Rhodri Williams QC and Nia Gowman appear for successful Claimant in landmark High Court judicial review case on determination of school reorganisation proposals pursuant to the School Standard and Organisation (Wales) Act 2013 and the standing of the Welsh language as a language of the law for the purpose of statutory interpretation.

Full Judgment: https://www.bailii.org/ew/cases/EWHC/Admin/2020/2071.html

Press Article: www.bbc.co.uk/news/uk-wales-53592819

Facts

The Claimant sought judicial review of a decision made by Rhondda Cynon Taff County Borough Council ("Local Authority") on 18 July 2019 to implement proposals concerning the wide-ranging re-organisation of primary, secondary and sixth form education in the greater Pontypridd area. Having undertaken a consultation process, the Local Authority published its proposals in several Statutory Notices:

1. The alteration of the age range of pupils at Cardinal Newman School, from 11 – 19 years, to an age range of 11 – 16 years, resulting in the removal of the sixth form provision.

2. The closure of Pontypridd High School and Cilfynydd Primary School, and the creation of a new 3 – 16 years school on the site of Pontypridd High School. Pontypridd High School currently educates children aged from 11 – 19. There will be no sixth form provision at this school after the changes.

3. The closure of Hawthorn High School and Hawthorn Primary School and the creation of a new 3 – 16 school on the site of the current Hawthorn High School. Hawthorn High School currently educates children aged from 11 – 19. There will be no sixth form provision at this school after the changes.

4. The closure of Ysgol Gynradd Gymraeg Pont Sion Norton (Welsh-medium) and Heol y Celyn Primary School (dual-medium) and the opening of a new Welsh-medium primary school on the site of the current Heol y Celyn Primary School.

The legal framework for school re-organisation in Wales is governed by the School Standard and Organisation (Wales) Act 2013 ("the 2013 Act"). Section 38(1)(2) of the 2013 Act provides that Welsh Ministers must issue a code on school organisation which is to contain (amongst other things) provision about the exercise of the functions of, among other persons, local authorities. The Code in force at the time was the School Organisation Code dated July 2013 ("the Code").

The Claimant's case was that the decision in relation to each Statutory Notice was flawed and unlawful in that:

- Ground 1: The decision to re-organise sixth form education, as part of Proposals 2 and 3, was taken in breach of section 50 of the 2013 Act;

- Ground 2: The decision in relation to all four proposals was taken in breach of the Code in that the Local Authority:
    - Ground 2(d): Failed to take into consideration the response of Estyn to the consultation process;
    - Ground 2(f): Failed to consider suitable alternative proposals which were put forward as part of the consultation process
    - Ground 2(g): Failed to take into account a specific factor for proposals to reorganise secondary schools or remove sixth forms, namely how the proposals might affect the sustainability or enhancement of Welsh medium provision in the regional 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post 16 education

The Claimant was successful on Ground 1 and Ground 2(g) which are discussed further below.

Ground 1 – 'Statutory Interpretation of 50(2) 2013 Act'

The 2013 Act provides that certain proposals for school reorganisation can only be approved by the Welsh Ministers. The remaining categories of proposals can be determined at local level by the Local Authority.

Section 50 sets out the proposals which require referral to the Welsh Ministers as follows:

> "*(1) Proposals published under section 58 require approval under this section if –*
> *(a) The proposals affect sixth form education, ...*
> *(2)Proposals affect sixth form education if –*
> *(a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age, or*
> *(b) they are proposals to make a regulated alteration to a school, the effect of which would be that provision of education suitable to the requirements of persons above compulsory school age at the school increases or decreases.*
> *(3) Where proposals require approval under this section, the proposer must send a copy of the documents listed to the Welsh Ministers before the end of 35 day beginning with the end of the objection period."*

'Regulated alterations' are defined in Schedule 2 of the 2013 Act and include the alteration of the lowest age and highest of pupils for whom education is normally provided at the school.

In respect of the aforementioned Statutory Notices, the Local Authority referred Proposal 1 to the Welsh Ministers on the basis of section 50(2)(a). No other proposals were referred.

The Claimant's case was that, on a proper reading of section 50(2)(a), Proposals 2 and 3 should also have been referred to the Welsh Ministers because section 50(2)(a) covers proposals to discontinue a school, which provides education, in the form of sixth form education, which is

suitable only to the requirements of pupils aged 16 – 19, i.e. persons above compulsory school age. This would apply to Pontypridd or Hawthorn High Schools.

The Local Authority's case was that, on a proper reading of section 50(2)(a), Proposals 2 and 3 did not need to be referred to the Welsh Ministers because section 50(2) covers proposals to discontinue a school which provides sixth form education only.

The Arguments

The Claimant's case was that the adverb "only" qualifies the education which is provided and not the provision made by the school.

The Claimant invited the Court to consider the Welsh language version of section 50(2)(a) which supported its interpretation.

The Claimant relied upon section 1 Welsh Language (Wales) Measure 2011) and section 156 Government of Wales Act 2006 in support of its contention that the Welsh language version of the legislation had equal standing to the English language version. It followed that any question of construction could not be determined by simply considering the English language version.

The Claimant also maintained that its interpretation was supported when contrasting section 50(2)(a) with the wording of other provisions within the 2013 Act and the preparatory material available in relation to the adoption of the 2013 Act.

In contrast, Local Authority's position was that the Claimant's interpretation does not make sense on the plain language of the words used and that if the section 50(2)(a) of the 2013 Act were intended to encompass the closure of any school which provided education suitable for those above compulsory school age, then the word 'only' would be redundant as an unnecessary qualification. The Local Authority submitted that the position of the word 'only' in the English text does not matter and that wherever it is placed in the sentence, it must be intended to qualify the act of providing the education concerned, rather than the kind of education provided. The Council also submitted that because the position of the word "only" does not matter in the English text, then the position of the words "yn unig" in the Welsh text does not matter either.

The Local Authority also maintained that its interpretation was supported when contrasting section 50(2)(a) with the wording of other provisions within the 2013 Act and the preparatory material available in relation to the adoption of the 2013 Act.

Decision

In approaching his decision, Mr Justice Fraser confirmed at paragraph 45:

I consider that in order to give proper effect to the primary legislation as well as section 1(3)(c)(i) of the Welsh Language (Wales) Measure 2011, I have to consider the meaning of the Welsh language text of the 2013 Act as well as the English text, insofar as I am able to do so.

Responding to the Local Authority's submission that because the position of the word "only" does not matter in the English text, then the position of the words "yn unig" in the Welsh text does not matter either, Mr Justice Fraser stated at paragraph 65:

This is a bold submission to make; in my judgment it is misplaced where the Welsh text has equal standing with the English text; and I consider it to be wrong. The meaning of the Welsh text is not derived by construing the meaning of the English text, and then applying that meaning across to the Welsh text, which is what this submission seeks to do. That is not considering the two language texts as having equal effect.

Mr Justice Fraser found in favour of the Claimant concluding as follows:

77. *There is nothing to suggest that section 50(2) specifies the only ways in which proposals could "affect sixth form education". To read it in that way would require one to read the introductory words within section 50(2) as though they stated "Proposals affect sixth form education [only] if —", followed by the two different ways in which that could be satisfied under (a) and (b). This would require one to read into the statute a word that is simply not there. There is nothing in the wording of either section 50(1) or section 50(2) that justifies such a construction in my judgment. Section 50(2) clearly identifies matters that do "affect sixth form education" but there is no reason to conclude that (a) and (b) are the only ways in which this can be done.*

78. *Even if I am wrong about that, and section 50(2) does contain the only two ways in which proposals could be said to "affect sixth form education", then in my judgment the word "only" in section 50(2)(a) qualifies "education" as contended for by the Claimant, and not "school". I do not accept the argument advanced by the Council that the meaning of the sentence in section 50(2)(a) is the same, regardless of where the word "only" appears within it. This is not correct even in terms of the English text. Nor can it be used to explain why the different position of the word in the Welsh text does not matter, either.*

79. *Given the Welsh text of the Act has equal status with the English, the texts of both have to be construed. The meaning must be consistent across the texts in both languages. I take account of the literal translation provided by counsel for all parties (following the oral explanation by Mr Williams QC, leading counsel for the claimant, of the English equivalent of the different groups of Welsh words). In my judgment, the position of the words "yn unig" near the end of the section, together with the words that precede it, is more consistent with the Claimant's construction than it is with that contended for by the Council. The Council's submissions wholly ignore the Welsh text, then conclude (after construing the English text) that the Welsh text must have the same meaning, or does not matter. I do not consider that to be the correct approach to legislation passed in Wales, both in Welsh and in English, the text of each language having an equal status to the other.*

80. *The Council's contended for meaning requires one to read "only" into the introductory words of section 50(2), where it does not appear at all; and also requires one to read "only" within section 50(2)(a) as not being referable to "education" at all, but applying only to "school". I consider that to be a constrained and artificial reading of section 50(2)(a). The Council's contended for meaning also requires one to ignore the*

Welsh text. The Claimant's contended for meaning is consistent both in the Welsh language and English language versions, and does not require one to read additional or further words into the introductory passage of section 50(2) that are not there. It is by far the preferable construction.

Mr Justice Fraser went on to confirm that the Claimant's contended for construction of section 50(2) was entirely consistent with the other provisions within the 2013 Act. In particular, Mr Justice Fraser held:

82. *The construction that I have identified is also consistent with section 71(1)(c) of the 2013 Act, which concerns discontinuance. Because the Welsh Ministers fund 6th form education, it is wholly understandable that they can make their own proposals to discontinue that at any particular school, but only if that school only educates 6th form pupils and no others (in other words, is what is usually called a 6th form college). There is no good reason why the Welsh Ministers should have the power to make proposals to discontinue if the 6th form is part of a wider school. However, that is a narrower power than that provided to the Welsh Ministers under section 50 of the 2013 Act. The rationale for the power of the Welsh Ministers to approve proposals that affect 6th form education coming from a local authority under section 50 is no less compelling where, as here, the cessation of that education is said to be closure of an entire existing school (with a 6th form) with immediate re-opening of a new school on the same site (without a 6th form). The net effect of this in terms of impact upon 6th form education would be the same as, for example, in the Cardinal Newman case, namely a school in operation on the same site after the changes, but without a 6th form.*

Mr Justice Fraser concluded:

88. *Given the construction that I find is the correct one, it therefore follows that the Claimant succeeds on Ground 1. Proposals 2 and 3 in respect of Pontypridd High and Hawthorn High affect sixth form education and therefore require the approval of the Welsh Ministers pursuant to section 50 of the 2013 Act. The Council did not have such approval, have not referred those proposals to the Welsh Ministers in order to obtain it, and are therefore in breach of that statutory requirement.*

Ground 2(g) 'The Welsh Language Ground'

Section 38(1)(2) of the 2013 Act provides that the Welsh Ministers must issue a code on school organisation and that the Code is to contain provision about the exercise of the functions of, amongst others, local authorities.

Paragraph 1.4 of the Code stipulates that:

In all cases, existing pupils at a school where provision is being reduced or removed **must** *be able to continue receiving an education that provides at least equivalent standards and opportunities for progression in their current language medium. Specific transition arrangements may be necessary in order to achieve this.*

Where proposals affect schools where Welsh is a medium of instruction (for subjects other than Welsh) for some or all of the time, local authorities **should** *carry out a Welsh Language Impact Assessment.*

Paragraph 1.9 of the Code provides that relevant bodies **should** take into account the following specific factors for proposals to reorganise secondary schools or to add or remove sixth forms

> *The extent to which proposals contribute to the 14 – 19 agenda taking account of the views of local 14 – 19 networks and learning partnerships.*
>
> *How proposals might affect the sustainability or enhancement of Welsh medium provision in the local 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post-16 education...*

The Arguments

The Claimant's case was that the Local Authority failed to take into account how the proposals might affect the sustainability or enhancement of Welsh medium provision in the regional 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post-16 education.

The Claimant argued that the Welsh Language Impact Assessment, Community Impact Assessment and Equality Impact Assessment completed by the Local Authority did not actually assess the impact of the proposals on the Welsh language. Further, the Claimant submitted that the changes to Welsh medium primary education, found in Proposal 4, would inevitably have an impact upon the take-up of Welsh medium secondary education because any children who leave Welsh medium primary education would unlikely go on to Welsh medium secondary education. The Claimant therefore maintained that any proposals to change Welsh medium primary education should therefore consider how this might affect the sustainability or enhancement of Welsh medium secondary provision in the 14 – 19 network and access to post-15 Welsh medium courses.

The Claimant also relied upon a proposed determination of the Welsh Language Commissioner ("WLC") who had concluded, in respect of the proposal to close Ysgol Pont Sion Norton, that the Local Authority was in breach of standards 91 to 93 of the Welsh Language Standards (No.1) Regulations 2015 ("the 2015 Standards"). These standards required the local authority when publishing its consultation document to consider, and seek views on: i) the effects of the decision under consideration on opportunities for persons to use the Welsh language and treating the Welsh language no less favourably than the English language (Standard 91); ii) how the policy could be formulated or revised so that it would have positive effects on opportunities for persons to use the Welsh language and treating the Welsh language no less favourably than the English language (Standard 92); and iii) how the policy could be formulated or revised so that it would not have adverse effects on opportunities for persons to use the Welsh language and treating the Welsh language no less favourably than the English language (Standard 93).

The WLC intervened in proceedings in order to provide further assistance to the Court in respect of the application of the 2015 Standards and its findings in so far as they concern the Local Authority's proposal.

The Local Authority relied upon a Welsh Language Impact Assessment, Community Impact Assessment and Equality Impact Assessment in support of its assertion that it considered how its proposals might affect Welsh medium education. The Local Authority further maintained that it was not required to consider how its preferred proposals affected the sustainability or enhancement of Welsh medium provision in the local 14 – 19 network because they did not include proposals to reorganise Welsh medium secondary education.

The Local Authority denied that it had failed to comply with the 2015 Standards and that in any event the Code and the 2015 Standards are different regimes and not applicable in the context of this judicial review claim.

Judgment

Mr Justice Fraser accepted the Claimant's submission that changes to Welsh medium primary education impact upon welsh medium secondary education as follows:

> *114. In so far as it may be necessary to confirm it in this judgment, it is plain and obvious that changes to Welsh medium primary education must inevitably have an impact upon Welsh medium secondary education. The fewer pupils who enjoy a Welsh medium primary education, the fewer are likely to attend Welsh medium secondary education. As Mr Williams for the Claimant put it, such pupils are "lost for ever", which in terms of their living their lives in Wales through the use of Welsh, is probably correct; although it may be an emotive way of putting it. Certainly in terms of their being educated through the medium of Welsh, it will be correct. Children who leave Welsh medium primary education will be lost to Welsh medium secondary education.*
>
> *115. The Claimant makes the consequential point that any proposals to change Welsh medium primary education should therefore consider how this might affect the sustainability or enhancement of Welsh medium secondary provision in the 14 – 19 network, and access to post-16 Welsh medium courses. I accept that submission. The submission by the Claimant is that the decisions in respect of the proposals were made without taking account of the impact of Proposal 4 upon Welsh medium secondary education.*

Having considered the consultation documentation and the Local Authority's evidence, Mr Justice Fraser concluded as follows:

> *116. …They failed, in my judgment, to consider how the decisions that they were making either contributed to the strategic aims of increasing the use of Welsh, and/or whether they were treating Welsh no less favourably than English. I would go further and say that the Council failed entirely to consider how the reorganisation would impact upon Welsh medium secondary education.*

117. This finding is borne out by the entries in the consultation document itself, which sets out only very cursorily the advantages and disadvantages of the alternative options. Nowhere in those advantages and disadvantages is the impact upon Welsh medium secondary education of the potential changes to Welsh medium primary education specifically identified or even addressed…

Mr Justice Fraser noted that the guidance could be departed from, if there is good reason. In this regard, Mr Justice Fraser stated:

118. This means that this can be departed from, if there is good reason. Such an explanation would have to be provided; but in any event, it is difficult to see why the Council would decide that there was a good reason for failing to consider the impact on Welsh medium secondary education, particularly given it is the policy of the Welsh Government to strive for 1 million Welsh speakers by 2050. There is no adequate explanation for any departure by the Council, even if there were a conscious departure. But rather than make a conscious departure from the Code, with a reason for that, the Council has in my judgment simply failed to take the requirement under paragraph 1.9 into account. The point simply seems not to have been addressed.

As to the Local Authority's reliance on the impact assessments, Mr Justice Fraser concluded:

119. … The Welsh Language Impact Assessment document, however, even though it was updated, has extraordinarily limited content in terms of impact upon the Welsh language of the proposal… In my judgment, the inadequate content of the Welsh Language Impact Assessment demonstrates that the Council failed in its duties in this respect. There is nothing either in the Equality Impact Assessment, or Community Impact Assessments, that makes good this deficiency.

Accordingly, Mr Justice Fraser concluded:

123. The Council is in breach of paragraph 1.9 of the Code because it failed to consider how the closure of Ysgol Gynradd Gymraeg Pont Sion Norton and Heol y Celyn, and the establishment of a new Welsh medium primary school on the Heol y Celyn site would impact upon Welsh medium provision generally, and how the impact upon Welsh medium primary education would also impact upon Welsh medium secondary education for those in the local 14 – 19 network. The Council failed to assess the impact of the proposals on the Welsh language in any meaningful way.

Acknowledging the importance of the Welsh language, Mr Justice Fraser went on to state:

*124. Nor do I consider that this failure can, or should, be overlooked, or categorised (as the Council seemed to be contending for at one stage) as a mere technicality. The principles identified at [**Error! Reference source not found.**] above make it clear how important the Welsh language is to life in Wales. If the Welsh language is to be treated no less favourably than the English language in Wales, and if people should be able to*

live their lives in Wales through the medium of Welsh if they choose, then this failure by the Council is an important one.

Grappling with the status of the WLC's proposed determination that the Local Authority is in breach of the 2015 Standards, Mr Justice Fraser stated:

121. *The court cannot slavishly follow the conclusion by the WLC on breaches of the standards, although breaches (or prima facie breaches, as no final determination has been made in the instant case) are not irrelevant. Judicial review proceedings will consider the 2013 Code, not the 2015 Standards. The fact that, in the current view of the WLC as expressed in his evidence before me, the Council also breached the 2015 Standards, does however help in this way. Had the Council wholly complied with its duties in all respects under the 2015 Standards, it would make it harder for the Claimant to make good an alleged breach of the Code*

Relief

The Court went on to consider the issues of delay and materiality advanced by the Local Authority.

The Court rejected the Local Authority's argument that the Claimant had delayed in advancing the claim for judicial review. In particular, the Court noted that due to the interlinking of the proposals, and having regard to the fact that Proposal 1 has not yet been determined by the Welsh Ministers, any delay in the Claimant issuing proceedings has caused no effectively delay to the implementation of the proposals.

The Local Authority accepted that if the Claimant were to succeed on Ground 1, that this would be material and that relief would inevitably follow.

The Local Authority argued that in the event that the Claimant were to succeed on any element of Ground 2, the High Court must nevertheless refuse to grant relief on the basis that the outcome for the Claimant would not have been *highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred* (section 31(2A) Senior Courts Act 1983. The Local Authority relied upon the nature of the failures complained of, describing these as "the trivial nature of many of the alleged procedural deficiencies".

Having found in favour of the Claimant on Ground 2(g), Mr Justice Fraser stated:

164. *Regardless of what the position might have been had the Claimant succeeded on either the Estyn Ground and/or the Alternative Proposals Ground, these submissions by the Council have to be addressed in the context of the ground upon which the Claimant has succeeded, namely the Welsh Language Ground. I would not describe this as being trivial, even if that were the test, and I doubt many people in Wales would either. To be fair to Mr Milford, he probably had in mind the details of the challenges under the other two limbs of Ground Two (which have failed), rather than the Welsh Language Ground, when he included this*

in the Council's skeleton argument. I regard the Welsh language requirements in the Code as being of considerable importance.

165. *Given the Claimant has succeeded on the Welsh Language Ground, it is simply not possible to state that it would have been highly likely that the outcome would have been the same had the Council complied with its duties in this respect. Due to the interlinking of the four proposals, which the contemporaneous documents make clear are linked together, this success on the Welsh Language Ground affects all of the proposals.*

166. *It is not "highly likely that the outcome for the [Claimant] would not have been substantially different if the conduct complained of had not occurred". The section is not therefore engaged. Given this conclusion, it is unnecessary to consider certification under section 31(2B) and (2C); however, the importance of the Welsh language to education in Wales (and life in Wales generally) is precisely the sort of matter which, in my judgment, would qualify as being of exceptional public interest under section 31(2B) if that point were to arise. It is not necessary to determine that point however, given my conclusion at [165] above.*

167. *There is no valid or justifiable reason, in my judgment, to deny the Claimant the appropriate relief on Ground One, referring the matters concerning the 6th forms at Pontypridd High and Hawthorn High to the Welsh Ministers, nor on the Welsh Language Ground. The breaches by the Council on each of those two grounds entitle the Claimant to relief. The extent to which the success of the Claimant on the Welsh Language Ground affects the proposed 6th form closures is not a matter argued before me, nor do I consider that it is a matter for the court in any event.*

Comment

This is a landmark ruling demonstrating the importance of the Welsh language in Wales and in particular highlighting the significance and applicability of Welsh language legislation.

Never again will it be sufficient to argue that the English language version of a statute dictates what the meaning of the law is. From now on, all those concerned with the proper implementation of all legislation in Wales will need to bear in mind both language versions.

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