



**TRIBIWNLYS Y GYMRAEG**  
**Rhif yr Achos: TyG/WLT/18/3**

ALED POWELL  
(Ceisydd)  
v  
COMISIYNYDD Y GYMRAEG  
(Atebydd)

**PENDERFYNIAD Y TRIBIWNLYS**

Aelodau'r Panel

Keith Bush QC (Llywydd y Tribiwnlys)  
Isata Kanneh  
Sara Peacock

Gwrandawriad

27 Gorffennaf 2018  
Prifysgol Glyndŵr,  
Wrecsam

Deunydd y bu'r Tribiwnlys yn ei ystyried

Gweler yr Atodiad

Natur y cais

Cais o dan adran 103 Mesur y Gymraeg (Cymru) 2011 am ganiatâd i wneud cais am adolygiad o benderfyniad y Comisiynydd (25 Mai 2018) i beidio â chynnal ymchwiliad i gŵyn am fethiant corff i gydymffurfio â Safon berthnasol y Gymraeg. Cafodd y cais ei wrthod gan aelod o'r Tribiwnlys sydd wedi'i chymwysu'n gyfreithiol (Nicola Jones) ar 13 Mehefin 2018. Cyflwynwyd cais gan y Ceisydd, o dan reol 16(8) Rheolau Tribiwnlys y Gymraeg 2015, i'r cais gael ei ailystyried gan banel Tribiwnlys.



**WELSH LANGUAGE TRIBUNAL**  
**Case No: TyG/WLT/18/3**

ALED POWELL  
(Applicant)  
v  
WELSH LANGUAGE COMMISSIONER  
(Respondent)

**THE DECISION OF THE TRIBUNAL**

Members of the Panel

Keith Bush QC (President of the Tribunal)  
Isata Kanneh  
Sara Peacock

Hearing

27 July 2018  
Glyndŵr University,  
Wrexham

Material considered by the Tribunal

See the Appendix

Nature of the application

Application under section 103 of the Welsh Language (Wales) Measure 2011 for permission to apply for a review of the decision of the Commissioner (25 May 2018) not to carry out an investigation into a complaint of a failure by a body to comply with a relevant Welsh language Standard. The application had been refused by a legally-qualified member of the Tribunal (Nicola Jones) on 13 June 2018. The Applicant applied, under rule 16(8) of the Welsh Language Tribunal Rules 2015, for the application to be reconsidered by a Tribunal panel.

## Penderfyniad y Tribiwnlys

Mae'r panel Tribiwnlys yn cytuno â phenderfyniad yr aelod sydd wedi'i chymhwyso'n gyfreithiol i wrthod caniatâd i wneud y cais.

*(Er mwyn sicrhau bod gan Geisydd hawl briodol i apelio mae rheol 16(11) o Reolau Tribiwnlys y Gymraeg 2015 yn darparu y dylai'r Tribiwnlys, mewn achos felly, roi caniatâd i wneud y cais am adolygiad ond wedyn gwrthod y cais hwnnw a dyna'r gorchymyn ffurfiol a wneir gan y Tribiwnlys.)*

## The Tribunal's Decision

The Tribunal panel agrees with the decision of the legally-qualified member to refuse permission to make the application.

*(In order to ensure that an Applicant has a proper right of appeal against a decision to refuse permission, rule 16(11) of the Welsh Language Tribunal Rules 2015 provides that in such a case the Tribunal should give permission to make the application for a review but to then dismiss that the application and that is the formal order that the Tribunal makes.)*

## RHESYMAU

### Cyflwyniad

1. Ar 1 Rhagfyr 2016, anfonodd y Ceisydd e-bost at y Comisiynydd yn cwyno bod ei gyngor lleol wedi methu, mewn sawl ffordd, i gydymffurfio â'i ddyletswyddau o dan Safonau'r Gymraeg a osodwyd arno gan hysbysiad cydymffurfio a gyflwynwyd gan y Comisiynydd o dan adran 45 Mesur y Gymraeg (Cymru) 2011. Yr unig gŵyn sy'n berthnasol i'r cais hwn oedd bod cyfrif Facebook a weithredwyd gan y cyngor "yn ymddangos i gyhoeddi gwybodaeth yn ddwyieithog, ond gyda'r Saesneg uwchlaw'r Gymraeg." Roedd y Ceisydd yn awgrymu bod hyn yn groes i safon 70. Mae'n amlwg mai'r safon berthnasol, h.y. yr un sy'n gymwys i ddefnyddio cyfryngau cymdeithasol, yw, mewn gwirionedd, safon 58, sy'n datgan "Pan fyddwch yn defnyddio'r cyfryngau cymdeithasol, rhaid ichi beidio â thrin y Gymraeg yn llai ffafriol na'r Saesneg". Triniodd y Comisiynydd y gŵyn fel un o fethiant i gydymffurfio â'r safon honno.
2. Ar 30 Awst 2017, hysbysodd y Comisiynydd y Ceisydd na fyddai'n cynnal ymchwiliad i'r gŵyn dan sylw, ar y sail nad oedd, yn ei barn hi, dystiolaeth o fethiant i gydymffurfio â safon 58 oherwydd "nid yw'r safon hon â gofyniad i osod testun Cymraeg cyn testun Saesneg". Roedd y farn honno'n seiliedig ar yr absenoldeb, yn safon 58, o unrhyw gyfeiriad

## REASONS

### Introduction

1. On 1 December 2016 the Applicant emailed the Commissioner complaining that his local council had failed, in a number of respects, to comply with its duties under Welsh language Standards imposed on it by a compliance notice given to it by the Commissioner under section 45 of the Welsh Language (Wales) Measure 2011. The only complaint which is relevant to this application was that a Facebook account operated by the council "appears to publish information bilingually, but with the English above the Welsh (transl.)". The Applicant suggested that this was contrary to standard 70. It is clear that the relevant standard, i.e. the one that applies to the use of social media, is in fact standard 58, which provides that "When you use social media you must not treat the Welsh language less favourably than the English language". The Commissioner treated the complaint as one of failure to comply with that standard.
2. On 30 August 2017 the Commissioner notified the Applicant that she would not be carrying out an investigation into the complaint in question, on the grounds that, in her view, there was no evidence of a failure to comply with standard 58 since "this standard does not require the Welsh text to be placed before the English text". This view was based on the

penodol at leoliad cymharol y ddwy iaith. Mae hyn mewn gwrthgyferbyniad â safonau eraill (megis safon 70, sy'n delio â hysbysiadau corfforol) sy'n cynnwys gofyniad bod yn rhaid gosod y fersiwn Cymraeg fel ei fod yn cael ei ddarllen cyn y fersiwn Saesneg.

3. Nid oedd yr Ymgeisydd yn cytuno â dehongliad y Comisiynydd o safon 58. Yn ei farn ef, roedd y gofyniad na ddylai'r Gymraeg gael ei thrin yn llai ffafriol na'r Saesneg yn awgrymu na ddylai'r Gymraeg ymddangos islaw'r Saesneg. Felly, heriodd benderfyniad y Comisiynydd i beidio ag ymchwilio i'w gŵyn drwy gais i'r Tribiwnlys o dan adran 103 y Mesur (Achos TyG/WLT/17/2). Ar 19 Mawrth 2018 cyhoeddodd y Tribiwnlys ei benderfyniad i ddiddymu gwrthodiad y Comisiynydd i gynnal ymchwiliad i gŵyn yr Ymgeisydd a'i gwneud yn ofynnol i'r Comisiynydd ailystyried y mater, yn unol â chanllaw'r Tribiwnlys ar y dehongliad cywir o safon 58.

4. Bu'r Tribiwnlys o'r farn nad oedd y prawf yr oedd yn ofynnol i'r Comisiynydd ei weithredu mewn cysylltiad â safon 58 (h.y. a yw'r Gymraeg yn cael ei thrin yn llai ffafriol na'r Saesneg) yn gyfystyr â'r prawf yr oedd yn ofynnol iddi ei weithredu mewn cysylltiad ag, er enghraifft, safon 70 (sef, a oedd y testun Cymraeg yn debygol o gael ei ddarllen cyn y testun Saesneg). Fodd bynnag, nid oedd y prawf cyntaf yn gwahardd ystyriaeth o lleoliad cymharol y ddwy iaith. Byddai eu lleoliadau cymharol yn ffactor perthnasol wrth benderfynu a oedd y Gymraeg yn cael ei thrin yn llai ffafriol na'r Saesneg, er nad dyna oedd, o reidrwydd, yr unig ffactor perthnasol. Roedd yn fater i farn werthusol y Comisiynydd i asesu, mewn achos penodol, a oedd lleoliad y ddwy iaith, gan ei ystyried ochr yn ochr â ffactorau perthnasol eraill, yn golygu nad oedd y Gymraeg yn cael ei thrin yn llai ffafriol na'r Saesneg.

absence, in standard 58, of any specific reference to the relative positioning of the two languages. This is in contrast to other standards (such as standard 70, which deals with physical notices) which contain a requirement that the Welsh version of the wording must be positioned so that it is read before the English version.

3. The Applicant did not agree with the Commissioner's interpretation of standard 58. In his opinion the requirement that the Welsh language should not be treated less favourably than the English language implied that the former should not appear below the latter. He therefore challenged the Commissioner's decision not to investigate his complaint by an application to the Tribunal under section 103 of the Measure (Case TyG/WLT/17/2). On 19 March 2018 the Tribunal published its decision annulling the Commissioner's refusal to carry out an investigation into the Applicant's complaint and requiring the Commissioner to reconsider the matter in accordance with the Tribunal's guidance on the correct interpretation of standard 58.

4. The Tribunal held that the test which the Commissioner was required to apply in relation to standard 58 (i.e. whether the Welsh language had been treated less favourably than the English language) was not identical to the test which she was required to apply in relation to, for example, standard 70 (whether the Welsh language text was likely to be read before the English language text). However, the former test did not preclude consideration of the relative positions of the two languages. Their relative positions would be a relevant factor in deciding whether the Welsh language was being treated less favourably than the English, although it was not necessarily the only relevant factor. The assessment whether, in a particular case, the position of the two languages, taken together with other relevant factors, meant the Welsh language had been treated less favourably than the English language was a matter for the evaluative judgment of the Commissioner.

5. Mae'r cais presennol yn deillio o'r ffaith bod y Comisiynydd, ar ôl ailystyried y mater, wedi hysbysu'r Ceisydd, ar 25 Mai 2018, nad oedd, o hyd, yn bwriadu cynnal ymchwiliad i'r gŵyn dan sylw. Wrth esbonio ei phenderfyniad, dywedodd ei bod hi wedi ystyried, yn unol â'r egwyddorion a gyflwynwyd gan y Tribiwnlys, lleoliadau cymharol y testun Cymraeg a'r testun Saesneg, yng nghyd-destun "natur y neges Facebook a'r ffordd y mae'r wybodaeth wedi ei gyflwyno". Cyfeiriodd at natur gryno'r neges, gyda'r testunau yn y ddwy iaith yn ymddangos yn agos at ei gilydd o fewn un ffenestr. Roedd yn bosibl eu darllen yr un pryd, heb orfod gadael y dudalen Facebook er mwyn gweld y fersiwn Cymraeg. Yn yr holl amgylchiadau, gan gymhwyso ei barn werthusol, nid oedd y Gymraeg wedi cael ei thrin yn llai ffafriol na'r Saesneg, ni fu methiant i gydymffurfio â safon 58 ac nid oedd unrhyw gyfiawnhad dros ymchwilio i'r gŵyn.
6. Aeth ymlaen i gyfeirio hefyd at yr amser a aeth heibio ers i'r gŵyn gael ei gwneud (16 mis) a sylwodd bod negeseuon ar y dudalen Facebook bellach yn gosod testun Cymraeg cyn testun Saesneg. Yng ngoleuni'r ffactorau pellach hyn, hefyd, nid oedd y Comisiynydd "wedi'i pherswadio y byddai cynnal ymchwiliad yn cael effaith cadarnhaol pellach ar ddefnyddwyr Cymraeg."
7. Mae'r Ceisydd yn dymuno i'r Tribiwnlys adolygu cyfreithlondeb penderfyniad diweddaraf y Comisiynydd i beidio ag ymchwilio i'w gŵyn.
5. The present application arises out of the fact that the Commissioner, having reconsidered the matter, notified the Applicant, on 25 May 2018, that she still did not intend to carry out an investigation into the complaint in question. In explaining her decision she stated that, in accordance with the principles laid down by the Tribunal she had considered the relative positions of the text in Welsh and the text in English, in the context of "the nature of the Facebook message and the way in which the information has been presented (transl.)" She referred to the concise nature of the message, with both language texts appearing close together within a single window. Both could be read at the same time, without the need to leave the Facebook page in order to see the Welsh version. In all the circumstances, applying her evaluative judgement, the Welsh language had not been treated less favourably than the English, there had been no failure to comply with standard 58 and there was no justification for investigating the complaint.
6. She went on to refer also to the time that had elapsed since the complaint had been made (16 months) and stated that messages on the Facebook page now placed the Welsh text before the English text. In view of these further factors, also, the Commissioner "was not persuaded that carrying out an investigation would have a further positive impact on users of the Welsh language (transl.)".
7. The Applicant wishes the Tribunal to review the lawfulness of this latest decision of the Commissioner not to investigate his complaint.

#### Sail dros adolygiad

8. Mae'r Ceisydd wedi cyflwyno tair sail wahanol dros herio penderfyniad y Comisiynydd:
  - i. mae'n dadlau bod gosod y testun Cymraeg ar ôl y testun Saesneg yn golygu'n anochel bod y Gymraeg yn cael ei thrin yn llai ffafriol na'r Saesneg, waeth beth yw'r amgylchiadau.

#### Ground for review

8. The Applicant has put forward three separate ground for challenging the Commissioner's decision:
  - i. he argues that placing the Welsh language text so that it follows the English text inevitably means that the Welsh is being treated less favourably than the English, whatever the circumstances;

- ii. mae'n herio barn y Comisiynydd na fyddai ymchwiliad yn cael unrhyw effaith gadarnhaol pellach ar ddefnyddwyr y Gymraeg, am ei fod yn honni bod yna enghreifftiau eraill lle mae'r cyngor dan sylw, a nifer o sefydliadau eraill, wedi gosod y Saesneg cyn y Gymraeg, yn groes i'r safonau perthnasol. Mae'n credu y byddai ymchwiliad i'w gwyn, wedi'i ddilyn gan gamau gorfodi priodol, yn helpu i ddiddymu'r arferion hyn;
- iii. mae'n cwyno bod y Comisiynydd, wrth ailystyried ei gwyn (cyfeirnod CSG 176), wedi seilio ei phenderfyniad ar un enghraifft yn unig o neges ddwyieithog ar y dudalen Facebook berthnasol. Roedd y neges honno, yn ôl canfyddiad y Comisiynydd, yn neges gryno lle mae'r ddwy iaith yn ymddangos yn agos at ei gilydd a'i bod yn bosibl gweld y ddwy o fewn y ffenestr. Ond roedd y negeseuon eraill a oedd yn ymddangos ar y dudalen yn llawer hwy, ac o ganlyniad, er mwyn darllen y fersiwn Cymraeg byddai angen sgrolio i lawr neu glicio ar ddolen neu botwm er mwyn ei weld. Yn yr achosion hynny, roedd rhan fawr o'r fersiwn Cymraeg, neu, weithiau, y cyfan ohono, yn anweladwy i'r rhai a fyddai'n darllen y dudalen, tra bod y fersiwn Saesneg bob amser yn weladwy, o leiaf yn rhannol. Pe byddai'r Comisiynydd wedi seilio ei hasesiad ar enghreifftiau o'r fath, ni fyddai ganddi, yn ôl dadl y Ceisydd, unrhyw opsiwn arall ond i ddod i'r casgliad bod yna dystiolaeth fod y Gymraeg yn cael ei thrin yn llai ffafriol na'r Saesneg ac i gynnal ymchwiliad.
- ii. he challenges the Commissioner's assertion that an investigation would have no further positive impact on users of Welsh, since he claims that there are other examples where the council in question, and a number of other institutions, have placed the English before the Welsh, contrary to the relevant standards. He believes that an investigation into his complaint, followed by appropriate enforcement action, would help to eliminate these practices;
- iii. he complains that in reconsidering his complaint (reference CSG 176) the Commissioner has based her decision on only one example of a bilingual message on the relevant Facebook page. This was, as the Commissioner has found, a concise message where the two languages appear close together and can both be seen within the window. But other messages which had appeared on the page were much longer, with the result that in order to read the Welsh version it was necessary to scroll down or to click a link or button in order to see it. In such cases, a large amount, and sometimes all, of the Welsh version was initially invisible to those reading the page, whereas the English version was always visible, at least in part. Had the Commissioner based her assessment on such examples, the Claimant argues that she would have had no alternative but to conclude that there was evidence that the Welsh was being treated less favourably than the English and to have carried out an investigation.

### Egwyddorion Cyfreithiol

- 9. O dan adran 103(4) y Mesur, y prawf y mae'n rhaid i'r Tribiwnlys ei gymhwyso wrth benderfynu a ddylai roi caniatâd i gais gael ei wneud i herio penderfyniad y Comisiynydd yw:
  - a) a fyddai gan y cais disgwyliad rhesymol o lwyddo, neu

### Legal Principles

- 9. Under section 103(4) of the Measure, the test which the Tribunal must apply when deciding whether to give permission for an application to be made to challenge a decision of the Commissioner is whether:
  - a) the application would have a reasonable prospect of success, or

b) a oes rheswm cryf arall pam y dylai'r cais gael ei glywed.

10. Rhaid pwyso a mesur rhagolygon cais o lwyddo yn unol â'r egwyddor gyffredinol (adran 102(3)) bod yn rhaid i'r Tribiwnlys ddelio â chais am adolygiad o benderfyniad o'r fath fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol.

### Ystyriaeth

11. Mae'r Tribiwnlys yn nodi bod y Comisiynydd, wrth ystyried y neges y mae'n cyfeirio ati, wedi cymhwyso'r egwyddorion cyfreithiol perthnasol, fel y'u hesboniwyd gan y Tribiwnlys yn Achos TyG/WLT/17/2, wedi rhoi ystyriaeth ofalus i nodweddion y neges dan sylw ac wedi dod i benderfyniad rhesymegol. Nid swyddogaeth y Tribiwnlys yw gofyn i'w hun a yw'n cytuno â'r penderfyniad hwnnw neu beidio ond a yw'r penderfyniad a wnaed gan y Comisiynydd yn gydnaws â'r gyfraith. Os oedd gan y Comisiynydd hawl i wneud y penderfyniad a wnaeth ar sail y neges y buodd hi wedi'i hystyried, nid fyddai gan y Tribiwnlys unrhyw sail dros ymyrryd â'r penderfyniad hwnnw.

12. Cwestiwn anoddach o lawer yw a oedd gan y Comisiynydd, mewn gwirionedd, yr hawl i seilio ei phenderfyniad ar y neges dan sylw, yn hytrach nac ar negeseuon eraill a gyhoeddwyd gan y cyngor ar y dudalen Facebook. Rhoddwyd caniatâd gan y Tribiwnlys i'r Ceisydd gyflwyno gerbron y panel sgrin luniau o negeseuon eraill a oedd wedi ymddangos ar y dudalen honno ym misoedd Hydref a Thachwedd 2016. Mae rhain yn darparu tystiolaeth glir o negeseuon llawer hwy na'r un a ddisgrifiwyd gan y Comisiynydd. Maent yn dangos, i gychwyn, y neges gyfan yn Saesneg ond dim ond llinell neu ddwy o'r fersiynau Cymraeg. Er mwyn gallu darllen y neges yn Gymraeg, byddai'n rhaid i rywun sgrilio i lawr i ddatgelu testun nad oedd, ar y cychwyn, yn ymddangos yn y ffenestr sy'n dangos y neges. Mewn un achos (neges ddyddiedig 1 Tachwedd 2016 a oedd yn hysbysu digwyddiad tân gwyllt mawreddog

b) there is some other compelling reason why the application should be heard.

10. The prospects of success of an application must be judged against the general principle (section 103(3)) that the Tribunal must deal with an application for review of such a decision as if it were an application for judicial review made to the High Court.

### Consideration

11. The Tribunal notes that the Commissioner, when considering the message to which she refers, has directed herself as to the applicable legal principles, as explained by the Tribunal in Case TyG/WLT/17/2, has carefully considered the characteristics of the message in question and has arrived at a rational decision. The function of the Tribunal is not to ask itself whether or not it agrees with that decision but whether it has been taken by the Commissioner in accordance with the law. If the Commissioner was entitled to come to her decision based on the message which she has considered, there is no basis on which the Tribunal could interfere with that decision.

12. A much more difficult question is whether the Commissioner was, indeed, entitled to base her decision on the message in question, rather than on other messages which had been published by the council on the Facebook page. The Tribunal permitted the Applicant to place before the panel screenshots of other messages which had appeared on that page in October and November 2016. These provide clear evidence of much longer messages than the one described by the Commissioner. They show, initially, the whole of the message in English but only a line or two of the Welsh versions. In order to read the message in Welsh one would have to scroll down to bring into view text that does not initially appear in the window showing the message. In one case (a message dated 1 November 2016 and advertising an annual grand fireworks display) there is no Welsh text visible at all at first.

blynyddol) nid oes unrhyw destun Cymraeg yn weladwy o gwbl i gychwyn.

13. Felly mae'n ymddangos, ar sail y dystiolaeth bellach a gyflwynwyd gan y Ceisydd, bod y neges a ystyriwyd gan y Comisiynydd (dyddiedig 1 Rhagfyr 2016 ac a oedd yn hysbysebu Cyngerdd Nadolig), yn gynrychioliadol. Roedd yn bosibl, er enghraifft, i'r fersiynau Cymraeg a Saesneg o'r neges gael eu darllen, yn eu cyfanrwydd, o fewn ffenestr y neges, heb orfod sgrilio i lawr - rhywbeth a oedd yn wahanol i achos y negeseuon eraill a ymddangosodd tua'r un amser.
  14. Roedd cwyn y Ceisydd dyddiedig 1 Rhagfyr 2016 yn gŵyn fod y dudalen Facebook yn cyhoeddi gwybodaeth ar ffurf negeseuon oedd, yn gyffredinol, â'r testun Saesneg uwchben y testun Cymraeg, yn hytrach na chwyn am neges benodol. Roedd hysbysiad gwreiddiol y Comisiynydd o'i phenderfyniad i beidio ag ymchwilio i'r gŵyn (30 Awst 2017) hefyd yn cyfeirio at y gŵyn fel a ganlyn "bod y Gymraeg islaw'r Saesneg ar dudalen Facebook y Ganolfan Groeso". Dyfynnwyd cyfeiriad y dudalen. Ni chyfeiriwyd at y gŵyn fel un a oedd yn ymwneud ag unrhyw neges neu negeseuon unigol a oedd wedi ymddangos ar y dudalen honno.
  15. Mae'n ymddangos bod y canolbwyntio ar un neges benodol wedi codi am fod y Ceisydd ei hunan, wrth wneud cais i'r Tribiwnlys am adolygiad o wrthodiad gwreiddiol y Comisiynydd i ymchwilio i'w gŵyn am y dudalen Facebook, wedi dewis rhoi enghraifft o'r hyn yr oedd wedi cwyno yn ei gylch ac wedi cynnwys sgrin lun ohono (sef y neges am y cyngerdd Nadolig) yn ei Hysbysiad Cais i'r Tribiwnlys. Wrth wneud hynny, rhoddodd yr esboniad canlynol: "Er gwybodaeth y Tribiwnlys, dyma sgrin lun sy'n dangos natur yr hyn a oedd yn destun achos CSG176, sef bod cyfrif Facebook....yn cyhoeddi gwybodaeth gyda'r Saesneg uwchlaw'r Gymraeg". Mae'n rhaid cofio, wrth gwrs, bod yr Ymgeisydd yn credu bod unrhyw achos o leoli'r Gymraeg ar ôl y Saesneg yn mynd yn
13. The message which the Commissioner considered (dated 1 December 2016 and advertising a Christmas Concert) therefore appears, from the evidence produced by the Claimant, to be unrepresentative. Unlike in the case of the other messages which appeared at around the same time, the English and Welsh versions of the message could be read, in their entirety, within the message window without having to scroll down.
  14. The Applicant's complaint of 1 December 2016 was a complaint that the Facebook page was publishing information in the form of messages which generally had the English above the Welsh rather than a complaint about a specific message. The Commissioner's original notification of her decision not to investigate the complaint (30 August 2017) also referred to the complaint as being "that the Welsh was below the English on the Tourism Centre's Facebook page (transl.)". The address of the page was quoted. There was no reference to the complaint relating to any individual message or messages that had appeared on that page.
  15. The concentration on a single message arose, it appears, because when the Applicant applied to the Tribunal for a review of the Commissioner's original refusal to investigate his complaint about the Facebook page, he himself selected an example of what he had complained about and included a screenshot of it (i.e. of the Christmas concert message) with his Notice of Application to the Tribunal. When doing so, he gave, by way of explanation, the following: "For the information of the Tribunal, here is a screenshot which shows the nature of that which was the subject of case CSG176, namely that the ... Facebook account publishes information with the English above the Welsh (transl.)". It must be remembered, of course, that the Applicant believed that any positioning of the Welsh

groes i safon 58. Ar y llaw arall, roedd y Comisiynydd yn credu na allai lleoliad perthynol y ddwy iaith fyth cynrychioli methiant i gydymffurfio â safon 58. Felly, am wahanol resymau, roedd yr Ymgeisydd a'r Comisiynydd o'r farn nad oedd nodweddion negeseuon unigol yn berthnasol.

16. Ni ddaeth pwysigrwydd ystyried nodweddion negeseuon unigol yn glir i'r partion nes i'r Tribiwnlys, trwy ei benderfyniad ar 19 Mawrth 2018, esbonio bod angen, wrth benderfynu a oedd defnyddio cyfryngau cymdeithasol yn trin un iaith "yn llai ffafriol na'r llall", ystyried holl nodweddion perthnasol negeseuon penodol. Fodd bynnag, ar ôl i'r sefyllfa ddod yn eglur, ni wnaeth y Ceisydd dynnu sylw'r Comisiynydd at unrhyw neges ar wahân i'r un a oedd yn ymwneud â'r cyngerdd Nadolig fel neges a oedd yn berthnasol i'w gŵyn. Nid oes tystiolaeth ychwaith, bod y Comisiynydd wedi ymweld neu ail-ymweld â'r dudalen Facebook er mwyn cael darlun mwy cyflawn o'r ffyrdd yr oedd y dudalen honno'n cyhoeddi gwybodaeth. Gallai fod wedi gwneud hynny'n rhwydd, fel y mae'r Ceisydd wedi dangos drwy ei dystiolaeth ychwanegol, a gasglwyd ym mis Gorffennaf 2018.

17. Pan fydd awdurdod cyhoeddus yn gwneud penderfyniad ar sail ffeithiau anghywir, gall hyn, yn ddarostyngedig i rai amodau penodol, alluogi'r Uchel Lys (ac felly'r Tribiwnlys pan fydd y mater o fewn ei awdurdodaeth) i ddileu'r penderfyniad ar y sail bod hynny'n gamgymeriad gweithdrefnol a oedd wedi arwain at anghyfiawnder. Cadarnhawyd hyn gan benderfyniad y Llys Apêl yn *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49. Nodwyd yr amodau y mae'n rhaid eu diwallu cyn y gall hyn ddigwydd gan yr Arglwydd Ustus Carnwath, ym mharagraff 63, sef:

- i. Bod camagraff wedi'i greu gan gamgymeriad ynghylch ffaith berthnasol;
- ii. Bod y ffaith dan sylw yn un "sefydledig", h.y. pe byddai sylw wedi'i dynnu at y

language after the English was contrary to standard 58. The Commissioner, on the other hand, believed that the relative positions of the two languages could never amount to a failure to comply with standard 58. So, for different reasons, both the Applicant and the Commissioner regarded the characteristics of individual messages as irrelevant.

16. The importance of taking into account the characteristics of individual messages did not become clear to the parties until the Tribunal, by its decision of 19 March 2018, explained that when deciding whether the use of social media treated one language "less favourably" than the other it was necessary to take into account all the relevant characteristics of specific messages. However, once the position had been clarified, the Applicant did not draw the Commissioner's attention to any message other than the one relating to the Christmas concert as being relevant to his complaint. There is no evidence, either, that the Commissioner visited or re-visited the Facebook page in order to obtain a fuller picture of the ways in which that page published information. She could easily have done so, as the Applicant has demonstrated by his supplementary evidence, which was gathered in July 2018.

17. Where a public authority takes a decision based on erroneous facts, this can, subject to certain conditions, enable the High Court (and therefore the Tribunal, where the matter is within its jurisdiction) to quash the decision on the basis that this was a procedural mistake giving rise to an injustice. This is confirmed by the decision of the Court of Appeal in *E and R v The Secretary of State for the Home Department* [2004] EWCA Civ 49. The conditions which must be satisfied before this can occur were set out by Lord Justice Carnwath at paragraph 63, namely:

- i. That an erroneous impression has been created by a mistake as to a relevant fact;
- ii. That the fact in question is an "established" one, i.e. that if attention had been drawn to



- pwynt ar y pryd, gellid bod wedi dangos y sefyllfa gywir drwy dystiolaeth wrthrychol ac annadleuol;
- iii. Na ellir barnu'n deg bod y person sy'n ceisio herio'r penderfyniad yn gyfrifol am y camgymeriad;
  - iv. Bod gan yr holl gyfranogwyr yn y penderfyniad ddiddordeb ar y cyd mewn cydweithredu er mwyn cyrraedd y canlyniad cywir;
  - v. Bod y camargraff wedi chwarae rhan sylweddol yn y rhesymu.

- the point at the time, the correct position could have been shown by objective and uncontentious evidence;
- iii. That the person seeking to challenge the decision could not fairly be held responsible for the error;
  - iv. That all the participants in the decision had a shared interest in co-operating to achieve the correct result;
  - v. That the mistaken impression played a material part in the reasoning.

18. Ac eithrio iii), mae pob un o'r amodau uchod yn amlwg wedi'u bodloni yn yr achos hwn. Fel swyddog cyhoeddus sy'n gyfrifol am ymchwilio, mewn achosion priodol, i fethiannau i gydymffurfio â'r Safonau, roedd y Comisiynydd yn rhannu diddordeb ar y cyd gyda'r Ceisydd mewn deall gwir natur y gŵyn a'r ffeithiau a oedd yn sail iddi. Roedd rhan berthnasol o resymu'r Comisiynydd yn seiliedig ar ei chred anghywir bod y neges a oedd yn hysbysu'r cyngerdd Nadolig yn enghraifft nodweddiadol o'r hyn yr oedd y Ceisydd yn cwyno amdano. Petai'r mater wedi'i godi, gellid bod wedi sefydlu'r sefyllfa wirioneddol a hynny'n syml drwy ymweld â'r dudalen Facebook dan sylw.

18. With the exception of iii) all of the above conditions are obviously satisfied in this case. As a public officer charged with investigating, in appropriate cases, failures to comply with Standards, the Commissioner shared with the Applicant a common interest in understanding the true nature of the complaint and the facts on which it was based. A material part of the Commissioner's reasoning is based on her erroneous belief that the message advertising the Christmas concert was a typical example of what the Applicant was complaining about. Had that issue been raised, the true position could have been established simply by visiting the Facebook page in question.

19. Mae'n ymddangos mai'r hyn sydd wedi digwydd yw bod camdealltwriaeth wedi codi ym meddwl y Comisiynydd ynglŷn â gwir sail y gŵyn. Mae'n ymddangos bod hyn wedi deillio o awgrym clir yr Ymgeisydd, a wnaed cyn i'r Comisiynydd ailystyried ei phenderfyniad, bod y neges am y cyngerdd Nadolig "yn dangos natur yr hyn a oedd yn destun i achos CSG176". Oherwydd bod cais am ganiatâd i wneud cais am adolygiad yn cael ei ystyried ex parte, hynny yw gan ystyried dadleuon y Ceisydd yn unig, ni wyddom a oedd y Comisiynydd wedi ystyried sicrhau eglurhad gan y Ceisydd neu wedi ymweld â'r dudalen Facebook er mwyn gweld a oedd y neges dan sylw'n nodweddiadol, mewn gwirionedd, o'r hyn yr oedd yr Ymgeisydd yn dymuno cwyno amdano. Mae'n bosibl y gallai'r Comisiynydd fod wedi'u cymryd camau rhesymol a fyddai

19. What appears to have happened is that a misunderstanding arose in the mind of the Commissioner as to the true basis of the complaint. This appears to have originated in the Applicant's clear representation, made before the Commissioner reconsidered her decision, that the Christmas concert message "shows the nature of that which was the subject of case CSG176". Since an application for permission to apply for a review is considered ex parte, in other words on the basis of the Applicant's arguments only, we do not know whether the Commissioner considered seeking clarification from the Applicant or visited the Facebook page to check whether the message in question was, in fact, typical of what the Applicant wished to complain about. It may be that there were reasonable steps that the Commissioner could

wedi osgoi'r camddealltwriaeth. Ar y llaw arall, gallai fod rhesymau da pam na chymerodd gamau o'r fath. Beth bynnag fo'r esboniad pam na sylwodd y Comisiynydd ar y camddealltwriaeth, ni all y Tribiwnlys osgoi'r casgliad y dylai'r Ceisydd, ar ôl creu'r argraff bod y neges dan sylw yn gynrychioliadol o'r hyn yr oedd yn cwyno amdano, fod wedi cywiro'r gamargraff honno, ar ôl iddo sylweddoli y gallai nodweddion negeseuon unigol fod o bwys mawr.

20. Felly, mae'r Tribiwnlys o'r farn na ellir, yn yr achos hwn, bodloni'r amod, sy'n angenrheidiol cyn y gall camgymeriad ffeithiol gyfiawnhau adolygiad, na ellir, yn deg, canfod y Ceisydd yn gyfrifol am y camgymeriad dan sylw. Mae'n rhaid i'r Ceisydd dderbyn ei siâr o'r bai am y camgymeriad. Er nad yw'n gwbl berthnasol i'r penderfyniad presennol, roedd y panel wedi synnu nad oedd y Ceisydd, pan dderbyniodd benderfyniad diweddaraf y Comisiynydd, a oedd yn amlwg yn seiliedig ar gamddealltwriaeth o gwmpas ei gŵyn wreiddiol, wedi hysbysu'r Comisiynydd ar unwaith, darparu'r math o ddeunyddiau y mae wedi gallu eu darparu i'r Tribiwnlys, a gofyn i'r Comisiynydd ailystyried ei phenderfyniad, gan gymryd y deunydd hwnnw i ystyriaeth.

21. Wrth gwrs, ni seiliwyd penderfyniad y Comisiynydd i beidio ag ymchwilio i'r gŵyn ar ei barn nad oedd unrhyw dystiolaeth o fethiant i gydymffurfio â safon 58 yn unig. Nid yw'r oedi sydd wedi digwydd ers Rhagfyr 2016, ynddo'i hun, yn ymddangos yn ffactor pwysig i'r Tribiwnlys, yn enwedig am fod yr oedi yn cynnwys, yn rhannol, yr 8 mis y cymerodd y Comisiynydd i wneud ei phenderfyniad gwreiddiol i beidio ag ymchwilio a hefyd, yn rhannol, ar ei dehongliad anghywir o'r safon dan sylw. Ond roedd ei chanfyddiad bod y cyngor dan sylw, erbyn iddi ailystyried y mater, wedi newid ei arfer a'u bod bellach yn gosod y Gymraeg uwchben y Saesneg ar negeseuon ar y dudalen Facebook yn arwyddocaol iawn. Diben y system Safonau

have taken which would have avoided the misunderstanding. On the other hand, there may have been good reasons why she did not take such steps. Whatever the explanation for the Commissioner not having identified the misunderstanding, the Tribunal cannot avoid the conclusion that the Applicant, having created the impression that the message in question was representative of what he was complaining about, should, once he realised that the detailed characteristics of individual messages might be of great importance, have corrected that impression.

20. The Tribunal therefore finds that one of the conditions which must be satisfied before a factual error can justify a review, namely that the Applicant cannot be held fairly responsible for the error in question, cannot be satisfied in this case. The Applicant must take his share of the blame for the error. Although not strictly relevant to the present decision, the panel were surprised that, when he received the Commissioner's latest decision, which was clearly based on a misunderstanding of the scope of his original complaint, the Applicant did not immediately bring this to the Commissioner's attention, provide her with the kind of material with which he has been able to provide the Tribunal, and asked the Commissioner to reconsider her decision taking that material into consideration.

21. The Commissioner's view that there was no evidence of a failure to comply with standard 58 was not, of course, her only ground for deciding not to investigate the complaint. The delay that has occurred since December 2016 does not, itself, seem to the Tribunal to be a weighty factor, particularly since the delay consists partly of the 8 months which it took the Commissioner to reach her original decision not to investigate and partly of her erroneous interpretation of the standard in question. But her finding that by the time she reconsidered the matter the council in question had changed its practice and was now placing the Welsh above the English is highly significant. The purpose of the Standards regime is to change the behaviour

yw newid ymddygiad awdurdodau cyhoeddus ac, os yw'n digwydd, fel mae'r Comisiynydd yn nodi, bod newid o'r fath wedi bod, gellir deall rhesymeg ei chasgliad, yn seiliedig ar y ffaith honno ac ar yr amser a oedd wedi mynd heibio, y byddai ymchwiliad, hyd yn oed pe byddai wedi arwain at ganfyddiad o fethiant i gydymffurfio, yn ddefnydd adnoddau a fyddai'n anghymesur i unrhyw fudd a fyddai'n deillio i ddefnyddwyr y Gymraeg. Roedd hyn, felly, yn sail resymegol, ar wahân, dros benderfyniad i beidio ag ymchwilio, ac un na fyddai gan y Tribiwnlys unrhyw sail ar gyfer ymyrryd ag ef.

22. Er ei fod wedi mynegi rhywfaint o amheuaeth ynglŷn ag a oedd y cyngor, mewn gwirionedd, wedi newid ei agwedd, ni chyflwynodd y Ceisydd unrhyw dystiolaeth gerbron y Tribiwnlys i awgrymu nad oedd gan y Comisiynydd yr hawl, pan wnaeth y penderfyniad sy'n cael ei ystyried, i ddod i'r casgliad bod y cyngor wedi gwneud hynny. Dadleua'r Ceisydd yn hytrach, bod angen cynnal ymchwiliad a gosod cosbau er mwyn atal y cyngor ac eraill rhag cyflawni mathau eraill o fethiannau i gydymffurfio â safonau. Er bod y Tribiwnlys yn cydnabod bod system gadarn ac effeithiol ar gyfer gorfodi safonau'r Gymraeg yn hollbwysig er mwyn cyflawni amcanion y Mesur, mae'n rhaid i'r Comisiynydd, wrth weithredu'r system, gael elfen o ddisgresiwn i ganolbwyntio adnoddau ar weithgareddau a fydd yn cyflawni'r budd mwyaf. Ni phrofwyd bod y ffordd y mae hi wedi arfer y disgresiwn hwnnw yn yr achos hwn y tu hwnt i'w phwerau.

### Casgliad

23. Felly, mae'r Tribiwnlys yn cadarnhau'r penderfyniad a wnaed gan yr aelod sydd wedi'i chymwysu'n y gyfraith i wrthod caniatâd i'r Ceisydd wneud cais am adolygiad o benderfyniad y Comisiynydd i beidio ag ymchwilio i gŵyn y Ceisydd, ar y sail:

a) Er ei bod yn ymddangos bod penderfyniad y Comisiynydd yn seiliedig ar gamdealltwriaeth o gwmpas cwyn y

of public authorities and if, as appears to be the case, the Commissioner was satisfied that there had been such a change, one can understand the logic of her conclusion, based on that fact and on the time that had elapsed generally, that an investigation, even if it led to a finding that there had been a failure to comply, would be a use of resources which would be disproportionate to any resulting benefit to users of Welsh. This was therefore a separate, rational, basis for a decision not to investigate, with which the Tribunal would have no grounds for interfering.

22. Although he expressed some scepticism as to whether the council had, in fact, changed its approach, the Applicant did not place before the Tribunal any evidence to suggest that the Commissioner was not entitled, when she made the decision under consideration, to conclude that it had. The Applicant argued, instead, that it was necessary to carry out an investigation and to impose sanctions in order to discourage the council and others from committing other failures to comply with standards. Whilst the Tribunal accepts that a robust and effective system for enforcing Welsh language standards is essential in order to achieve the aims of the Measure, the Commissioner must, when operating that system, have a measure of discretion to focus resources on activities which will yield the greatest benefit. The way in which she has applied that discretion in this case has not been shown to be outside her powers.

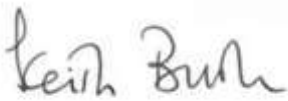
### Conclusion

23. The Tribunal therefore confirms the decision made by the legally-qualified member to refuse permission to the Applicant to apply for a review of the Commissioner's decision not to investigate the Applicant's complaint, on the grounds that:

a) Although the Commissioner's decision appears to be based on a misunderstanding of the scope of the

Ceisydd, a'i bod hi wedi methu ag ystyried yr holl dystiolaeth a fyddai wedi bod yn berthnasol i'r gŵyn honno, nid oedd un o'r amodau a nodwyd gan y Llys Apêl yn E ac R v Secretary of State for the Home Department [2004] EWCA Civ 49 cyn y gall y llysoedd (a'r Tribiwnlys) ymyrryd mewn achos o'r fath wedi'i ddiwallu. Gellir barnu'n deg bod y Ceisydd ei hun yn gyfrifol, yn rhannol, am y camgymeriad drwy awgrymu bod y neges benodol a ystyriwyd gan y Comisiynydd yn gynrychioliadol o'i gŵyn a thrwy beidio a chywiro'r camargraff honno;

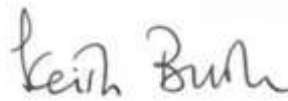
- b) I'r graddau bod y Comisiynydd wedi seilio ei phenderfyniad ar ei hasesiad ynghylch a oedd y neges dan sylw yn cydymffurfio â Safon 58, wnaeth hynny gan ddilyn yr egwyddorion cyfreithiol cywir ac ar ôl ystyriaeth ofalus o'r ffactorau perthnasol ac ni ellir dweud bod ei phenderfyniad yn afresymegol.
- c) Roedd gan y Comisiynydd hawl, yn seiliedig ar ei chred, ar yr adeg berthnasol, bod y cyngor dan sylw wedi newid ei arfer a'u bod felly wedi dileu'r sail dros gwyno, ac ar yr amser a aeth heibio ers derbyn y gŵyn, i benderfynu y byddai ymchwiliad yn golygu gwneud defnydd o adnoddau a fyddai'n anghymesur i unrhyw effaith fuddiol ar ddefnyddwyr y Gymraeg.



**Keith Bush CF**  
Llywydd y Tribiwnlys  
29 Awst 2018

Applicant's complaint, and had failed to consider all the evidence which would have been relevant to that complaint, one of the conditions laid down by the Court of Appeal in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 before the courts (and the Tribunal) can intervene in such a case has not been satisfied. The Applicant can himself be fairly held responsible, in part, for the error by suggesting that the particular message considered by the Commissioner was representative of his complaint and by not correcting that impression;

- b) Insofar as the Commissioner based her decision on her assessment of whether the message in question complied with Standard 58, she did so on correct legal principles and after a careful consideration of the relevant factors and her decision could not be said to be irrational;
- c) The Commissioner was entitled, based on her belief, at the relevant time, that the council in question had changed its practice so as to remove the ground for complaint, to decide that an investigation would involve making use of resources in a way which was disproportionate to any beneficial impact on users of Welsh.



**Keith Bush QC**  
President of the Tribunal  
29 August 2018

## ATODIAD

(Deunydd a ystyriwyd gan y Tribiwnlys)

1. Hysbysiad Cais y Ceisydd dyddiedig 25 Mai 2018;
2. Llythyr y Comisiynydd, dyddiedig 25 Mai 2018 yn hysbysu'r Ceisydd o'i phenderfyniad (yn dilyn dirymiad o'i phenderfyniad gwreiddiol) i beidio â chynnal ymchwiliad i gŵyn y Ceisydd, dyddiedig 1 Rhagfyr 2016;
3. Cwyn wreiddiol yr Ymgeisydd, dyddiedig 1 Rhagfyr 2016;
4. Llythyr y Comisiynydd, dyddiedig 30 Awst 2017 yn hysbysu'r Ceisydd o'i phenderfyniad gwreiddiol i beidio â chynnal ymchwiliad i gŵyn yr Ymgeisydd.
5. Sgrin lun o neges ddyddiedig 1 Rhagfyr 2016;
6. Penderfyniad aelod o'r Tribiwnlys sydd wedi'i chymhwyso yn y gyfraith dyddiedig 11 Mehefin 2018 yn gwrthod caniatâd i wneud yr hawliad;
7. Casgliad o sgrin luniau o negeseuon amrywiol dyddiedig 31 Hydref 2016 i 30 Tachwedd 2016.

## APPENDIX

(Material considered by the Tribunal)

1. Applicant's Notice of Application dated 25 May 2018;
2. Commissioner's letter dated 25 May 2018 notifying the Applicant of her decision (following annulment of her original decision) not to carry out an investigation into the Applicant's complaint dated 1 December 2016;
3. Applicant's original complaint dated 1 December 2016;
4. Commissioner's letter dated 30 August 2017 notifying the Applicant of her original decision not to carry out an investigation of the Applicant's complaint.
5. Screenshot of message dated 1 December 2016;
6. Decision of the legally-qualified member of the Tribunal dated 11 June 2018 refusing permission to make the claim;
7. Collection of screenshots of various messages dated 31 October 2016 to 30 November 2016.