Neutral Citation Number: [2016] EWHC 1512 (Admin)

Case Nos: CO/4008/2015, CO/5026/2015 and CO/5027/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2016

Before :

LORD JUSTICE SIMON
and
MR JUSTICE FLAUX

- -

Between :

The Queen (on the application of Jewish Rights Watch, t/a Jewish Human Rights Watch)	**Claimant**
and	
Leicester City Council	**Defendant**

and between :

The Queen (on the application of (1) Jewish Rights Watch, t/a Jewish Human Rights Watch), and (2) Jonathan Neumann)	**Claimants**
and	
Gwynedd Council	**Defendant**

and between :

The Queen (on the application of (1) Jewish Rights Watch, t/a Jewish Human Rights Watch, and (2) Jonathan Neumann)	**Claimants**

and

City and County of Swansea **Defendant**

Mr Robert Palmer (instructed by **RHF Solicitors**) for the Claimants
Mr Andrew Sharland and **Mr Zac Sammour** (instructed by Leicester City Council, Gwynedd Council Legal Service and Acuity Legal Ltd) for the Defendants

---

Hearing dates: 4 and 5 May 2016

- -

Approved Judgment

Lord Justice Simon:

1. This is the judgment of the Court.

Introduction and the matters in issue

2. By these three claims, Jewish Human Rights Watch ('JHRW') challenges resolutions which have been passed by three Local Authorities which were critical of the State of Israel and its policies. It argues that the resolutions were the result of the Councils deliberately involving themselves in an area of foreign policy which they knew was controversial and where strong views were held on each side.

3. It is JHRW's case that the Councils singled out Israel for different treatment than that adopted in respect of other countries and, in particular, failed properly or sufficiently to consider the effect of the resolutions on the Jewish community. JHRW contends that the Councils failed to have due regard to the need to eliminate discrimination and harassment of Jewish people, and the need to foster good relations between those who are Jewish and those who are not; and that in doing so they failed to have any regard to the Public Sector Equality Duty, set out in s.149 of the Equality Act 2010, and their legal duties as public authorities, as set out in s.17 of the Local Government Act 1988. In consequence, it claims that the resolutions should be quashed.

4. The underlying nature of the complaint is set out in §§2, 3, 7, 8 and 11 of the first witness statement of Mr Neumann in the case against Leicester City Council ('Leicester'). Mr Neumann is a director of JHRW and was joined as a claimant in the case against Gwynedd Council ('Gwynedd') and City and County of Swansea ('Swansea').

> JHRW was incorporated on the 17th December 2014 and was formed with a view to challenging the rising anti-Semitism in the UK which was particularly acute during the course of that year. What concerned me was that various groups and individuals were using condemnation of Israel as a means to attack British Jews. The number of recorded attacks on Jews and Synagogues in 2014 was at the highest level in recent memory. Community Security Trust ('CST'), a charity that deals with security in the Jewish Community, published their report on these attacks in 2014 …
>
> … JHRW believes these figures reflect an atmosphere of growing hostility towards Jews but that they do not fully capture other causes and symptoms of that hostility, which includes, for example, motions and resolutions by institutions. The aim of JHRW is to attempt to turn the tide in relation to these incidents by educating the Jewish and wider community as to how and why anti-Semitism is growing and where appropriate by undertaking action to combat it.
>
> What concerns me about any motion that deals with boycotting goods in the context of Israel is the impetus it gives to the movement known as BDS. BDS stands for Boycott, Divestment

> and Sanctions. The movement was created to maximise political pressure on the Jewish State … and ultimately see it destroyed … BDS is now well known in trades unions, universities and local authorities and the way it is promoted is such that it denies Jewish rights to self-determination and is silent on the matters of the safety and welfare whether living in Israel or the UK. The level of hatred that has been experienced by Jewish people today in the UK and elsewhere has much to do with the BDS movement.
>
> … The connection between calls, resolutions and motions to boycott the Jewish State and the harassment of Jews is direct. Jewish students feel ostracised when their peers endorse BDS and its aims, and I believe Jewish residents in towns and cities feel the same when their councils do so.
>
> … Whilst there is no direct reference to the BDS movement in the City Council debate, the motion falls squarely within the impact on the Jewish Community and is exactly the same.
>
> … Bad news travels fast and this Motion was certainly bad news for the wider Jewish Community. I know that many Jews were feeling vulnerable as a result of the increased attacks referred to in the CST report and this Motion just made matters worse. I have lived in London almost all my life and found that the kind of hostility to my community last year to be noticeably greater than in the past. There should in my view be proper consideration of all the issues when a Motion such as this is discussed and there clearly wasn't.

5. In the case against Leicester there was a further witness statement supporting the claim from Jeffrey Kaufman who lives within the Leicester area and is an elected member of Leicestershire County Council. His evidence describes the dismay among members of Jewish congregations in the area that Leicester 'had picked on Israel as [its] target.' In the light of the fact there were so many other conflicts which might have been the subject of resolutions, in his view:

> It was impossible to avoid the conclusion that Israel was being targeted because it is a Jewish State and that as a consequence we as Jews living and working in and around Leicester were being targeted as well … It was as if, despite all the time they had lived and worked in Leicester, … the City Council did not consider Jewish people to be part of that community.

6. The three Councils also served evidence, and it is only necessary at this stage to refer to the witness statements served on Leicester's behalf by the Mayor of Leicester, Sir Peter Soulsby. His evidence raised some of the legal arguments which it will be necessary to consider later; but he also emphatically contested the assertion that a criticism of Israel was necessarily an attack on British Jews:

> I do not accept this at all. In my view, criticism of Israel is fundamentally different to criticism of, or an attack on, British Jews. A significant number of British Jews are critical of the State of Israel in the context of Palestine and the treatment of Palestinians (indeed, after the resolution was passed I was contacted by a group of Jewish residents of Leicester expressing support for the resolution although I also received criticism of the resolution from Jewish residents and Jewish groups as well).

7. Mr Neumann also exhibited a copy of the CST report which highlights a distinction between activity which is directed against Israel and anti-Semitism:

> CST is often asked about the difference between antisemitic incidents and anti-Israel activity, and how the distinction is made in the categorisation of incidents. The distinction between the two can be subtle and the subject of much debate. Clearly, it would not be acceptable to define all anti-Israel activity as antisemitic; but it cannot be ignored that contemporary antisemitism can occur in the context of, or be accompanied by, extreme feelings over the Israel/Palestine conflict. Discourse relating to the conflict is used by antisemitic incident offenders to abuse Jews; and anti-Israel discourse can sometimes repeat, or echo, antisemitic language and imagery. Drawing out these distinctions, and deciding on where the dividing lines lie, is one of the most difficult areas of CST's work in recording and analysing hate crime.

8. This evidence raises a number of issues before one gets to the legal argument: first, where the dividing line between criticism of Israel and anti-Semitism may lie; secondly, the authority of JHRW to represent the views of Jewish community generally and in the particular localities of the three Councils; thirdly, and linked to the second issue, JHRW's standing to bring proceedings (particularly in relation to procurement decisions); fourthly, the legality of Israel's occupation of East Jerusalem and the West Bank; and fifthly, the ambit of the right of self-expression even in areas of extreme sensitivity and controversy.

9. So far as the first three points are concerned, and leaving aside for the present the legal argument in relation to procurement, in our view the Court should not adopt an over-strict approach to standing in the present case. Anti-Semitism (like all forms of racism) is an insidious menace to the fabric of Civic Society, and the Courts are likely to be disinclined to exclude relief solely on the basis that an applicant may be unable cogently to explain the motives of those concerned or to demonstrate that he or she represents the views of the majority of Jews. Nevertheless we note, first, that Mr Palmer's assertion that JHRW consulted widely among the Jewish community before bringing the claim was not supported by any evidence; secondly, that there was no specific evidence from a member of the Jewish community in Gwynedd or Swansea; and thirdly, that criticism of Israel is not seen by all Jews in this country as an attack on their community, or, at least, not necessarily so.

10. As to the fourth point, although Mr Sharland's written submissions developed an argument that the resolutions were, and were intended to be, 'no more than an expression of political solidarity with Palestinians living under unlawful Israeli occupation', his oral submissions did not develop the point; and in view of the way in which the argument developed, with its focus on the legality of the resolutions, it is unnecessary to say anything further on the point.

11. So far as the fifth point is concerned, we accept that the Court should be vigilant to protect the right of freedom of expression, even (and perhaps particularly) where the expression of certain views may upset or offend the public or a section of the public. The point is well-expressed in a familiar passage from the judgment of Sedley LJ in *Redmond-Bate v. Director of Public Prosecutions* [1999] EWHC Admin 733 (1999); Crim.L.R 998 in the context of the common law right of freedom of expression:

> Freedom of speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the jury which in 1670 refused to convict the Quakers William Penn and William Mead for preaching ideas which offended against state orthodoxy.

To that statement we would only add that the right to freedom of expression under article 10 of the European Convention on Human Rights is subject to limitations, including those imposed by the criminal law.

12. Unsurprisingly, Mr Palmer disavowed any suggestion that his client was seeking to inhibit freedom to criticise Israel. His submission was that the focus of the claims was the legality of the resolutions that were passed rather than the debates that led to them. Nevertheless, a considerable part of the hearing was taken up with a detailed analysis of Council debates (where records of them existed) to see what was said. This is a matter to which we return later in this judgment.

13. It is with these considerations in mind that we turn to the resolutions in issue.

The resolutions

14. Although the earliest of the resolutions in issue was the motion passed by Swansea, it is convenient to start with the motion adopted by Leicester.

Leicester

15. On 13 November 2014, following a debate (transcribed in 17 pages of single space typescript), the meeting of the Council adopted a motion. Although there are different versions, the case proceeded on the basis of the record set out at **Annex A** to this judgment. So far as the claim under s.17 of the 1988 Act was concerned the particular focus was on the words:

> Therefore, Leicester City Council resolves, insofar as legal considerations allow, to boycott any produce originating from illegal Israeli settlements in the West Bank until such time as it complies with international law and withdraws from Palestinian Occupied territories.

Gwynedd

16. On 9 October 2014, following a short debate (running 1½ pages of transcript), the Council adopted a resolution criticising Israel. The record of the resolution is set out at **Annex B**. The crucial words of the resolution are:

> Following the latest attacks by the Israeli State on the territory of the Palestinians living in the Gaza Strip, this Council calls for a trade embargo with Israel and condemns the over-reaction and savageness used.
>
> Furthermore, we confirm and underline this Council's decision [not to invest] in Israel or in that country's establishments.

17. There was an issue as to the correct translation of the words in parenthesis from the original Welsh, but we accept that the resolution was expressed in terms of a decision not to invest in Israel rather than to cease investing in Israel. The witness statement of Dafydd Edwards (the Head of Finance at Gwynedd) was to the effect that Gwynedd had no investments in Israel at the time and that the call 'for a trade embargo with Israel' was directed to Central Government.

Swansea

18. On 17 June 2010, the Council passed the resolution expressing concern that a company, Veolia, which was involved in building a light railway in Israel was also involved in (or might be involved in seeking) contracts with Swansea. The minutes of the meeting are set out in **Annex C**.

19. The words of the resolution were:

> This Council therefore
>
> > Notes with regret that Veolia is involved in (or will be seeking) contracts with the City & County of Swansea.
> >
> > Calls on the Leader & Chief Executive to support the position of the UN in regards to the Israeli settlements in East Jerusalem, so long as to do so would not be in breach of any relevant legislation.

> And asks the Leader & Chief Executive to note that Council does not wish to do business with any company in breach of international law or UN obligations or demands, so long as to do so would not be in breach of any relevant legislation.

20. Although there was a debate leading to the Swansea resolution, there is no longer a record of it; and the delay in bringing the claim and the difficulties that now face Swansea in answering it by reference to what was, or might have been said, during the debate, are points raised in answer to the claim.

The evidence

21. We have referred to some of the evidence already but it is convenient at this stage to refer to two further points.

22. First, the evidence from each of the Defendant Councils was that the resolutions did not bind the Councils to abide by or act upon them. Leicester, Gwynedd and Swansea each operated through an Executive (which developed and implemented policy); and procurement was a function of the Executive rather than the full Council.

23. The second point is that two of the resolutions contained qualifying words. In the case of Leicester, the boycott resolution was qualified by the words, 'insofar as legal considerations allow'. In the case of Swansea the exhortation to support the position of the UN in relation to the settlement of East Jerusalem was qualified by the words, 'so long as to do so would not be in breach of any relevant legislation.'

The statutory framework

Section 149 Equality Act 2010

24. This provision sets out the public sector equality duty ('PSED').

> (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.
>
> …
>
> (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.
>
> …
>
> (5) Having due regard to the need to foster good relations 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) tackle prejudice, and
>
> (b) promote understanding.
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
>
> age;
> disability;
> gender reassignment;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation.
> …

The cases on s.149 and the argument

25. Two issues arise: first, whether the elected Councils were public authorities exercising functions which gave rise to a PSED; and secondly, if the elected Council did have a PSED, what was its ambit and was there sufficient regard to the statutory criteria set out in s.149(1) of the Equality Act?

26. On the first issue, Mr Sharland submitted that the resolutions did not create policy; in each case it was the Executive which established and implemented policy. It followed that the elected Council was not a public body exercising its functions, and consequently the s.149 PSED was not engaged. Mr Palmer submitted in answer that it

was the elected Council which exercised the relevant statutory duties and powers, including the formulation of policy; and the fact that these duties and powers were allocated to the Executive, did not have the consequence that the elected Council were not exercising a function. It was simply a function that had been allocated to the Executive.

27. On the second issue, Mr Palmer referred to a number of cases which established the purpose and ambit of the PSED. In *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 at [274] the Court of Appeal made clear that the purpose of the PSED was to require public bodies to give advance consideration to equality issues 'before making any policy decision that may be affected by them.' The extent of the duty is reflected in principles set out by the Court of Appeal in *Bracking v SSWP* [2013] EWCA Civ 1293 at [26]:

> (1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rear guard action', following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23-24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
> i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.' (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be 'rigorous in both enquiring and reporting to them': *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77-78]

> '[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, 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. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.

(ii) At paragraphs [89-90]

> [89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):
>
> > '….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

28. The summary of the law as set out in *Bracking* was cited with approval by the Supreme Court in *Hotak v. Southwark London Borough Council* [2015] UKSC 302; [2015] 2 WLR 1341 at [73]-[75]. At [75], Lord Neuberger (with whom the other members of the Court agreed) referred to the *Hurley* case, and added:

> … it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that 'there has been a rigorous consideration of the duty'. Provided that there has been a 'proper and conscientious focus on the statutory criteria', he said 'the court cannot interfere … simply because it would have given greater weight to the statutory criteria.'

29. It is accepted by the Defendants that a local Jewish community falls within the definition of a protected characteristic for the purpose of s.149(7).

30. In our view a number of relevant and interlinked points arise.

31. First, the principles described in *Bracking* and the other cases are not to be regarded as an all-embracing code which applies to every public body exercising its functions.

32. Secondly, while it is clear that a public authority must comply with its PSED under s.149, this obligation is more easily applied to a formal and developed policy than it is to resolutions of a local council following debate. In our view the obligations which are described apply primarily, if not exclusively, to those involved in the process of framing and implementing policy (the Executive, in constitutional terms) rather than those who debate broad issues which may result in policies subsequently drafted and framed in accordance with the law. This is clear from the nature of the duty described in the cases: for example, the duty to acquire relevant information, the continuing nature of the obligations, the obligations of those who may advise the decision-makers, see also *Pieretti v. LB Enfield* [2010] EWCA Civ 1104 at [26] and *R (Bailey and ors) v. LB Brent and ors* [2011] EWCA Civ 1586 at [75]. While we would not exclude the possibility that the duty may arise in relation to Council motions following a debate, it is likely only to arise where a resolution is closely focussed and the policy will be directly implemented.

33. Thirdly, Mr Palmer accepted that it was legitimate for local councils to criticise Israel by resolution. However, he submitted that, if they do so, they must carry out a conscientious assessment of the impact of any resolution on the local Jewish community. When asked what this assessment should involve, he submitted that the minimum requirement should be that someone should raise in debate the impact of the resolution on the Jewish community. This would mean that where council resolutions followed debate, it would be necessary to look at the transcript (where it existed) to see whether 'due regard' had been given to the statutory criteria.

34. In the case of Leicester, this involved looking at the transcript of 77 minutes of debate to see whether consideration, or sufficient consideration, had been given to the impact of the resolution on the Jewish community. This was not a productive exercise. First, Councillors do not (and should not) expect that their speeches will be scrutinised later in Court to see whether the Council's PSED was being properly addressed, or, to adopt the phrase used in *Hurley* case, whether there was 'proper and conscientious focus on the statutory criteria.' It would significantly inhibit debate if this were a requirement of the law, and we see no warrant for it. Secondly, one of the Councillors was plainly aware of the impact of the debate on her Jewish constituents.

> … I did talk to a number of people in my ward about the motion tonight … I do have parts in my ward [with] a long established Jewish community, both the Orthodox … and Liberal Jews … people have differing views, people are different …

35. In our view, the exercise of scrutinising the debate simply highlighted the unreality of this part of the Claimant's case.

36. In the case of Swansea the exercise was impossible since there was no available transcript and one cannot see what was said in June 2010, or whether consideration was given to the impact on the local Jewish community.

37. Fourthly, the approach set out above gives appropriate weight to the qualifying word 'due' in the phrase 'due regard' in s.149(1), to the nature of 'non-binding' resolutions, to the express reservation (in the case of Leicester and Swansea) that the resolution should only operate to the extent that it was legal and to the right to free political debate within the confines of the criminal law.

Section 17 Local Government Act 1988.

38. This section (in its amended form) provides:

> (1) It is the duty of every public authority to which this section applies, in exercising, in relation to its public supply or works contracts, any proposed or any subsisting such contract, as the case may be, any function regulated by this section to exercise that function without reference to matters which are non-commercial matters for the purposes of this section.
>
> ...
>
> (3) The contracts which are public supply or works contracts for the purposes of this section are contracts for the supply of goods or materials, for the supply of services or for the execution of works; but this section does not apply in relation to contracts entered into before the commencement of this section.
>
> (4) The functions regulated by this section are -
>
> (a) the inclusion of persons in or the exclusion of persons from—
>
> (i) any list of persons approved for the purposes of public supply or works contracts with the authority, or
>
> (ii) any list of persons from whom tenders for such contracts may be invited;
>
> (b) in relation to a proposed public supply or works contract with the authority -
>
> (i) the inclusion of persons in or the exclusion of persons from the group of persons from whom tenders are invited,
>
> (ii) the accepting or not accepting the submission of tenders for the contract,

(iii) the selecting the person with whom to enter into the contract, or

(iv) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract; and

(c) in relation to a subsisting public supply or works contract with the authority -

(i) the giving or withholding approval for, or the selecting or nominating, persons to be sub-contractors for the purposes of the contract, or

(ii) the termination of the contract.

(5) The following matters are non-commercial matters as regards the public supply or works contracts of a public authority, any proposed or any subsisting such contract, as the case may be, that is to say -

…

(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors;

…

(7) Where any matter referable to a contractor would, as a matter specified in subsection (5) above, be a non-commercial matter in relation to him, the corresponding matter referable to -

(a) a supplier or customer of the contractor;

(b) a sub-contractor of the contractor or his supplier or customer;

(c) an associated body of the contractor or his supplier or customer; or

(d) a sub-contractor of an associated body of the contractor or his supplier or customer;

is also, in relation to the contractor, a non-commercial matter for the purposes of this section.

...

(10) This section does not prevent a public authority to which it applies from exercising any function regulated by this section

> with reference to a non-commercial matter to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with -
>
> (a) the duty imposed on it by section 149 of the Equality Act 2010 (public sector equality duty), or
>
> (b) any duty imposed on it by regulations under section 153 or 154 of that Act (powers to impose specific duties).

The argument in relation to s.17

39. At the hearing this challenge was confined to the resolutions passed by Leicester and Swansea; although in relation to Swansea the relevant statutory scheme at the time was different.

40. Mr Palmer drew attention to Government Information Note 01/2016 (dated 17 February 2016): 'Public Procurement Note: ensuring compliance with wider international obligations letting public contracts', at §7:

> Public procurement should never be used as a tool to boycott tenders from suppliers based in other countries, except where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government. There are wider national and international consequences from imposing such local level boycotts. They can damage integration and community cohesion within the United Kingdom, hinder Britain's export trade, and harm foreign relations to the detriment of Britain's economic and international security. As highlighted earlier, it can also be unlawful and lead to severe penalties against the contracting authority and the Government.

41. He submitted that the effect of s.17(4) was that the regulated functions included the exclusion of persons from whom tenders may be invited, see s.17(4)(a) and (b). By adopting its policies, the Councils resolved to exclude from any list or group of persons from whom tenders might be invited, any persons supplying produce originating from Israeli settlements in the West Bank. In calling for a boycott by reference to non-commercial matters, the policy infringed s.17(1), and the exception in s.17(10) did not apply. In the case of Leicester, the resolution specifically related to the Council's procurement policy and 'any produce originating from illegal Israeli settlements in the West Bank'. In the case of Swansea, the motion called on the Leader of the Council and the Chief Executive to note that the Council did not wish to do business with any company (implicitly) based in Israeli settlements on the West Bank or East Jerusalem.

42. At least to some extent, the argument in relation to s.17, overlaps with the argument under s.149 as the terms of s.17(10)(a) would suggest; and in our view it fails on a similar basis. Mr Palmer characterised the motions as 'calling for a boycott', but that term is inexact in view of the previously noted qualification in the case of Leicester and Swansea that the resolution was only to operate to the extent that the law allowed.

43. The evidence was that, whatever the form of words used in the motion, the Councils' functions, in so far as they related to public supply and works contracts, were carried out by an Executive in accordance with the Councils' legal duties; and Council motions did not bind the Executive. In relation to Leicester, there was the evidence in §2 of the witness statement of Sir Peter Soulsby:

> I can confirm that … in Leicester, procurement is an Executive function and resolutions passed by the Council do not bind the Executive. I can further confirm that since the resolution was passed, the Council's procurement exercises have continued in the same way as before the motion was passed. The Council has not sought to exclude any person or group of persons from whom tenders are invited on the basis of country or territory of origin of supplies. Further, such matters have played no part in the decision as to which tenders are accepted by the Council. Such non-commercial matters have formed no part of the procurement process and will not form any part of the procurement process in the future.

44. The evidence of Mr Patrick Arran (Head of Legal and Democratic Services at Swansea) at §1 of his witness statement was to similar effect. In addition he exhibited extracts from two contracts between the Council and Veolia entered into in September and October 2010.

45. We would add that the evidence of Mr Edwards (on behalf of Gwynedd) was to the effect that the relevant Council policy was the adoption of its Treasury Management Report by the full Council in March 2014, followed by a further decision of the Council to approve a new Treasury Management Strategy Statement in March 2015. Neither implemented the resolution or breached the Council's s.17 obligations.

46. The evidence is clear: the Council resolutions did not override, or even affect, the lawful exercise of its public functions in relation to public supply or works contracts, and no contracts or potential contracts were affected by the resolutions.

47. We have referred to Mr Palmer's submission that the proper legal analysis is that the Council is the sole repository of its legal power and that, on this basis, the evidence that it is the Executive which exercises such power is immaterial. In our view that argument does not address the reality of the situation. The Claimants seek a declaration in each case that 'the Council's policy is unlawful' and ask for an order that it be quashed. What is clear from the evidence is that the resolutions do not represent Council policy.

48. Mr Palmer's response was to ask rhetorically what the purpose of the resolutions was, if not to establish policy? He was also critical of the words which qualified the resolution in terms of their legality, submitting that the qualification necessarily rendered the resolution 'incoherent and irrational'. The answer to the first point may lie in the nature of political discourse in a democracy. So far as the second point is concerned, we do not see any irrationality in qualifying the operation of a resolution by reference to legality. Doubtless the Courts will be astute to prevent plainly unlawful resolutions being passed under the cover of such qualifying words; but if the

Council has not in fact acted on the resolution, then the existence of the qualifying words will, at the very least, be relevant to the grant of discretionary relief.

Summary of conclusions on s.149 and s.17

49. For these reasons we have concluded that the claims fail in relation to each of the Councils on an analysis of the facts and the applicable legal principles.

50. In the light of these conclusions we can deal with the remaining issues more shortly.

Standing

51. We have already set out our broad approach to the standing of JHRW. However, the Claimants' submission that the Gwynedd and Swansea failed to take into account the views of (and effect on) the Jewish community before the resolutions were passed, is weakened by the absence of evidence from anyone in the local Jewish communities in relation to these matters, and by Mr Palmer's acceptance that there was 'not a wide consultation with the local Jewish community.' As already noted there was no evidence of any consultation at all. This is particularly relevant to the challenge in relation to the s.17 challenge.

Delay

52. CPR 54.5 provides that claims for judicial review must be brought promptly and, in any event, within three months after the grounds for making the claim first arose. It has often been said, and scarcely needs to be repeated here, that the three months limit is not an aspiration but a backstop.

53. Although the delay exceeded this three month period in the case of the claims against Leicester and Gwynedd, if we had considered that there was substantial merit in the claims we would not have refused relief solely on the grounds of delay.

54. In the case of Swansea, however, we are quite satisfied that there has been undue delay which must result in relief being refused under s.31(6) of the Senior Courts Act 1981. Although the 3-month period expired on 17 September 2010, the claim was not served until 27 October 2015, and even then there was no prior Letter before Claim. There has been no explanation for the delay; and the delay has caused the significant prejudice that there are no longer records of the debate prior to the passing of the resolution.

Conclusion

55. It follows that each of the claims must be dismissed.

56.

Annex A: Leicester

At a meeting of Leicester City Council held … on Thursday 13 November 2014 duly convened for the business hereunder mentioned.

Business

11. Notice of Motion.

2. Proposed by Councillor Dawood, seconded by Councillor Kitterick

Preamble

Leicester is a City renowned for its tolerance, diversity, unity and its strong stance against all forms of discrimination, this position enables different communities to live together.

It is also important when there I oppression and injustice, that Leicester City Council takes up a position takes up a position to support communities experiencing such inequalities and in this instance it is the plight of the Palestinian people, which is why the following motion is being moved.

The Motion

Leicester City Council recognises the right of the State of Israel to exist in peace and free from incursion, but condemns the Government of Israel for its continuing illegal occupation of Palestine's East Jerusalem and the West Bank; for its continuing blockade of Gaza; and the illegal appropriation of land in the West Bank and settlement buildings.

The Council welcomes the decision of the United Nations on 29 November 2012 to recognise Palestine 'non-member observer State', but for the people of Palestine the suffering since 1967 continues.

The Council also welcomes UK Parliament's vote on 13th October 2014 to recognise Palestinian Statehood even though the United Kingdom Government fails to do so. It is with regret we note the Government of Israel continues to ignore and breach International Law, Geneva Convention and UN Resolutions and continues with its occupation of Palestinian territories.

Therefore, Leicester City Council resolves, insofar as legal considerations allow, to boycott any produce originating from illegal Israeli settlements in the West Bank until such time as it complies with international law and withdraws from Palestinian Occupied territories.

Furthermore, Leicester City Council continues the example of good community relationships by developing a sustainable city, promoting harmony and respect for all people to live in a neighbourly way.

Annex B: Gwynedd

Minutes of the meeting of the Council on 9 October 2014

11. Notices of Motion

(A) It was reported that a notice of motion had been received, along with a procedural motion, in accordance with the Procedural Rules, from Councillor Owain Williams, requesting that the following proposal be discussed at the full Council instead of being referred to a committee.

RESOLVED to discuss the motion at this meeting.

The following proposal was proposed and seconded:

'Following the latest attacks by the Israeli State on the territory of the Palestinians living in the Gaza Strip, this Council calls for a trade embargo with Israel and condemns the over-reaction and savageness used.

Furthermore, we confirm and underline this Council's decision [to stop investing]* in Israel or in that country's establishments.

We believe that if Gwynedd leads the way there is hope that other councils in Wales and beyond will follow our example.'

During the discussion:

- The proposal was supported and the member was congratulated for bringing the matter before the Council.
- It was noted that it was important that Gwynedd Council looked out on the world and that it tried to influence to the best of its ability on a situation like this.
- It was emphasised that it must be made clear that the proposal condemned the Israeli State and not the Jewish religion.

Resolved to accept the motion.

* There was evidence that the words in parenthesis were better translated from the original Welsh as: [not to invest]

Annex C: Swansea

Minutes of the Meeting of Council of the City and County of Swansea … on Thursday 17 June 2010 …

…

Prior to moving the motion published in the Council Summons, Councillor M J Hedges indicated that he wished to alter the motion under Council Procedure Rule 10.14. The amendment was seconded by Councillor D Phillips.

The amendment motion being as follows:

'The UN not only does not recognise Israel's annexation and occupation of East Jerusalem, but has repeatedly stated its view that the Israeli settlements in East Jerusalem and the West Bank contravene international law, and it has demanded that Israeli settlement activities and occupation should not be supported.

The international trading company, Veolia, is a leading partner in a consortium seeking to build a light railway system linking Israel to illegal settlements in occupied East Jerusalem, a project that clearly not only contravenes UN demands but is in contravention of international law.'

This Council therefore

1. Notes with regret that Veolia is involved in (or will be seeking) contracts with the City & County of Swansea.
2. Calls on the Leader & Chief Executive to support the position of the UN in regards to the Israeli settlements in East Jerusalem, so long as to do so would not be in breach of any relevant legislation.
3. And asks the Leader & Chief Executive to note that Council does not wish to do business with any company in breach of international law or UN obligations or demands, so long as to do so would not be in breach of any relevant legislation.

RESOLVED that the amended notice of motion be approved.