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

CO/618/2021

[2021] EWHC 2192 (Admin)

Royal Courts of Justice

Tuesday, 27 April 2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

B E T W E E N :

FDA

Claimant

- and -

THE PRIME MINISTER AND MINISTER OF THE CIVIL SERVICE

Defendant

MR. T. HICKMAN QC appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MISS C. IVIMY and MR J. POBJOY (instructed by the Government Legal Department appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared from CVP recording)

MR JUSTICE LINDEN:

Introduction

1 This is a renewed application for permission to apply for judicial review, permission having been refused on the papers by Farbey J on 1 April 2021. Farbey J considered that the claim is not justiciable and, therefore, did not examine its underlying merits.

The Claim

2 The Claim challenges two decisions of the Prime Minister: first, his decision on 20 November 2020 that the Home Secretary had not breached the Ministerial Code of Conduct; and, second, the Prime Minister's refusal on 17 February 2021 to amend the Ministerial Code to make clear that the term "bullying", where it appears in the Ministerial Code, does not require that unwanted conduct is intended or that a Minister is aware of the consequences of their actions. The relief which the claimant seeks is a declaration that the Prime Minister misinterpreted the term "bullying" in the Ministerial Code or, alternatively, that his decision to refuse to amend the Code to provide a definition of that term which is in line with departmental policies, is unlawful.

Background

3 The first three paragraphs of the Ministerial Code state, so far as material, as follows,

> "1.1 Ministers of the Crown are expected to maintain high standards of behaviour and to behave in a way that upholds the highest standards of propriety.
>
> 1.2 Ministers should be professional in all their dealings and treat all those with whom they come into contact with consideration and respect. Working relationships, including with civil servants, ministerial and parliamentary colleagues and parliamentary staff should be proper and appropriate. Harassing, bullying or other inappropriate or discriminating behaviour wherever it takes place is not consistent with the Ministerial Code and will not be tolerated. (emphasis added)
>
> 1.3 The *Ministerial Code* should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life."

4 The provisions in para.1.2 relating to harassment and bullying were introduced by Prime Minister May in 2018. In the Foreword to the 2018 Ministerial Code, she stated:

> "Parliament and Whitehall are special places in our democracy, but they are also places of work too, and exactly the same standards and norms should govern them as govern any other workplace. We need to establish a new

> culture of respect at the centre of our public life: one in which everyone can feel confident that they are working in a safe and secure environment."

5 In February 2020, Sir Philip Rutnam, the Permanent Secretary of the Home Office, resigned. His public resignation statement included allegations of bullying against the Home Secretary. On 2 March 2020, it was announced that there would be an investigation and that Sir Alex Allan, the then Independent Advisor on Ministers' Interests, had been asked by the Prime Minister to provide advice about whether the facts established by the Cabinet Office, in relation to the conduct of the Home Secretary, was consistent with the Ministerial Code.

6 The evidence considered by the Cabinet Office and its findings have not been published. However, Sir Alex's advice included the following:

> "The Ministerial Code says that 'Harassing, bullying or other inappropriate or discriminating behaviour wherever it takes place is not consistent with the Ministerial Code …' Definitions of harassment concern comments or actions relating to personal characteristics and there is no evidence from the Cabinet Office's work of any such behaviour by the Home Secretary. The definition of bullying adopted by the Civil Service accepts that legitimate, reasonable, and constructive criticism of a worker's performance will not amount to bullying. It defines bullying as intimidating or insulting behaviour that makes an individual feel uncomfortable, frightened, less respected or put down. Instances of the behaviour reported to the Cabinet Office would meet such a definition."

His conclusion included the following:

> "My advice is that the Home Secretary has not consistently met the high standards required by the Ministerial Code of treating her civil servants with consideration and respect. Her approach on occasions has amounted to behaviour that can be described as bullying in terms of the impact felt by individuals. To that extent her behaviour has been in breach of the Ministerial Code, even if unintentionally. This conclusion needs to be seen in context. There is no evidence that she was aware of the impact of her behaviour, and not feedback was given to her at the time. The high pressure and demands of the role, in the Home Office, coupled with the need for more supportive leadership from top of the department has clearly been a contributory factor. In particular, I note the finding of different and more positive behaviour since these issues were raised with her."

7 Having considered this advice, on 20 November 2020, the Prime Minister concluded that the Home Secretary had not breached the Ministerial Code. He noted that Sir Alex had found that:

> "the Home Secretary had not always treated her civil servants with the consideration and respect that would be expected and her approach on occasion had amounted to behaviour that can be described as bullying in terms of the impact felt by individuals."

And that Sir Alex:

> "went on to advise, therefore, that the Home Secretary had not consistently met the high standards expected under the Ministerial Code"

The Prime Minister went on to say that:

> "The Prime Minister notes Sir Alex's advice that many of the concerns now raised were not raised at the time and that the Home Secretary was unaware of the impact that she had. He is reassured that the Home Secretary is sorry for inadvertently upsetting those with whom she was working. He is also reassured that relationships, practices and culture in the Home Office are much improved. As the arbiter of the code, having considered Sir Alex's advice and weighing up all the factors, the Prime Minister's judgement is that the Ministerial Code was not breached."

8 The claimant's case is that the Prime Minister therefore found that, because the Home Secretary had not intended to upset the civil servants working for her, she was not guilty of "bullying" and, therefore, not in breach of the Ministerial Code. On behalf of the claimant, Mr Hickman QC contends that this is inconsistent with the approach under other civil service procedures which, whilst they may not adopt a uniform definition of "bullying", almost invariably emphasise that what matters is the effect on the victim of bullying, and that the fact that the alleged perpetrator may not have intended to upset or undermine the complainant is not a "defence".

9 Mr Hickman contends that Sir Alex was right to interpret the word "bullying" in the Ministerial Code consistently with this approach and to reach his decision on the basis of the impact of the Home Secretary's behaviour rather than whether she was aware of its impact. Mr Hickman submits that the reference in the Code to bullying reflects the norms set out in civil service disciplinary and grievance procedures and it guides Ministers as to their need to act consistently with those procedures.

10 In correspondence which followed the Prime Minister's decision, the claimant threatened legal proceedings in relation to this issue, but indicated that it would be willing to accept, as an alternative, an amendment to the Ministerial Code. This proposal was set out in a letter dated 4 February 2021, as follows:

> "Their proposal is that the Prime Minister agrees to issue an amendment to the Code that defines bullying (and harassment) in the same way as it is defined in e.g., the Home Office grievance policy and thus makes explicit that bullying is based on the impact on the recipient, not the intention of the perpetrator. That will at least mitigate the intractable workplace problems and provide clarity for the future. It will also bring the Code in line with the expectations of those who work in the civil servants and the standards expected of in all other workplaces."

That proposal was refused on 17 February 2021, hence the second limb of the claimant's challenge.

<u>The Claim</u>

11 The challenge to the Prime Minister's decision of 20 November 2020 is put on a narrow basis. The claimant does not ask the court to express any view on whether the Home Secretary committed the acts alleged against her, nor on the sanction against her if she did. These are conceded to be matters for the Prime Minister. Nor does Mr Hickman ask the court to quash the Prime Minister's decision. He submits, nevertheless, that the court is entitled to, and should, rule on the meaning of the term "bullying" in the Ministerial Code

and should declare that the Prime Minister made his decision on the basis of a misinterpretation of that term.

12 Mr Hickman acknowledges that civil servants working in the Home Office, and indeed at any other department of the civil service, have the benefit of grievance and disciplinary policies which contain the sort of definitions of "bullying" for which he contends. In principle, a civil servant who was upset by the conduct of the Home Secretary which was the subject of the Cabinet Office's' investigation and Sir Alex's advice in the present case would, therefore, have been able to bring a grievance based on the impact of the conduct alone. He also accepts that civil servants are protected by the terms of their contracts and by the statutory employment rights available to employees.

13 Mr Hickman argues, however, that the Prime Minister's interpretation of the Code has introduced different standards of behaviour in relation to the issue of bullying according to whether the perpetrator is a Minister or a Permanent Private Secretary to whom the Ministerial Code applies, or a civil servant working in the same department. He also submits that civil servants will be strongly discouraged from raising issues of bullying by the Prime Minister's interpretation of the word "bullying", not least because raising grievances vexatiously is a category of serious misconduct in civil service disciplinary procedures and, on one reading of the relevant policies, to return to the Prime Minister for an adjudication of a grievance on essentially the same facts would amount to acting vexatiously. Mr Hickman says that the perception will be that there is considerable risk associated with bringing an internal grievance in circumstances where the Prime Minister had found that no bullying had taken place, even if he was applying a different test when he made that finding.

14 On this basis, Mr Hickman submits that civil servants do have an interest in decisions under the Code, which the court is entitled to protect, at least to the extent of interpreting or clarifying the meaning of the Code. This, he says, is confirmed by Prime Minister May's foreword to the 2018 Ministerial Code when introducing the provisions relating to bullying and harassment.

15 In relation to the 17 February 2021 refusal to amend the Code, Mr Hickman argues that it is irrational to have different standards applicable to the concept of bullying according to whether the issue arises under the Ministerial Code or the internal disciplinary or grievance procedures. Insofar as the Prime Minister's interpretation was correct, then it is irrational to refuse to amend the Code to bring it into line with the generally-accepted civil service approach.

16 As far as the question of justiciability is concerned, Mr Hickman submits that:

> (a) The court should be slow to rule that a claim is not justiciable at the permission stage, bearing in mind that the court does not hear full argument at this stage and there merely needs to be an arguable ground for judicial review which has a realistic prospect of success. He also emphasises the importance of the issues which the claim raises;
>
> (b) This is not a case where the subject matter of the Claim is inherently unsuitable for judicial determination on the basis that it is political and/or there is no judicial or manageable standard. He refers to the well-known passages at paras.41 to 43 of the decision of the Supreme Court in *Shergill v Khaira & Others* [2015] AC 359, and he submits that the present case does not fall within either of the two categories of non-justiciable cases identified

by Lord Neuberger. He also relies on para.31 of the decision of the Supreme Court in *Miller and Cherry v. The Prime Minister* [2020] AC 373 which states, in summary, that the fact that a dispute concerns the conduct of politicians or arises from a matter of political controversy is not sufficient in itself to prevent the court from becoming involved.

(c) The issue is one of rights and interests in the workplace, as Prime Minister May's Foreword to the 2018 Code made clear. The claimant and its members therefore have interests which are derived from the Code and/or are affected by the Code and they are entitled to ask the court to adjudicate its meaning. In this regard Mr Hickman draws an analogy with the approach in the case of *R (EHRC) v. The Prime Minister* [2011] 1WLR 1389, where the court adjudicated issues relating to the meaning and content of guidance to intelligence officers and service personnel in relation to detention and questioning overseas. He also relies on the decision in *Her Majesty's Treasury v. Information Commissioner* [2009] EWHC 1311 to submit that, in the context of freedom of information requests, a court may be called upon to interpret the Ministerial Code and he argues that references to bullying in the Ministerial Code are to the norms set out in the civil service disciplinary and grievance procedures.

(d) The question which the court is asked to determine in the present case is not a political one. It is merely asked to declare the meaning of the term "bullying" where it appears in the Code, as a matter of objective interpretation and applying the usual principles.

(e) The Court of Appeal, in *R (Gulf Centre for Human Rights) v. The Prime Minister* [2017] EWCA Civ. 1855, effectively ruled on the meaning of the Code and did not appear to consider that there could never be a question arising out of the Code which the court was competent to adjudicate.

(f) Finally, the reasons given by Farbey J for holding that the Claim is not even arguably justiciable are each unsound, primarily because they did not go to justiciability.

<u>The defence to the Claim</u>

17 On behalf of the defendant, Sir James Eadie QC resists the grant of permission on three main bases, namely, justiciability, merits and standing, but principally on the issue of justiciability. Underpinning all of these objections is his contention that this case is, ultimately, about the appointment and dismissal of Ministers and/or the relationship between Ministers and the Prime Minister, all of which matters are essentially political rather than legal matters and, therefore, are not justiciable. The Code is, essentially, a political statement of what the Prime Minister expects of his Ministers. It is not intended to, and does not, give rise to the rights or interests on the part of civil servants in private law or public law. Any issues as to the breach of the Code are for the Prime Minister rather than the courts.

18 Sir James draws particular attention to paras.1.4 to 1.6 of the Code, which he says explain its nature, its function and who is responsible for following and, therefore, enforcing it as follows:

> "1.4 It is not the role of the Cabinet Secretary or other officials to enforce the Code. If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary, feels that it warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the independent adviser on Ministers' interests.
>
> 1.5 The Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations. It applies to all members of the Government and covers Parliamentary Private Secretaries in paragraphs 3.7 – 3.12.
>
> 1.6 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public. However, Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards."

19 Sir James submits that the text of the Ministerial Code therefore makes clear that it is guidance to Ministers as to how they should conduct themselves in the context of a relationship which is not governed by law. It identifies the standards to which the Prime Minister requires them to adhere if they are to retain his confidence, and it makes clear that he and he alone is the judge of whether those standards have been met, subject to the political scrutiny of Parliament and voters. The Code does not, he submits, bear on the rights and obligations owed to civil servants.

20 Sir James also points out that the fact that the enforcement of the Code is a matter for the Prime Minister is accepted by the claimant insofar as Mr Hickman accepts that the appointment and termination of the office of a Minister is a matter for the Prime Minister. Mr Hickman also accepts that the assessment of the evidence and the finding as to whether the Minister is guilty of the matters alleged is a matter for the Prime Minister, as is the question of sanction in the event of breach. The rationale for these concessions, Sir James argues, also leads to the conclusion that the question of how the term "bullying" is interpreted and applied is a matter for the Prime Minister.

21 Sir James points out that the context of the *EHRC* case relied on by Mr Hickman was very different. There, the court ruled on the contents of the guidance in a context in which the application of the guidance potentially gave rise to questions of fact or law on which the court could, in principle, adjudicate in relation to a document which affected the rights and obligations in respect of those who were its subject. By contrast here, submits Sir James, Mr Hickman appears to accept that the court could not rule on the application of the Code as opposed to the meaning of its words.

22 Sir James relies on judicial statements and decisions on permission in *R (Hemmings) v. The Prime Minister* [2006] EWHC 2831, and at first instance in *The Gulf Centre for Human Rights* case, that the Code is not justiciable. He points out that, in *The Gulf Centre for Human Rights* case, the Court of Appeal was not called upon to decide the issue of justiciability, although that issue, he has shown me, was raised in the respondent's skeleton argument for the purposes of the hearing before the Court of Appeal. The issue which the court was called upon to decide was whether an amendment to para.1.2 of the Code, so that it no longer stated in terms that the overarching duty on Ministers to comply with the law

included international law and treaty obligations, was a change of substance. The court decided that it was not a change to the Code given that the paragraph did not create any freestanding duty but merely reminded Ministers that they were subject to the law. It therefore did not matter whether para 1.2 referred specifically to international law or to treaty obligations. If there had been any doubt about this, it was removed by public statements which had been made on behalf of the Government to the effect that the amendment did not materially alter the duty of Ministers to comply with the law.

23 Sir James notes that, at para.19, the Court of Appeal held that the Code, or the material part of the Code, did not create freestanding duties or obligations on the part of Ministers and he notes that at para.25 the Lord Chief Justice said,

> "Even if we considered it was open to us to do so, it would be perverse for this court to interpret paragraph 1.2 in a way in which the Government has repeatedly stated was not intended and which GCHR itself says would be most unsatisfactory."

He argues that the Lord Chief Justice was there indicating that it was not open to the court to interpret the Code or, at least, indicating doubts on this score.

Conclusion

24 I acknowledge that a number of the arguments on behalf of the defendant are powerful but, essentially for the reasons which Mr Hickman gives, in my view they are not sufficiently powerful for the court to conclude, at this stage in the proceedings, that it is not even realistically arguable that the Claim is justiciable. In my view, it is highly arguable that in *The Gulf Centre* case the Court of Appeal interpreted the terms of para.1.2 of the Code in coming to the conclusion that it did not establish a freestanding duty over and above a Minister's duty to comply with the law and that the revision to para.1.2 therefore did not alter the substance of the position. I have real doubts about Sir James' argument that, at para.25, the Lord Chief Justice was suggesting that the court could not interpret para.1.2 of the Code as opposed to saying that the court could not interpret it as having the meaning contended for by the claimant in that case. I accept Sir James Eadie's submission that *The Gulf Centre* case is not authority on the question of the justiciability of the Ministerial Code itself nor, indeed, the material part of the Ministerial Code for present purposes. But I note that very experienced Treasury Counsel does not appear to have taken justiciability as a prior point in that case. Nor did the Court of Appeal, for understandable reasons given the way in which the issue was presented, indicate that it regarded justiciability as an absolute bar to hearing the case, notwithstanding that that issue was raised in the skeleton submitted on behalf of the respondents.

25 I agree with Sir James that, after a full hearing, the court may well conclude that the claimant is attempting to draw the line between the legal and the political in the wrong place or in an artificial way. But, as I have indicated, I do not consider that the position is so clear cut that the Claim can be disposed of on the basis of the justiciability point at this stage.

26 As far as the underlying merits of the claim in relation to the Prime Minister's 20 November 2020 decision are concerned, it seems to me that to some extent they overlap with the arguments in relation to justiciability. The question whether the Code was intended to protect the interests of civil servants may influence its interpretation. I see the force of Sir James' arguments that "bullying" in itself is not a legal term of art or prohibited by law, although the facts which amount to bullying may form the basis of other types of claim in private law. Nor does "bullying" have a fixed meaning and nor does the Code expressly

include any definition, whether by expressly incorporating the definition in civil service disciplinary or grievance procedures or otherwise. Indeed, the evidence suggests that there is no uniform definition in those procedures. It is, therefore, highly arguable that the Prime Minister was entitled to apply his own interpretation of the term "bullying", given that it is not defined in the Code.

27 However, in my view, the contrary is realistically arguable. Subject to the justiciability arguments, the court may be persuaded that the word "bullying" should be read in the context of civil service definitions and as having the same minimum or essential content as those definitions. Alternatively, the court may be persuaded that the term should be read in the context of the definition of "bullying" in the procedures applicable in the particular department in which the issue arises, and/or interpreted consistently with that meaning.

28 In relation to standing, again it seems to me that much depends on the nature and purpose of the Code. If it does not give rise to any legally-recognised rights, expectations or interests on the part of civil servants, then it is unlikely that the claimant will have standing but this issue may then be academic. If the claimant's arguments on justiciability and the merits prove sound, then it is arguable that the claimant, which represents civil servants, has standing. I, therefore, consider that this issue should be determined at the full hearing.

29 I take a different view in relation to Ground 2, however, i.e. the challenge to the Prime Minister's decision of 17 February 2021. It seems to me that once it is accepted that it is for the Prime Minister to decide the contents of the Code, it must follow that the most that the court can do, if it can do anything, is to interpret those contents. I therefore refuse permission in relation to the challenge to that decision.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.