mae'r cais dan reol 28 wedi ei benderfynu gan Lywydd y Tribiwnlys, yn unol â pharagraff 5(f) Cyfarwyddyd Ymarfer 3 y Tribiwnlys. Cyflwynodd y ddau barti eu dadleuon yn ysgrifenedig.

Y dadleuon

3. Mae'r ddau barti'n ymwybodol ac yn cyfeirio at benderfyniad y Tribiwnlys yn TyG 18/2 lle yr oedd cais i ddileu cais am adolygiad. Mae'r ddau barti yn cyfeirio at y rhesymau yn yr achos hwnnw yn eu dadleuon ysgrifenedig.
4. Yn y mater hwnnw, ystyriodd y Llywydd yn hirfaith ac yn fanwl a oedd gan y Tribiwnlys bŵer i barhau i adolygu penderfyniad gan y Comisiynydd i wrthod ymchwilio i gŵyn os oedd y Comisiynydd wedyn wedi newid y penderfyniad hwnnw ac wedi penderfynu ymchwilio.
5. Yn y mater hwn mae rhesymau'r Ceisydd pam y dylai'r mater fynd rhagddo wedi'u nodi uchod.
6. Ymatebodd y Comisiynydd i resymau'r Ceisydd mewn llythyr dyddiedig 14 Awst 2019. Yr oedd y llythyr yn datgan; Fod pwerau'r Tribiwnlys wedi eu nodi yn adran 103 a 104 y Ddeddf. Na allai ond cadarnhau penderfyniad y Comisiynydd neu ei ddiddymu. Oherwydd bod y Comisiynydd wedi newid y penderfyniad nad

the Tribunal to terminate the case using its powers under rule 28.

2. 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

3. Both parties are aware and refer to the Tribunal's decision in TyG 18/2 where there was an application to strike out an application for a review. Both parties make reference to the reasons in that case in their written arguments.
4. In that matter the President considered at length and in detail whether or not the Tribunal had the power to continue to review a decision by the Commissioner to refuse to investigate a complaint if the Commissioner then changed that decision and decided to investigate.
5. In this matter the Applicants reasons why the matter should proceed are noted above.
6. The Commissioner responded to the Applicants grounds in a letter dated the 14 August 2019. The letter stated that; The powers of the Tribunal were set out in section 103 and 104 of the Act. That it could only confirm the Commissioners decision or annul it. That as the Commissioner had changed the decision there was no further decision for the Tribunal to take,

oedd unrhyw gamau pellach i'r Tribiwnlys eu cymryd, na ddylai ymgymryd ag adolygu materion damcaniaethol ac o'r herwydd y dylai'r cais am adolygiad gael ei ddileu. Cyfeiriodd y Comisiynydd at ganfyddiad y Tribiwnlys yn TyG 18/2 ac yn benodol at baragraffau 24 a 25, nodir y rhain isod yn ogystal â pharagraff 23, yr wyf yn ei gynnwys er budd y darlun cyflawn.

“23. Mae Adran 104(1) yn darparu y “gall” y Tribiwnlys (a) gadarnhau penderfyniad y Comisiynydd neu (b) ddiddymu penderfyniad y Comisiynydd. Os bydd y Tribiwnlys yn diddymu penderfyniad y Comisiynydd, mae isadran (2) yn darparu fod yn rhaid i'r Tribiwnlys anfon yr achos yn ôl at y Comisiynydd gyda chyfarwyddiadau i'w ailystyried. Mae'n amlwg, felly, fod y Mesur, drwy gyfeirio at “diddymu” penderfyniad y Comisiynydd, yn cyfeirio at benderfyniad sy'n parhau i fodoli. Pe na fyddai hynny'n wir, 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 “gall” yn isadran (1) yn awgrymu bodolaeth pŵer neu bwerau ychwanegol, gan gynnwys y pŵer i ddatgan fod penderfyniad gan y Comisiynydd y tu hwnt i'w phwerau, ond heb ddiddymu'r penderfyniad hwnnw, gan fod y penderfyniad, er enghraifft wedi cael ei wrthdroi gan y Comisiynydd? Mewn geiriau eraill, a yw isadran (1) yn rhoi dwy enghraifft o'r gorchymynion y gall y Tribiwnlys eu gwneud ond heb gyfyngu ar allu'r

it should not embark on reviewing theoretical issues and as such the application for a review should be struck out. The Commissioner referred to the Tribunal's findings in TyG 18/2 and specifically to paragraphs 24 and 25, these are noted below in addition to paragraph 23 which I add for completeness:-

“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 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

Tribiwnlys i wneud gorchmynion eraill lle bo'n briodol? Nid yw'n ymddangos i'r Tribiwnlys fod hwn yn ddehongliad cywir o isadran 104(1). Yr hyn a geir yno yw dewis deuaidd rhwng dau fath o orchymyn, gan orfodi'r Tribiwnlys i ddewis un neu'r llall yng ngoleuni ei benderfyniad ar gyfreithlondeb penderfyniad y Comisiynydd. Nid oes ond dau beth y "gall" y Tribiwnlys ei wneud dan yr amgylchiadau. Mae patrwm yr isadran yn awgrymu'n gryf y byddai bodolaeth unrhyw drydydd opsiwn wedi cael ei nodi'n glir ochr yn ochr â'r opsiynau eraill.

25. Ym marn y Tribiwnlys rhestru, felly, mae ymhlyg yn adran 104 y Mesur mai'r unig "benderfyniad" y caiff y Tribiwnlys ddelio ag ef yw un sy'n parhau mewn grym. Unwaith y mae'r Comisiynydd wedi gwrthdroi penderfyniad i beidio ag ymchwilio i gŵyn, mae swyddogaeth y Tribiwnlys yn dod i ben. Mae'r dehongliad hwn yn gwbl gydnaws â diben y Tribiwnlys, sef i beidio â chymryd lle'r Uchel Lys yn gyffredinol yng nghyswllt gweithredoedd y Comisiynydd, ond, fel y mae Mr Lewis yn awgrymu yn ei sylwadau ysgrifenedig, cynnig rhwymedi pan fo'r Comisiynydd wedi gwrthod ag ymchwilio i'w gŵyn ef neu hi."

I gynorthwyo'r partion, amgaeir copi llawn o'r penderfyniad yn achos TyG 18/2. Mae'r Tribiwnlys wedi darllen y penderfyniad ac wedi atgoffa'i hun o'r gyfraith achos y cyfeiriwyd ati yn y penderfyniad hwnnw.

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 it alongside the other options.

25. In the listing 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."

To assist the parties attached is a full copy of the decision in case TyG18/2. The Tribunal has read the decision and reminded itself of the case law referred to within that decision.

7. Yn ogystal â'r ddadl gyfreithiol a gyflwynwyd gan y Comisiynydd, mae'r llythyr dyddiedig 14eg Awst 2019 yn cadarnhau'r canlynol:-
- Byddai'r cylch gorchwyl yn cael ei bennu ac yn cynnwys y ddwy agwedd sy'n pryderu'r Ceisydd.
 - Byddai'r Comisiynydd yn cofnodi'r mater yn y Gofrestr, fel sy'n ofynnol gan Adran 109 y Ddeddf a
 - Bod y Comisiynydd wedi ysgrifennu at y Ceisydd yn canslo'r hysbysiad a gyhoeddwyd dan Adran 94 y Ddeddf a oedd yn datgan fod y Comisiynydd yn gwrthod ymchwilio.
7. In addition to the legal argument put forward by the Commissioner the letter of the 14th August 2019 confirms that;-
- The terms of reference would be set and include both aspects of concern to the Applicant.
 - The Commissioner would be recording the matter in the Register as required by Section 109 of the Act and
 - That the Commissioner had written to the Applicant to cancel the notice issued under Section 94 of the Act which had stated the Commissioner was declining to investigate.

Asesiad

8. Nid oes gan y Tribiwnlys bŵer cyffredinol i oruchwyllo'r ffordd y mae'r Comisiynydd yn cynnal ymchwiliad. Byddai'r Ceisydd, pe byddai'n dymuno herio dull y Comisiynydd o weithredu, yn gorfod ceisio rhwymedi yn yr Uchel Lys.
9. Ni fyddai'r ffaith fod y penderfyniadau dan sylw bellach wedi cael eu gwrthdroi yn rheswm digonol dros beidio â bwrw ymlaen â'r achos, o angenrheidrwydd. Fel y nodwyd gan 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*

Assessment

8. 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.
9. 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*

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.”

Nid yw'n ymddangos fod yna resymau budd cyhoeddus a fyddai'n cyfiawnhau ymarfer y disgrisiwn hwnnw yn yr achos hwn.

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.”

There does not appear to be reasons of public interest that would merit exercising that discretion in this case.

10. Mae'r Tribiwnlys yn cytuno â'r sylwadau a wnaed yn TyG 18/2 y rhoddir i'r Tribiwnlys, dan adran 103(2) awdurdodaeth i "adolygu" penderfyniad y Comisiynydd i beidio ag ymchwilio i gŵyn. Ymddengys bod y term "adolygu" yn cael ei ddefnyddio mewn ffordd dechnegol, gyfreithiol, fel y cadarnheir gan is-adran (3) sy'n darparu fod yn rhaid i'r Tribiwnlys ymdrin â chais am adolygiad o'r fath "fel pe bai'n gais am adolygiad barnwrol a wnaed i'r Uchel Lys." Mae natur yr adolygiad dan sylw, felly, yn un sy'n cymhwyso'r un egwyddorion ag a gymhwysir gan yr Uchel Lys wrth ystyried cais am adolygiad barnwrol yn unol ag adran 29 Deddf Uwchlysoedd 1981 a rhan 54 o'r Rheolau Trefniadaeth Sifil. Ond wrth ddarparu fod yn rhaid i'r Tribiwnlys ymdrin â'r cais am adolygiad fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol, mae adran 103(3) y Mesur

10. The Tribunal agrees with the comments made in TyG 18/2 that the Tribunal is given, under section 103(2), a jurisdiction to "review" the Commissioner's decision not to investigate a complaint. It 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

yn datgan yn glir fod hyn “yn ddarostyngedig i adran 104”.

Measure states clearly that this “is subject to section 104”.

11. Effaith adran 104 yw gosod terfyn ar eangder y pŵer fyddai gan y Tribiwnlys pe na fyddai'r geiriau “yn ddarostyngedig i adran 104” yn bodoli. Adran 104, a'r adran honno'n unig, sy'n diffinio'r hyn y gall y Tribiwnlys ei wneud wedi iddo ddod i benderfyniad ar gais. (Am ryw reswm, mae adran 103 yn cyfeirio at “benderfyniad” (“decision”) y Comisiynydd tra bo adran 104 yn crybwyll “determination”, ond ymddengys mai'r un ystyr sydd i'r 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 yng nghyswllt materion a grybwyllwyd yn is-adran (2)” yn unig, sef presenoldeb tystion a'u cwestiynu, cynhyrchu ac archwilio dogfennau a materion eraill sy'n atodol i swyddogaethau'r Tribiwnlys” ac nid yw'n ymddangos fod adran 126 yn ychwanegu at swyddogaethau sylfaenol y Tribiwnlys na chwaith, felly, yn ychwanegu at y pwerau a roddwyd i'r Tribiwnlys gan adran 104.

11. 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 “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.

12. Mae Adran 104(1) yn darparu y “gall” y Tribiwnlys (a) gadarnhau penderfyniad y Comisiynydd neu (b) diddymu penderfyniad y Comisiynydd. Os bydd y Tribiwnlys yn diddymu penderfyniad y Comisiynydd, mae is-adran (2) yn darparu fod yn rhaid i'r Tribiwnlys anfon yr achos yn ôl at y Comisiynydd gyda chyfarwyddiadau i'w ailystyried. Mae'n amlwg,

12. 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 reconsideration. It is clear, therefore, that the

felly, fod y Mesur, drwy gyfeirio at “ddiddymu” penderfyniad y Comisiynydd, yn cyfeirio at benderfyniad sy’n parhau i fodoli. Pe na fyddai hynny’n wir, ni fyddai’r gorchymyn i anfon y mater yn ôl at y Comisiynydd yn gwneud unrhyw synnwyr.

13. A yw’r defnydd o’r gair “gall” yn is-adran (1) yn awgrymu bodolaeth pŵer neu bwerau ychwanegol, gan gynnwys y pŵer i ddatgan fod penderfyniad gan y Comisiynydd y tu hwnt i’w phwerau, ond heb ddiddymu’r penderfyniad hwnnw, gan fod y penderfyniad, er enghraifft wedi cael ei wrthdroi gan y Comisiynydd? Mewn geiriau eraill, a yw is-adran (1) yn rhoi dwy enghraifft o’r gorchymynion y gall y Tribiwnlys eu gwneud ond heb gyfyngu ar allu’r Tribiwnlys i wneud gorchymynion eraill lle bo’n briodol? Nid yw’n ymddangos i’r Tribiwnlys fod hwn yn ddehongliad cywir o is-adran 104(1). Yr hyn a geir yno yw dewis deuaidd rhwng dau fath o orchymyn, gan orfodi’r Tribiwnlys i ddewis un neu’r llall yng ngoleuni ei benderfyniad ar gyfreithlondeb penderfyniad y Comisiynydd. Nid oes ond dau beth y “gall” y Tribiwnlys ei wneud dan yr amgylchiadau. Mae patrwm yr is-adran yn awgrymu’n gryf y byddai bodolaeth unrhyw drydydd opsiwn wedi cael ei nodi’n glir drwy ei restru ochr yn ochr â’r opsiynau eraill.

14. Ym marn y Tribiwnlys, felly, mae ymhlyg yn adran 104 y Mesur mai’r unig “benderfyniad” y caiff y Tribiwnlys ddelio ag ef yw un sy’n parhau

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.

13. 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.

14. In the Tribunal’s view, therefore, it is implicit in section 104 of the Measure that the only “decision” or “determination” the Tribunal may

mewn grym. Unwaith y mae'r Comisiynydd wedi gwrthdroi penderfyniad i beidio ag ymchwilio i gŵyn, mae swyddogaeth y Tribiwnlys yn dod i ben. Mae'r dehongliad hwn yn gwbl gydnaws â diben y Tribiwnlys, sef i beidio â chymryd lle'r Uchel Lys yn gyffredinol yng nghyswllt gweithredoedd y Comisiynydd, ond cynnig rhwymedi pan fo'r Comisiynydd wedi gwrthod ag ymchwilio i'w gŵyn ef neu hi.

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 to offer an Applicant a remedy when the Commissioner has refused to investigate his or her complaint.

15. Mae'r sefyllfa, yn dilyn gwrthdroi'r penderfyniad gwreiddiol gan y Comisiynydd, yn amlwg yn dod dan reol 28(2) Rheolau Tribiwnlys y Gymraeg 2015, sef, gan nad yw'r cais o fewn awdurdodaeth y Tribiwnlys bellach, ni fyddai parhau i'w ystyried yn ddefnydd cywir o broses y Tribiwnlys, ac nid oes gan y Tribiwnlys unrhyw ddewis arall ond ei ddileu.

15. The situation, following the Commissioner's reversal of the original decision, 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.

Iwan Jenkins

Llywydd y Tribiwnlys
6 Rhagfyr 2019

Iwan Jenkins

President of the Tribunal
6 December 2019