

BRIEFING NOTE ON GLOUCESTERSHIRE LIBRARIES JUDGMENT

The Court's Judgment – What it said

On 16 November 2011 His Honour Judge McKenna, sitting in the High Court, ruled that Gloucestershire County Council's decisions to cut library provision were unlawful due to the Council's breach of its statutory equalities duties. As a consequence it quashed those decisions. Those decisions were as follows:

- Cabinet Decision of 2 February 2011;
- Full Council decision of 16 February 2011 (as it related to libraries);
- Cabinet Member decision of 12 April 2011; and
- Any other decisions taken as a consequence of those decisions i.e. any libraries decisions subsequent to 2 February 2011.

The Court awarded the Claimant all of her costs – to be paid by the Council – in view of her outright victory. It refused leave to appeal. At the time of writing, the Sealed Order confirming this, and the transcript of the further oral judgment approved by the Judge are awaited.

The breach of the statutory equalities duties that the Court identified was a serious one, which it condemned as "*bad government*". These duties it identified as imposing "*important and onerous burdens*" (paragraph 118); which must be complied with "*in substance*" (paragraph 118) i.e. not as a merely technical box-ticking exercise. The Council relied on a number of Equalities Impact Assessments ("EIAs") in the case, but these documents were not enough to convince the Court that the Council had due regard to these important duties. Moreover the Court found that the duties must be exercised "*as part of the decision making process*" (paragraph 121). It found that as part of that process GCC did not "*undertake..a sufficiently thorough information gathering exercise and then properly analyse..that information*" (paragraph 131).

The Court's Judgment – What it didn't say

GCC has said publicly that the Court has ruled that the previously proposed shape of library provision complied with the duty to provide a "comprehensive and efficient library service" under s7 Public Libraries and Museums Act. This refers to paragraph 117 of its judgment. The wording here is unfortunate. On a straightforward reading it does appear as if the Judge is ruling as to the service's adequacy, but the passage must be read in context. The judge did not receive submissions on whether the proposed library service was or was not 'comprehensive and efficient', nor do his findings elsewhere relate to this. In fact his findings are only that (i) resource limitations are a relevant consideration for the Council; (ii) that the Council had sufficient regard to the duty when it was making its decision; and (iii) that it adequately assessed users needs for the purposes of compliance with the duty. He did not address whether the library provision actually *is* 'comprehensive and efficient'. Because of judicial deference to primary decision makers as to the merits of their decisions, actual compliance with the substance of the 'comprehensive and

efficient' duty is a matter for the Secretary of State's supervision under s10 of the Act.¹ It is for this reason that we did not mount a 'head on' challenge to the proposals as intrinsically breaching the Libraries Act. Nor did the Judge rule that community libraries comply with that Act. On the contrary, he notes at paragraph 117 that community libraries are outside statutory provision and therefore irrelevant to his considerations. All the judge is saying in this paragraph is that, in his view, the fact that the community libraries may not in fact materialize does not in itself affect compliance with the s7 duty.

Effect of the Court's Judgment

In quashing all relevant decisions, they have been made a nullity. It is as if the decisions were never made in the first place. That is the position that prevails now. In the absence of these decisions, library services in Gloucestershire must be run in accordance with the Council's previous decisions – as to budget, opening hours, range of services, number of fixed and mobile facilities, ownership etc.

This doesn't of course insulate libraries from *future* decisions. New decisions will no doubt be made. But they will need to be in accordance with the Council's decision-making procedures and subject to the democratic scrutiny that this entails and they will also have to be made in accordance with the Council's legal duties. The judgment is the best information we have as to what those duties require in practice. It makes clear that they are onerous, and that the previous attempt was not enough. What follows now must be an improvement.

In the absence of fresh decisions the Court will expect services to be reinstated save where decisions prior to 2 February 2011 permit services to remain withdrawn. The Court would not expect the previous service to be returned overnight, but it will expect prompt action in this regard – some matters may be able to be reinstated immediately whereas others will require additional employment, repairs to vehicles etc. Local residents and their elected representatives will need to keep a close eye on this.

The future

As for fresh decisions, the first issue will be whether the Council re-consults. There is no absolute duty of consultation, but where the Council had previously consulted and has been forced by the Court to revisit those plans it will be difficult for it to avoid consulting anew, particularly where, as here, the Court has condemned it for not carrying out a sufficiently thorough *information gathering exercise*. If it doesn't, it will need to find another way of acquiring much better user information in order to produce a much more substantial assessment of the equalities impact of its decision. We therefore anticipate re-consultation to take place, with further and better assessment of users' needs,

¹ PIL can write to the Secretary of State, raising the judgment. It is notable that the Parliamentary Culture, Media and Sport Committee (which recently had some success with the 'Phone Hacking' scandal) announced an inquiry into library closures within a few days of the judgment in this case: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news/library-closures-call-for-evidence/>.

further and better equalities assessments and further and better taking into account of that information in the decision-making process. There is no absolute duty for the Council to publish all of these processes, but it is democratically accountable and will, we expect, be at pains to show that it is doing a better job this time, so this should not be a problem in practice.

As to what proposal will be consulted-upon, there is no requirement for this to be different to that consulted-upon previously. However, the Court found that the previous proposal lacked adequate consideration of equalities issues and it can be inferred that this was made with reference at least in part to the shape of library provision in that proposal. The Court heard lots of evidence pointing out its inadequacies and the way that it cut off vulnerable communities from library provision. To simply re-consult on the same option would therefore be a risky option for the Council. Moreover, it would suggest a closed-mind, which is something that the Council must now strain to avoid if it is to avoid repeat litigation.

Finally, what will be the final shape of library provision after the Council has re-consulted, re-assessed users needs' and the equalities' impact? This is a difficult question. As you know, the equalities duties do not prescribe a minimum level of library provision. They are duties of process, but in giving effect to them, they must materially impact on the final decision. We can therefore expect that a library service that has had due regard to the need to eliminate discrimination, promote equality of opportunity and encourage participation of all vulnerable groups will be a substantial improvement on the previous proposals. For example, disadvantaged communities, more exposed to equalities impacts, should not be disproportionately affected as they are now, nor would we expect mobile libraries to cease.

The Council has to approach any new decisions with a genuinely open mind. Any statement that pre-empts the outcome is *prima facie* evidence of an unlawful approach – a 'closed mind' in breach of its consultation duties (if they are in play) and a failure to have 'due regard' to the equalities information it has yet to gather and assess.

In making its new decision, the Equalities Act 2010 is now in play.² This means that, in addition to race, sex and disability inequalities, it must now have regard to age (both young and old) and pregnancy/maternity considerations. It must also carry out the new process in accordance with its equalities policies.³

This is now the best opportunity for library users, judgment in hand, to seize the initiative and put forward better, more comprehensive, fairer library proposals, to the benefit of everyone in Gloucestershire.

**Public Interest Lawyers
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² See <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/>

³ See <http://www.gloucestershire.gov.uk/index.cfm?articleid=10744>