

IN CONFIDENCE

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Neutral Citation Number: [2019]EWHC 1901 (Admin)

Case No: CO/1892/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th July 2019

Before:

SIR WYN WILLIAMS
(Sitting as a Judge of the High Court)

Between:

**THE QUEEN ON THE APPLICATION OF
MAE MAGNESS (by her mother and litigation
friend RUTH MAGNESS)**

Claimant

- and -

POWYS COUNTY COUNCIL

Defendant

Margherita Cornaglia (instructed by **Watkins & Gunn, Solicitors**) appeared for the Claimant
Matthew Purchase (instructed by the **Defendant's Legal Services Department**) appeared for
the Defendant

Hearing date: 9 July 2019

DRAFT JUDGMENT

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Sir Wyn Williams:

Introduction

1. Library and associated services in the town of Welshpool are currently provided from a building used solely for those purposes. On 13 February 2019, the Defendant, by its duly appointed decision makers, decided that such services would, in the future, be provided from the building which is known as Powysland Museum. As its name suggests, this building is currently used as a museum. The Defendant intends that the library and museum will be “co-located” in the same building.
2. In these proceedings the Claimant seeks judicial review of the decision of 13 February 2019. The Claimant asserts that the decision was unlawful upon two bases. First (Ground 1), it is said that the Defendant failed to comply with duties to which it was subject pursuant to section 149 Equality Act 2010 (the public sector equality duties). Second (Ground 2), the Claimant argues that a public consultation which proceeded the decision of 13 February 2019 was unlawful because, at the time of the consultation, the Defendant had, already, determined that its plan for co-location should take place.
3. At the conclusion of the hearing on 9 July 2019 I indicated that I wished to take time to consider my decision, in particular, so that I could read a number of authorities which had been handed to me shortly before the hearing commenced.
4. It is also worth noting at this point that Counsel for the Claimant presented a skeleton argument in support of the application for permission. That skeleton, in respects which I will indicate below, raised issues not strictly encompassed

within the “Detailed Grounds of Challenge” which accompanied the judicial review claim form.

5. The decision of 13 February 2019 was not taken by the full council of the Defendant but, rather, delegated to “individual portfolio holders” in consultation with the Director of the Environment (hereinafter referred to as the “decision makers”). The decision-makers were the portfolio holder for Young People and Culture and the portfolio holder for Highways, Recycling and Assets. Both those persons were council members. It has not been suggested that such delegation was unlawful. However, I have thought it appropriate to identify the decision-makers since, inevitably, it is essential in a case of this type to analyse the decision-making processes which led to their decision and, so far as possible on the available evidence, to make a judgment about the factors which the decision-makers took into account when making their decision.

Background

6. The salient background facts are, in the main, uncontroversial. The building in which library services are currently provided within Welshpool was constructed in 1983. It has internal floor space of 406 square metres which includes a separate, upstairs, area for group activities.
7. In 2018, in response to budgetary requirements, the Defendant began an assessment of options for re-locating some of its employees in the north of the county in and around Welshpool. One of the options considered involved the closure of premises known as Neuadd Maldwyn and the consequent relocation of employees based at those premises to other buildings in the north of the

county. It was against this background that the possibility of locating both library and museum at Powysland Museum came to be considered.

8. Between 24 October and 30 November 2018 the Defendant consulted its employees about its proposals for their location. In essentially the same period, namely 22 October to 25 November 2018, the Defendant consulted the public about locating the library and museum within Powysland Museum.
9. On 18 December 2018 the Cabinet of the Defendant approved, subject to formal consultation with staff, a proposal to close Neuadd Maldwyn and disburse the Defendant's employees working at those premises to other locations. In order to reach its decision the Cabinet was provided with a detailed report together with appendices.
10. As well as resolving to close Neuadd Maldwyn, the Defendant's Cabinet delegated authority to the decision-makers to determine the office locations for the employees vacating Neuadd Maldwyn.
11. As I have said, on 13 February 2019 the decision under challenge was made. To assist the decision-making process, a report was prepared by the Principal Librarian and Principal Lead, Museums, Archives and Information Management. The report had a number of appendices and it included an impact assessment of the proposal under consideration. The report described the proposal as "to co-locate Welshpool Library into Powysland Museum, creating one public resource".

The Grounds of Challenge

Ground 1

12. Section 149 of the Equalities 2010 Act, so far as relevant to this case, provides as follows:-

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) ...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

By virtue of section 149(7) of the Act age is a relevant protected characteristic.

13. Section 149 of the 2010 Act has been the subject of significant litigation since its enactment. In particular, there have been a number of challenges in the Administrative Court in which it has been argued that the public authority being sued has failed to have regard to its public sector equality duties under section 149. In a judgment of this type, no useful purpose would be served by

citation from the numerous authorities. In my judgment, I can assess whether the decision-makers in this case had due regard to their duties under section 149 by applying the principles formulated at paragraph 30 of the detailed grounds of challenge which are derived from the judgment of McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. I should record, too, that I have sought to follow, conscientiously, a short passage from the judgment of Elias LJ in *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin). As he put it:-

“The concept of “due regard” requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria ... the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors”.

14. The principal point taken on behalf of the Claimant under Ground 1 is that the decision-makers failed to have due regard to their duties under section 149 as they related to those under the age of 18 years i.e. as they related to children. The Claimant has filed evidence which suggests that the co-location of the library and museum will result in a significant loss of floor space to the library with the consequence that the ability to host children’s group activities will be diminished as will be the ability to bring pushchairs and the like into the premises. Further, the Claimant’s evidence suggests that the co-location will result in the removal of designated children’s computers. It is said on behalf of the Claimant that the decision-makers failed to have regard to any of these issues when making their decision thereby rendering them in breach of their duties under section 149 of the Act. Stripped to its essentials, the issue for me is whether it is reasonably arguable that the decision-makers failed to have due

regard to these possibilities and failed to appreciate that that failure would render them in breach of their public sector equality duties.

15. The report to the decision-makers highlights a number of issues which were raised by members of the public during the course of the public consultation and, further, in the written submission from the group known as “Save Welshpool Library”. In particular, the authors of the report refer to concerns that there would be a down-grading of museum and library service delivery with “negative impact” and concerns about perceived lack of space within the Powysland Museum building to co-locate effectively so as to maintain the range of facilities, resources, outcomes and activities currently provided by both services. At paragraphs 2.7 and 2.8 of the report, the authors write:-

“2.7 Emails, comments on social media, the document from Save Welshpool Library Group, and the petition signed by over 4000 largely called on the Powys County Council to leave the library in its current location.

2.8 In response to this; essentially unprecedented budget pressures on both the Library and Museum Services mean that leaving the library in its current building is not financially sustainable – essentially one or both would have to cease. The library service fully endorses the view of the Save Welshpool Library group, about the wide ranging benefits of public library use. However, it does not agree that these benefits will be lost through co-location, as current provision can continue through flexible use of the available space (e.g. public access computers, class visits, children’s activities, opportunities for social interaction).”

16. At paragraph 3, the authors provide significant detail about the use of the library and museum in their separate locations. At paragraph 3.6, the authors say:-

“In addition to its well-used public computer facilities and its important role as a Library+ point for Powys County Council customer services work, its suitability as a venue for

individuals/local groups to gather makes it a great hub for the people of Welshpool and surrounding area. It provides a lifeline for vulnerable people who regard the Library as a safe haven. There is no reason that it should not continue to do so in the new location.”

17. Appendix D to the report is a detailed impact assessment. It has a section which deals, specifically, with age. Registered library members are identified by various age “bands” leading to the conclusion that about 24% of members are under the age of 18. The impact upon all library members is assessed at neutral, although the assessment suggests the need to continue to investigate all possible partnerships and ways to improve outcomes for residents of all ages.

18. Apart from noting the numbers of users under the age of 18 and the percentage to which I have referred, there is no specific reference to children in the section related to age. However, under the heading “Pregnancy and Maternity”, the following appears:-

“No specific data. Anecdotal evidence in comments to surveys state that new parents enjoy coming to the library with their babies whilst on maternity leave. Parents who cannot drive also state that they find the local library a lifeline, and very important to their wellbeing, preventing isolation. Preschool rhyme and story times are well attended at Welshpool library, and this boost to early literacy skills and family bonding will continue in the new location.”

19. The assessment indicates that the impact upon pregnancy and maternity is neutral. However, it also acknowledges that space for parking of pushchairs had been highlighted in consultation responses as a potential negative impact of the move.

20. The Defendant has not filed any witness statements from the decision-makers. That is not a point made in criticism – simply a statement of fact. It means,

however, that an assessment of what they did or did not take into account can only be based upon the written information which was provided to them and proper inferences to be drawn from such evidence.

21. On behalf of the Defendant, Mr Purchase submits that the evidence establishes that the decision-makers took account of the need to provide appropriate services for children, the possible impacts of its decision for children and, in particular, the need to provide computers dedicated for use by children and the need to take steps to maintain activities for children within Powysland notwithstanding the reduction in space available within that building. In my judgment, on the whole of the evidence available that submission is well founded.

22. During the course of his oral submissions Mr Purchase cast doubt upon a point made by Ms Cornaglia in her skeleton argument to the effect that whereas currently children have a designated area in the library of 30.06 square metres that will reduce in Powysland to 8.4 square metres. He sought to suggest that this point had been raised for the first time very late in the day. In fact, this same point had been made in the Detailed Grounds (see paragraph 5). It was based upon a witness statement filed on behalf of the Claimant by Mr Brian Timmis (see paragraph 71). On the face of it such a reduction in size might be thought to have a significant adverse impact upon the services enjoyed by children and cast doubt upon the Defendant's case that the impacts upon children of the co-location proposal had been assessed appropriately. The ultimate position adopted by the Defendant in argument was that Mr Timmis' evidence was not correct and that I should proceed upon the basis that although a

reduction in floor space available to children was a consequence of co-location it was nothing like as significant as that suggested on behalf of the Claimant.

23. Absent the issue relating to reduction in floor space I would have concluded without much hesitation that it was not arguable that the decision-makers had failed to have due regard to the public sector equality duties imposed upon them by section 149 of the 2010 Act. Initially, I did wonder whether the factual assertion as to the reduction in floor space (not rebutted by specific evidence on behalf of the Defendant) might lead to the opposite conclusion. On reflection, however, it does not. The impact assessment considered by the decision makers confirmed that the Defendant would “engage with experts to design the most comprehensive and efficient layout, to maximise diverse service delivery” (see Bundle page 281) and, further, it informed them that the Defendant would “investigate further partnership working with schools and leisure facilities, to broaden offer and to provide a larger venue if needed” (see Bundle page 283).
24. I have reached the conclusion that it is not arguable that the decision-makers failed to have regard to the public sector equality duties impose upon them by section 210 of the 2010 Act.

Ground 2

25. In *R (WX) v Northamptonshire County Council* [2018] EWHC 2178 (Admin) Yip J summarised the principles which must be applied in order to assess the

lawfulness of a public consultation such as that which occurred in this case.

At paragraphs 65 and 66 of her judgment, she said this:-

“65. I have regard to the well-known principles taken from *R (Gunning) v Brent London Borough Council* (1985) 84 LGR 168, endorsed by the Supreme Court in *R (Moseley) v LB Haringey* [2014] UKSC 56 that:

- a. Consultation must be at a time when proposals are still at a formative stage.
- b. The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
- c. Adequate time must be given for consideration and response.
- d. The product of consultation must be conscientiously taken into account in finalising any proposals.

66. The test is whether the process was so unfair as to be unlawful. In reality, this is likely to be based on a factual finding that something has gone clearly and radically wrong (See *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin)).”

26. As pleaded in the detailed grounds, the Claimant alleged that the public consultation was unlawful in the instant case because at the time it was carried out the Defendant had already determined that it would implement the co-location of the library and the museum.
27. In my judgment, there are a number of reasons why that contention is not correct, even arguably. First, read as a whole, the survey document distributed to the public sought views on a number of alternative possibilities. While it is clear that a preferred option had been identified by the time the consultation was undertaken, there is nothing in the document which suggests that the Defendant, as an organisation, let alone the actual decision-makers had closed

their minds to any other option. The relevant parts of the documents are set out at paragraphs 20 to 24 of the Summary Grounds of Defence. Second, there is no evidence that the decision-makers, themselves, had a closed mind or were acting as some kind of “rubber stamp” for a decision already taken. Third, the press release issued by Welshpool Town Council in April 2019 does not suggest that the Defendant, and through the Defendant as a body the decision-makers, had a closed mind as at October/November 2018. Rather it suggests the contrary. Notwithstanding the evidence of Mr Timmis and the written and oral submissions of Ms Cornaglia I do not regard it as arguable that the Defendant’s proposals were not still at a formative stage at the time of the consultation with the public.

28. In her skeleton argument and orally Ms Cornaglia raises the following further arguments in support of ground 2. First, the Defendant did not provide sufficient information to consultees. Second, the information obtained from the consultation was not reflected or taken account of in the decision making. Third specific important users were not consulted. She submits that individually and/or cumulatively such defects were sufficient to render the Defendant’s consultation so unfair as to make it unlawful and that was especially so given that the ultimate decision was to be taken in the context of the need to have due regard to the public sector equality duties, Ms Cornaglia acknowledges that if these points are meritorious the Claimant would require permission to amend the Detailed Grounds.

29. In my judgment these additional points are not arguable. A close examination of the evidence reveals that the results of the consultation and the main issues

emerging therefrom were clearly before the decision-makers and there is no reason to suppose that they did not have those results clearly in mind when they were considering their decision. Similarly, it is clear that schools were one of the sectors targeted in the consultation. I am satisfied that on any reasonable assessment the public at large was given proper information about the purpose of the investigation and the reasons for the Defendant's preferred option. On any view, in my judgment the public at large was provided with sufficient information about the Defendant's proposals to permit the public to make sensible and reasoned responses to the consultation.

30. In any event, I would take some persuading that I should permit points raised for the first time in a skeleton argument at a renewed permission hearing to be the basis for the grant of permission, especially when no explanation was offered for their appearance so late in the day.
31. In my judgment ground 2 is not arguable.

Conclusion

- 32, The renewed application for permission to apply for judicial review is dismissed.