Claim No. CO/618/2021

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

FDA

Claimant

- and -

THE PRIME MINISTER AND MINISTER OF THE CIVIL SERVICE

Defendant

CLAIMANT'S SKELETON ARGUMENT

References to the core bundle are to [CB/section/tab/page]

References to the documents bundle are to [DB/_____]

The Claimant applies to rely on a short statement and exhibits in reply from Mr Penman [CB/D/___].

A. INTRODUCTION

1. On 20 November 2020 the Defendant published his reasons for concluding that conduct of the Home Secretary, which had been the subject of an investigation by the Cabinet Office and advice from the Independent Adviser on Ministers' Interests, Sir Alex Allan, did not breach paragraph 1.2 of the Ministerial Code **[CB/A/3.3.4/152]**. Paragraph 1.2 states that harassment, bullying and discrimination, *"is not consistent with the Ministerial Code and will not be tolerated"* **[CB/A/3.2.4/97]**.

2. In the course of reaching his decision the Defendant misinterpreted the concept of *"bullying"* referred to in the Code. The Defendant wrongly considered or assumed that where a person does not intend to cause distress and is unaware of the consequences of her actions that their conduct does not, for that reason, constitute bullying.

3. This interpretation of the concept of bullying is inconsistent with the meaning of the Code. In common with the terms *"harassing"* or "*discriminating behaviour"* in paragraph 1.2, the term *"bullying"* in the Code derives its meaning from standards external to the Code, in particular the Government's own zero-tolerance policy on bullying in the Government workplace. The Prime Minister's interpretation departs—and departs in a fundamental respect—from the Government's own policy (see e.g. Civil Service HR, *Gateway Guide* (2017) **[___]** (c.2018) **[___]**). Conduct which otherwise amounts to bullying does not cease to be so just because it is not intentional or its negative impacts inadvertent: *"[b]ullying is not about whether the perpetrator of the acts intended them or not, but about the impact on the recipient and how it makes them feel."* (*HO Definitions of Bullying, harassment and discrimination (BHD) and victimisation* **[___]**).

4. The workplace policies applicable to civil servants assure them that the Government, "*does not tolerate"* bullying, harassment or discrimination in "*any form"* or *"from any source"* (including from Ministers). Civil servants are encouraged to take the often very difficult step of speaking up when they witness such conduct (e.g. the model policy of Civil Service HR ("CSHR"), *Dispute Resolution Policy and Procedures* §4-§5 **[___];** Home Office, *HR Policy and Guidance, GRP* **[____]**).

5. Sir Alex Allan in his report to the Defendant referred to the definition of bullying adopted by the civil service and noted that it would cover intimidating or insulting behaviour that makes an individual feel uncomfortable, frightened, less respected or put down **[CB/A/3.3.3/150]**. He applied this definition. Without questioning that reasoning and without any explanation, the Defendant departed from the civil service definition. In so doing he misdirected himself as to the objective meaning of the Ministerial Code.

6. The Court is therefore asked to declare that the Prime Minister misinterpreted and/or misapplied paragraph 1.2 of the Ministerial Code. The court is not asked by this judicial review to express any view on whether the Home Secretary committed the actions alleged against her or the sanctions, if any, that should follow from her actions.

B. THE CLAIMANT

11. The Claimant was founded in 1919 and is a trade union dedicated to representing managers and professionals in public service. It has approximately 18,000 members. Historically, it has represented the senior civil service, but its membership today covers a broad spectrum from Higher Executive Officers through to Permanent Secretaries working in government departments and agencies. It is a non-political union and rarely engages in litigation.

12. As a trade union, the Claimant's principal purposes by statute include regulating the relations between members and their employer: Trade Union and Labour Relations (Consolidation) Act 1992, section 1. To that end, the Claimant's Rules provide that it will (i) regulate relations between its members and their employers and (ii) protect, promote and represent the interests of its members, in particular as regards to their careers and conditions of service and in matters of common concern (rule 3 **[CB/A/3.4.4/191]**).

14. As explained in the witness statement of David Penman at paragraphs §72-§76 **[CB/A/3.5.1/215-216]**, the Claimant is concerned about significant implications if the Ministerial Code means that it only protects civil servants from bullying if that conduct is accompanied by an awareness or intention on the part of the Minister of the harmful consequences of their conduct.

15. This would result in double standards, with Ministers being subject to different, more lenient, standards than those which apply to civil servants. It would fail to uphold the assurance given to all civil servants that in the Government workplace bullying in any form will not be tolerated from any source.

15. The Claimant is also concerned that it would also give rise to difficulties for its members who are required to carry out disciplinary or grievance procedures in respect of complaints of bullying made against other civil servants. Any civil servant who is subject to disciplinary action as a result of bullying of subordinates when they did not intend to cause upset or were unaware of the impact of their actions will justifiably feel that they are not being subjected to the same standards.

16. Moreover, several of the Claimant's members were directly involved in the investigation concerning the Home Secretary and had raised concerns and

complaints relating to her. Its members also include Sir Phillip Rutnam whose resignation prompted the investigation of the Home Secretary under the Ministerial Code. His resignation statement can be found at **[CB/A/128-129]**.

C. THE DEFENDANT

19. The Defendant is both the Prime Minister and Minister for the Civil Service.

20. As Minister for the Civil Service, the Prime Minister has statutory obligations under Part 1 of the Constitutional Reform and Governance Act 2010 for the management of the Civil Service.

D. BACKGROUND

22. The Ministerial Code provides in paragraph 1 **[CB/A/3.2.4/97]**,

> "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."

23. The underlined words were added to the Ministerial Code published by Prime Minister Theresa May in 2018. In her forward she explained the purpose of this provision in the following terms **[CB/A/3.2.2/84]**:

> "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." (emphasis added)

24. In August 2019, Prime Minister Boris Johnson reissued the Ministerial Code. In his Foreword he stated that in order to "*win back the trust*" of the British people, *"There must be no bullying and no harassment..."* **[CB/A/3.2.4/93]**.

25. In February 2020 Sir Philip Rutnam, the Permanent Secretary of the Home Office, resigned in part because he considered that allegations made to him of bullying on the part of the Home Secretary had not been addressed. His public resignation statement included the following **[CB/A/3.3.1/128-129]**:[1]

> "My experience has been extreme but I consider that there is evidence that it is part of a wider pattern of behaviour.
>
> One of my duties as permanent secretary was to protect the health, safety and well-being of our 35,000 people.
>
> This created tension with the home secretary, and I have encouraged her to change her behaviours.
>
> I have received allegations that her conduct has included shouting and swearing, belittling people, making unreasonable and repeated demands - behaviour that created fear and that needed some bravery to call out."

26. On 2 March 2020 Michael Gove MP announced that there would be an investigation into the allegations by the Cabinet Office to establish the facts. Sir Alex Allan, the Independent Adviser on Ministers' interests, would be available to "*provide advice*" to the Prime Minister **[CB/A/3.3.2/130]**.

27. The Cabinet Office investigation has not been published and nor has the evidence presented to that investigation. The published version of Sir Alex Allan's advice states as follows **[CB/A/3.3.3/150-151]** (our emphasis):

> "The Ministerial Cope says "Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with concern and respect. I believe Civil Servants – particularly Senior Civil Servants – should be expected to handle robust criticism but should not have to face behaviour that goes beyond that. The Home Secretary says that she puts great store by professional, open relationships. She is action orientated and can be direct. The Home Secretary has also become – justifiably in many instances – frustrated by the Home Office leadership's lack of responsiveness and the lack of support she felt in DfID three years ago. <u>The evidence is that this has manifested itself in forceful expression, including some occasions of shouting and swearing. This many not be</u>

[1] The full statement is at https://www.bbc.co.uk/news/uk-politics-51688261

done intentionally to cause upset, but that has been the effect on some individuals.

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.

The Civil Service itself needs to reflect on its role during this period The Home Office was not as flexible as it could have been in responding to the Home Secretary's requests and direction. She has – legitimately – not always felt supported by the department. In addition, no feedback was given to the Home Secretary of the impact of her behaviour, which meant she was unaware of the issues that she could otherwise have addressed."

28. The conclusion of Sir Alex Allen states **[CB/A/3.3.3/151]**:

> "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." (emphasis supplied)

29. On 20 November 2020, the Government published a statement which set out the Prime Minister's decision. It stated that the Prime Minister had considered Sir Alex's conclusions carefully. It then summarised those conclusions as follows **[__]**:

> "Sir Alex's advice found that the Home Secretary had become – justifiably in many instances – frustrated by the Home Office leadership's lack of responsiveness and the lack of support she felt in DfID three years ago. He also found, however, 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.

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

30. The Prime Minister's decision was nonetheless that the Code had not been breached **[CB/3.3.4/152]**:

> "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."

31. The Government Legal Department has confirmed that the Prime Minister did not consider any document other than the report of Sir Alex Allan in reaching this decision and did not have before him any other explanation of the concept of bullying than that provided by Sir Alex referring to civil serve policy (see correspondence 10 September 2021 **[___]** and 7 October 2021 **[___]** Q1 & 2).

E. GROUNDS FOR JUDICIAL REVIEW

The issues

32. This judicial review raises two issues of law:

(1) Did the Defendant misdirect himself as to the word "bullying" used in paragraph 1.2 of the Ministerial Code?

(2) Is this issue justiciable?

33. Although these two separate issues are raised by this claim, the effect of the Court finding that the issue is non-justiciable would have the same effect as the Court finding that the Prime Minister had not misinterpreted the Code. A finding of non-justiciability would amount to a finding that a Prime Minister can interpret the terms bullying, harassment and discrimination in paragraph 1.2 of the Ministerial Code in any way he or she sees fit. A Prime Minster could for example consider that *"harassment"* does not include sexual harassment, that *"discrimination"* does not include discrimination on grounds of sexual

orientation or that *"bullying"* requires physical abuse. The Court would not be competent to correct such misdirections. The Ministerial Code would be substantially undermined as a policy document guiding the conduct of Ministers and creating expectations and protections for persons working with them, since its meaning would be no more and no less than the subjective opinion of the Prime Minister from time to time.

34. Since it is not suggested by the Defendant that there is any rule or category of non-justiciability, such as Parliamentary privilege, in play in this case, justiciability must depend on a precise analysis of the issues raised and whether they involve questions that the Court is not competent to address. The Claimant will therefore first set out the legal basis for the claim and then turn to the issue of justiciability, which is the Defendant's principal line of defence.

The first issue: Did the Defendant misdirect himself as to the meaning of bullying?

i. Published policies to be given an objective meaning

35. The Ministerial Code is a statement of Government policy issued by the Cabinet Office. It is not a law and the Prime Minister and Ministers are not bound by it as if it were a law.

36. However, it is well established that policies promulgated by public officials and bodies, even by the Cabinet Office,[2] have an objective meaning and that departure from the objective meaning—unless for good reasons—will constitute an actionable error of law on the part of a public official applying the policy.

37. This is the case even though (i) there will usually be no obligation for a public body to publish such a policy in the first place, and (ii) the policy, since it is not a law, will not generate legal rights.

38. The principles have been set out in a number of authorities, e.g. :

[2] See e.g. the "Consolidated guidance to intelligence officers and service personnel" 2010 considered in *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401, [2012] 1 WLR 1389. In revised form, the "Principles relating to the detention and interviewing of detainees overseas and passing and receipt of intelligence relating to detainees" (2019).

(1) In *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 Lord Wilson JSC for the Supreme Court stated in respect of any published policy at [31],

> "it is now clear that its interpretation is a matter of law which the court must therefore decide for itself."

(2) The Court also approved the statement of Lord Hope DPSC in *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299 at [36]:

> "Of course it is for the courts, not the Secretary of State, to say what the effect of the statements in the [Operational Enforcement] manual actually is."

(3) This principle has a long pedigree. Sir Thomas Bingham MR (as he then was) stated in *R v Director of Rail Passenger Franchising, Ex p. Save Our Railways* [1996] CLC 589 at 601d:

> "The court … cannot, in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means, not what anyone … would like it to mean."

(4) Published policies and codes should not be construed technically, in the same way as contracts and statutes; nonetheless they must be given their objective meaning:

> "…what is involved is still an interpretative process conducted by a court, which must necessarily be approached objectively and without speculation about what a particular minister may have had in mind."
>
> *Re McFarland* [2004] 1 WLR 1289 at [24] (Lord Steyn) applied in *R (Bloomsbury Institute Limited) v Office for Students* [2020] EWCA Civ 1074 at [56] (Bean LJ; Males and Simler LJJ agreeing).

(5) It is therefore no answer for an official to contend that in practice a policy is applied in a manner that differs from its objective meaning. Rejecting such a submission, Singh LJ stated, "*the difficulty is that the policy as promulgated … says what it says on its face*": *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2018] EWHC 969 (Admin), [2019] QB 251 [46]-[47] (Singh LJ giving the judgment of the Divisional Court)

(6) The misapplication of an external standard referred to in a policy equally constitutes an actionable error of law: e.g. *Atwood v Health Service Commissioner* [2008] EWHC 2315, Burnett J at [35]-[36].

39. Insofar as the Defendant suggests that the Ministerial Code does not have an objective meaning because it exists for his benefit and purely to assist him in his decision-making, such contention should be rejected. Ministers, even the Prime Minister, must correctly direct themselves to the proper meaning of published policies. Moreover, the Ministerial Code is a public statement of standards to which the Government adheres and it is intended to be and is relied upon by Ministers, civil servants, the general public and members of Parliament:

(1) It is a published policy which provides guidance to Ministers as well as Private Secretaries on a wide variety of subjects.[3]

(2) The purpose of the Ministerial Code is not only to set out the standards expected of Ministers by the Prime Minster; it also sets out the standards by which Ministers must justify their actions and those of their Private Secretaries to the public and Parliament. This is expressly recognised in paragraphs 1.5 and 1.6 of the Ministerial Code **[CB/A/3.2.4/98]**.

> "1.5 The Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. …
>
> 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. …"

(3) Section 1 of the Ministerial Code has a protective function: it sets out the conduct that civil servants can expect of Ministers in the workplace and it helps to ensure that that the Government's policy that bullying, harassment and discrimination is not tolerated in any form from any source is upheld. This could not be clearer from Prime Minister May's Foreword in which she emphasized that the reason for introducing the reference to bullying, harassment and discrimination was so that, "*everyone can feel confident that they are working in a safe and secure environment*".

[3] Including maters such as travel expenses and the submission of cases to the Parliamentary Commissioner for Administration on behalf of constitutes.

(4) It was recognised in *R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855 ("*GCHR case*") that paragraph 1.2 of the Code has an objective meaning (the case is discussed below).

40. The Ministerial Code, like other published policies, therefore has an objective meaning and it is possible for the Defendant to misdirect himself as to its meaning. In particular, the terms *"harassment"*, *"bullying"* and *"discrimination"* do not and cannot mean whatever a Prime Minister on any given day choses those terms to mean. They take their meaning from the language, context and background to the Code. Subject to any overring issue of non-justiciability, which is a subject addressed below, a misdirection as to the meaning of the Ministerial Code therefore represents an actionable error of law.

ii. Reference to harassment, bullying and discrimination are references to external duties and standards

41. The reference to harassment, bullying and discrimination in paragraph 1.2 of the Ministerial Code is a reference to concepts that are <u>external</u> to the Ministerial Code, just as the general reference to the duty on Ministers to comply with the law. The introduction of those terms into the Code did not subject Ministers to new or different duties from those to which they were already subjected. As such, the Defendant misdirects himself if he gives these concepts a *sui generis* or subjective meaning.

42. The Court of Appeal in the *R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855 held with respect to the reference to the duty on Ministers to comply with domestic and international law that, "*the Code did not create new or different duties; it simply referenced existing duties outside the Code*" (Lord Burnett LCJ, Sir Terence Etherton MR and Hamblen LJ at [19]). The Court of Appeal emphasized that the Ministerial Code states that it must be *"read against the background of the overarching duty on Ministers to comply with the law…"* and that paragraph 1.2 had *"referential status"* to independent norms outside the Code.

43. To this extent, the term "*bullying*" is no different from the linked concepts of harassment and discrimination also in paragraph 1.2 of the Code. They refer to

duties imposed under laws and policies outside the Code; by the same token, *"bullying"* refers to norms beyond the Code.

44. Notably, the concepts are also referred to in the same part of the Code as the reference to law (and previously also international law) are found.[4] The way that they are referred may also be significant: the Code states that bullying, harassment and discrimination are *"not consistent with the Ministerial Code"*. The words *"not consistent with"* also suggests that these concepts are not Code-concepts but that such conduct is not consistent with the Code-duty on Ministers to be professional, to treat people with respect and to comply with the law.

45. The introduction of the reference to the duty on Ministers not to engage in harassment, bullying and discrimination is a reference to the Government's zero-tolerance policy on harassment, bullying and discrimination, which in turn is intended to reflect and reinforce legal duties applicable to employees:

(1) Discrimination and harassment are both prohibited by statute, with statutory definitions in the context of employment: Equality Act 2010, ss. 13, 19 and 26. That is significant because the Defendant's position logically must be that he claims to be able to adopt a *sui generis* understanding of "*harassing*" and "*discrimination*" that departs fundamentally from the statutory prohibitions. It is also significant because harassment and bullying are closely related, and the same actions may constitute both bullying and harassment where the unwanted behaviour relates to one of the protected characteristics, such as sex, race, religion or sexual orientation.

(2) While bullying is not prohibited by statute as such, bullying in the workplace constitutes a breach of the implied term that employers will *"provide and maintain a working environment which is reasonably tolerable to all employees"*, for which an employer is vicariously liable (*Moores v Bude-Stratton Town Council* [2001] ICR 271 at [40]; *Barlow v Broxbourne* [2003] EWHC 50 at [16]). The courts have clarified the meaning of this external norm by a focus on the objective effect of the conduct rather than the subjective intent behind the actions: see *Horkulak v Cantor Fitzgerald* [2004] ICR 697 at [30]-[35].

[4] The reference to the overriding duty on Ministers to comply with the law is now contained in paragraph 1.3 of the Ministerial Code.

(3) The Government's workplace policies, embodied primarily in Civil Service HR policy, reinforce and reflect these underlying legal obligations. They also form part of the context in which the Code falls to be interpreted. Thus:

a. In 2017 Civil Service HR published a policy on bullying, harassment and discrimination ("Gateway Guide") **[___]**.[5] The guidance was developed in partnership with ACAS, human resources departments across the civil service and civil service unions. A key purpose of the document was to be, "*clear about what kind of behaviours are inappropriate*" in Government (Foreword from Sue Owen). It is directed at identifying bullying, harassment and discrimination and notes that the civil service "*has a **zero tolerance approach** to bullying, harassment and discrimination.*" **[___].** The Gateway Guide was reissued in c.2018. The Defendant acknowledges that, "*[i]t is the general expectation of Civil Service HR that all departments will adopt the model definition*" of bullying, harassment and discrimination contained in the Gateway Guide (RM1 §11 **[CB/C/3/290]**).

b. The changes made to the Ministerial Code in 2018 were made in the context of the Gateway Guide. The changes make explicit that harassment, bullying and discrimination are not consistent with the Code.

c. Also in 2018, Civil Service HR also published a model disciplinary policy and procedure **[___]** which all Departments are expected to adopt. Its purpose was to "*ensure that everyone meets the standards of conduct and behaviour expected of them*" **[___]**.

d. Civil Service HR also publishes a dispute resolution policy.[6] This makes clear that Government does, "*not tolerate <u>any form</u> of bullying, harassment (including sexual harassment) and discrimination from <u>any source</u>*" (§4 **[___]**) (emphasis supplied)). It makes clear that this

[5] "Bullying, Harassment and Discrimination – A Gateway Guide for Leaders and Managers" Civil Service Employee Policy, June 2017

[6] The date of first publication of this policy is not known to the Claimant and not specified in the document or the Defendant's evidence.

statement of principle and the dispute resolution policy applies to Ministers **[_____]**.

e. In addition to these central HR policies, individual departments have policies that are expected to be consistent with them but which can be individually tailored to departmental circumstances. The Home Office policy affirms that the department, "*does not tolerate any form of bullying, harassment .. and discrimination (BHD) from any source.*" **[____]**

46. In making clear that harassment, bullying and discrimination are contrary to the Ministerial Code, paragraph 1.2 was and is therefore referring to duties that are imposed on Ministers by norms external to the Code, as the Court of Appeal explained in the context of the references to law and international law in the *GCHR case*. In order to determine whether a Minister has breached such norms and standards, the Defendant must ensure that he directs himself to those norms and their meaning.

47. This was understood by Sir Alex Allan who referred to the civil service definition of bullying and explained that the conduct of the Home Secretary had met that definition. GLD has confirmed that no other document or definition was before the Defendant.

iii. The Defendant misdirected himself as to the concept of "bullying" referred to in the Ministerial Code

48. In stating that the conduct of the Home Secretary was not bullying because she had not intended or been aware of the consequences of her actions, the Defendant's reasons disclose a misdirection as to the meaning of the concept of bullying.

49. Bullying is closely related to the concepts of harassment and discrimination, both of which can be committed without a person intending or being aware of, the upset and distress that they cause. The Equality Act 2010 s.26, for instance, provides that harassment is "*unwanted conduct*" relating to a protected characteristic which has the purpose "*or effect*" of violating a person's dignity or

creating an intimidating, hostile, degrading or humiliating or offensive environment.[7]

50. The Gateway Guide sets out guidance on recognising harassment, bullying and discrimination. In relation to bullying, it states **[____]**,

> "Bullying
> Can be characterized as:
> - offensive, intimidating, malicious or insulting behaviour
> - abuse or misuse of power in ways that undermine, humiliate, denigrate of injure the recipient
>
> Bullying can also cover a broad spectrum of covert behaviours that may be more difficult to detect. It can include ill-treatment, interpersonal conflict, unwanted and unacceptable or counter productive workplace behaviours."

51. It then gives examples of "*overtly aggressive behaviour*" such as "*raised voices, putting people down in front of others, …*". And it states that even subtle forms of "*micro aggression*" can constitute bullying, "*whether international or unintentional*".

52. The Civil Service HR model disciplinary policy **[___]** states that its purpose was to "*ensure that everyone meets the standards of conduct and behaviour expected of them*" **[___]**. Examples of serious misconduct includes unintentional bullying **[___]**.

53. Home Office policy is in line with this definition and states for example that bullying "*is not about whether the perpetrator of the acts intended them of not, but about the impact on the recipient and how it makes them feel*" (DP1 §19 **[CB/A/3.5.1/198]** and **[___]**).

54. The Government's policies for its own employees and officers reflect the policy that it promotes for private employers. The Government website has a page on workplace bullying and harassment which makes clear that bullying does not require intentional conduct but is focused on the impact on the individual concerned ("*[b]ullying and harassment is behaviour that makes someone feel intimidated or offended.*")[8]

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[7] The legislative wording is explained in *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234 at [2]-[28]].

[8] https://www.gov.uk/workplace-bullying-and-harassment [___]

55. The Defendant's reasons for departing from Sir Alex Allan's conclusion that the Home Secretary's conduct amounted to bullying were that, (i) she inadvertently upset those with whom she was working and (ii) she was unaware of the impact of her actions. However, as Sir Alex Allan rightly appreciated, the reference to bullying in paragraph 1.2 of the Code is a reference to external standards, given expression in the Government's own policy on workplace standards and its zero tolerance approach to harassment, bullying and discrimination in Government. There is nothing in such norms and standards that supports the Defendant's view that conduct is not bullying if the distress it causes is unintentional or inadvertent. On the contrary, the Defendant's view deviates from an essential, minimum, aspect of the protection afforded to civil servants under the Government's own policies and fails to conform to the promise that harassment, bullying and discrimination in any form will not be tolerated from any source.

56. It is common ground that the only document the Prime Minister had before him was the report of Sir Alex Allan (see paragraph 31 above). It is not suggested by the Defendant that he directed himself to any other definition of bullying. He simply took his own view. However, just because the Prime Minister is the arbiter of the Ministerial Code does not mean that the Code means whatever he chooses it to mean: words have objective meaning.[9]

iv. Response to Defendant

57. The Defendant contends that the context is "*fundamentally disanalogous*" to the employment context and that therefore the Ministerial Code has a "*sui generis meaning*" of harassment, bullying and discrimination (DGR §39(6) **[CB/C/2/277]**). However, none of the reasons given is persuasive. In short:

(1) The Defendant contends that the Code is not intended to protect workplace standards so a different concept of bullying can be applied (DGR §39(1) **[CB/C/2/276]**). This is wrong: the inclusion of the reference to harassment, bullying and discrimination is intended to further the protection of civil

[9] The Defendant's position has much in common with that of Humpty Dumpty: "When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all." Lewis Carroll, *Through the Looking Glass* (1872) - Chapter 6.

servants in the workplace and as Prime Minister May explained in her foreword, to ensure that "*everyone can feel confident that they are working in a safe and secure environment*".

(2) The Defendant also contends that Ministers work with civil servants across Government as well as with persons out of Government (DGR §39(4) **[CB/C/2/277]**). But this is also the case with civil servants: it is not a reason for adopting a different meaning of harassment, bullying and discrimination to that which applies to civil servants and Ministers under Government HR workplace policies.

58. Indeed, it would be illogical if the references to harassment, bullying and discrimination in the Ministerial Code had a different meaning to the central Government HR policy on harassment, bullying and discrimination. No reasons have been given by the Defendant that could explain or justify such a difference. It would result in civil servants being under-protected.

59. It is clear for example that complaints relating to the Home Secretary fell to be addressed under the Civil Service HR Dispute Resolution Policy (see p.27-31 **[___]**) as well as the Home Office Grievance Resolution Policy and Procedure (p.3 **[___]**) which require mandatory action by managers when allegations of harassment, bullying or discrimination are made, even if no formal grievance is raised.

60. When such allegations are made in relation to Ministers, Mr McNeill explains that a decision is then taken by a Permanent Secretary or the Cabinet Office whether to proceed informally under these policies, as a formal grievance and/or under the Ministerial Code (RM1 §22 **[CB/C/3/293]**). Therefore, it seems that unless a formal grievance is raised, it is senior officials that will decide whether it proceeds informally under the dispute resolution policy or as a Ministerial Code investigation. The same complaints about the same factual allegations can, according to Mr McNeil, be directed down one of three routes. And unless an individual makes a formal grievance, the decision whether to treat the matter informally under the applicable HR policy or proceed to a Ministerial Code investigation will be taken by officials.

61. It would undermine the civil service and Home Office grievance policies if a decision to instigate a Ministerial Code investigation had the effect of substituting a concept of bullying, harassment and discrimination that was less protective of civil servants. That is no doubt why Sir Alex Allan recognised that the civil service understanding of bullying remained relevant.

62. The Defendant seeks to avoid this problem by suggesting that a formal grievance could still be pursued against the Home Secretary concerning the allegations considered by Sir Alex Allan. It appears to be the Defendant's case that he would then have to reconsider the issue applying a different concept of bullying. However this does not meet the objection as explained in the preceding paragraphs because it remains the case that civil servants are entitled to concerns about bullying being addressed at least informally in a manner consistent with the applicable civil service policies.

63. It is also is unrealistic to suggest that civil servants could pursue formal grievances about bullying where the Prime Minister, the most senior figure in Government, has rejected such complaints (See DP1 §62-§64 **[CB/A/3.5.1/211-213]**). Indeed, they would justifiably consider that they would be at risk of disciplinary action for doing so, given that the Home Office grievance policy states that a person who *persists in pursuing a concern or grievance which has already been investigated by another or the same manager and provides no new or material information"* can be considered as pursuing a vexatious complaint, which is itself a disciplinary matter **[___]**.

64. The Defendant also contends that bullying does not have a single definition. That is correct. It is also correct, as the Defendant contends, that intention can be relevant to whether bullying has occurred (for example, malicious conduct) (DGR §40 **[CB/C/2/278]**). But this is not to the point: the Defendant is unable to identify any basis for the Prime Minister's conclusion that it is an excuse for conduct otherwise amounting to bullying that the person did not intend to upset others or was unaware of the upset that they had caused. The Defendant accepts that departmental policies are expected to adhere to the central Government HR definition of harassment, bullying and discrimination and the Defendant's decision is not consistent with that definition.

65. It is also not relevant if, as Mr McNeal in his evidence contends, a small number of departments adopt a definition of bullying that requires intention or advertence as an ingredient (DGR §40(3) **[CB/C/2/278]**). Insofar as they do, they are contrary to central Government policy and, in any event, the Defendant cannot say that he had regard to or followed any such departmental definition as it is accepted that he did not. But in any event, Mr McNeal's reading of the policies is not accurate:

(1) Mr McNeal refers to the MOJ policy (RM1 §13(3) **[CB/C/3/290]**) dated August 2021, p.6). However, the full policy, exhibited by Mr Penman in his second statement,[10] shows that the following words are omitted from Mr McNeal's statement: "*You will not:…. harass, victimise or bully others through your actions, language or behaviour (whether done deliberately or not).*" (emphasis supplied) **[___].**

(2) Mr McNeal refers to the Norther Ireland Office policy, but this makes clear that the relevant issue is the impact on the person who is subject to the conduct not the intention of the perpetrator **[CB/C/3/311]**:

> "Bullying – is generally defined as repeated, offensive, abusive, intimidating, malicious or insulting behaviour, abuse of power or unfair penal sanction, which makes the recipient feel threatened, humiliated or vulnerable which undermines their self-confidence, and which may cause them to suffer stress."

(3) The DEFRA policy **[CB/C/3/299]** also clearly states that most people consider bullying and harassment to be "*interchangeable*", that harassment is "*in general terms unwanted conduct affecting the dignity of men and women in the workplace*". It states that key is that such conduct is "*viewed as demeaning or unacceptable to the recipient*". There is a reference to intention but this is limited to the reference to abuse or misuse of power, the second bullet point in the Gateway Guide definition.[11]

[10] As noted at the outset of this skeleton, the Claimant requires permission to rely on this statement.

[11] The MOD policy, also referred to by Mr McNeal, was the same in this respect. In 2021 the MOD policy was been changed to remove this reference to intention: see DP2.

Second Issue: The defence of non-justiciability

66. The Defendant's primary defence to the grounds of judicial review is that any decision made under the Ministerial Code is non-justiciable.

67. The Claimant submits that the matter is justiciable, in short because:

(1) The situation is not within either of the grounds for non-justiciability articulated by the Supreme Court in *Shergill v Khaira* [2014] UKSC 43, [2015] AC 359.

(2) In order for an issue to be non-justiciable very close attention must be given to the precise issue in question. The issue here – the meaning of the words harassment, bullying and discrimination used in the Ministerial Code – is not of the nature of a non-justiciable issue. On the contrary it is precisely the sort of question that courts engage in when judicially reviewing policies in both the public law and employment law context.

(3) The fact that the Ministerial Code states that the Defendant is the arbiter of the Code is not relevant. Statutory powers and government policies routinely make a public official the arbiter of an issue or dispute, that does not mean that their decisions are not subject to judicial review for misdirection of law.

(4) In *Gulf Centre for Human Rights* the Court of Appeal did interpret the meaning of paragraph 1.2 of the Ministerial Code.

68. In *Shergill v Khaira* Lord Neuberger, Lord Sumption and Lord Hodge stated that issues that are non-justiciable generally fall within two categories.

69. Category one comprises issues *"beyond the constitutional competence of the courts"*. These *"rare"* cases relate to issues of which the courts can take no cognisance. They include certain transactions of foreign States and proceedings in parliament. The *"distinctive feature"* of such cases is that the court may not adjudicate on matters *"even if it is necessary to do so in order to decide some other issues which is unquestionably justiciable"* (at [42]).

70. Category one has no application:

(1) The Defendant accepts that if precisely the same decision had been made by the Defendant in adjudicating a grievance, the court could determine whether he had misdirected himself to the meaning of the term bullying. Therefore the "*distinctive feature*" of category 1 cases is not present.

(2) The Code itself is also more generally subject to adjudication in the courts where it is relevant to an unquestionably justiciable issue. Examples include where the Code is relied upon in resistance to freedom of information requests: e.g. *HM Treasury v Information Commissioner* [2009] EWHC 1811, [2010] QB 563 (Law Officer's convention), *Cabinet Office v Information Commissioner* [UKUT] 0461 (AAC), 20 October 2014 (collective Cabinet responsibility). The Defendant acknowledges that the convention of collective cabinet responsibility was also relied upon in *A-G v Jonathan Cape Ltd* [1976] 752 (DGR Annex: The Ministerial Code §3). The consideration of such conventions in the courts and their indirect application establishes that the first category of non-justiciability articulated in *Shergill* is not applicable because the "*distinctive feature*" of that sort of non-justiciability is not present.

71. Category two refers to "*claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law.*" (at [43]). The examples given by their Lordships concerned complaints about conduct of foreign affairs: an application for a declaration as to the meaning of UN Resolutions and the legality of military action in Iraq (*R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] ACD 36) and an application for a declaration that the UK was in breach of international law by failing to denounce actions of the Israeli Government said to be in breach of international law (*R (Al-Haq) v SSFCA* [2009] EWHC 1910, [2009] ACD 76). Such issues, their Lordships explained, are not inherently non-cognisable by English courts but their resolution must be relevant to the determination of a domestic cause of action.

72. As these examples illustrate, category two non-justiciability is also not relevant to the issues arising in this claim. It is an established ground of judicial review that public officials must adhere to the objective meaning of policies they promulgate and apply and cannot give them whatever subjective meaning that they chose to give them on any given day. The issue is a justiciable one in public

law. This is not a case such as the interpretation of Security Council resolutions of international law, which lacks a domestic law "hook".

73. The contention that the present claim is non-justiciable is also inconsistent with the Court of Appeal's judgment in the *GCHR* case in which it pronounced on the proper meaning of paragraph 1 of the Ministerial Code. Burnett LCJ, Etherton MR and Hamblen LJ held that the deletion of a reference to international law in paragraph 1 of the then Code had not changed the meaning of that paragraph: "*In view of both the language used and the referential status of paragraph 1.2 of the Code, in our judgment the Deletion does not involve any change in substance.*" (at [23]). Clearly, therefore the meaning and proper interpretation of paragraph 1.2 of the Ministerial Code was not considered to be non-justiciable or beyond the competence of the court.

74. At the permission hearing before Linden J the Defendant stated that justiciability had been raised before the Court of Appeal. That makes it yet more significant that the Court of Appeal made the comments that it did: it could not have done so if the court had considered the matter non-justiciable. Linden J in granting permission expressed "*real doubts*" about the Defendant's contention that the Court of Appeal expressed a reservation about its ability to interpret paragraph 1.2. of the Code ([2011] EWHC 2192 (Admin) at [24] **[CB/B/3/247]**).

75. This judicial review therefore does not fall within either of the categories of non-justiciability identified in *Shergill* and a materially identical part of the Ministerial Code was the subject of adjudication as to its meaning in the *GCHR* case.

76. Turning to the Defendant's arguments, the Defendant first contends that the decision is non-justiciable "*because it concerns a political act/question*" (DFG §21-§27 **[CB/C/271]**). However, Baroness Hale and Lord Reed stated in *R (Miller & Cherry) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [31] that the fact that a dispute concerns the conduct of politicians or arises from a matter of political controversy is not sufficient to prevent the Court from becoming involved.

77. None of the arguments advanced by the Defendant goes beyond pointing to the political context recognised by Baroness Hale and Lord Reed as not affecting justiciability. Thus,

(1) The decision under challenge is not a *"political"* decision in the sense of being a "*policy decision*" "*political act*" or "*political decision*" such as the examples given by the Defendant (DGR §22 **[CB/C/2/270]**) (supply agreement between Government and DUP, promise to hold a referendum). The issue in this claim is the proper meaning of the word bullying in the Ministerial Code. That is not a "political" issue. Nor is the Defendant's adjudication as to whether a person has engaged in bullying a political issue, indeed it is precisely the same adjudication that he would have to undertake had it been presented to him as a grievance, which the Defendant accepts would be justiciable.

(2) The Defendant suggests that any judicial review relating to the Ministerial Code must be non-justiciable because *"significant aspects"* of the Ministerial Code embody *"political and constitutional conventions"* (DGR §24 **[CB/C/2/270]**). However, as the Defendant rightly recognizes, most of the Code is not concerned with constitutional conventions. Since the challenge does not relate to any such convention the point is irrelevant.

(3) The Defendant next contends that the challenge relates to a political act because it relates to the appointment of Ministers, which is said to be non-justiciable (DGR §27 **[CB/C/2/271]**). However, no challenge is made to the decision of the Defendant as to whether he has confidence in the Home Secretary or what should occur to the Home Secretary if bullying occurred. The issue is whether the Ministerial Code has been misinterpreted. One only has to posit the possibility of a Prime Minister deciding that a Minister had not engaged in harassment because no physical violence had occurred to see that the Courts must have a jurisdiction to correct mistakes as to the meaning of external concepts and standards contained in the Code in an appropriate case.

78. The Defendant's second contention is that "*the claim does not identify any legal issue for the Court to determine.*" (DGR §28 **[CB/C/2/271]**). Again this is not correct:

(1) The Defendant contends that the Ministerial Code does not "create any separate legal duties or obligations" (DGR §29 **[CB/C/2/271]**). This is correct as far as it goes. But policies by their nature do not create legal rights and

obligations. That does not mean that they do not have an objective meaning that the Courts will ensure is adhered to.

(2) The Defendant contends that the decision of the Prime Minister "*is itself of no legal effect*" (DGR §29 **[CB/C/2/271]**). That is also correct. The application of policies and codes often has no legal effects; but such decisions can have practical effects. In the present case, the purpose of the prohibition on harassment, bullying and discrimination is to protect civil servants in the workplace, the decision as to the scope of that protection and whether it had been breached was capable of having practical effects for them and their colleagues. Indeed this was self-evidently the reason why civil servants raised complaints about the Home Secretary. Moreover, as Mr Penman explains, it will have (negative) practical effects for the civil service for the future (DP1 §72-§76 **[CB/A/3.5.1/215-216]**).

(3) The Defendant's suggestion that the decision of the Prime Minister was some form of abstract political decision relating to his Cabinet, rather than being a complaint raised by civil servants about, in effect, the conduct towards them of those leading their department, is to mischaracterize the decision and the context in which it was made, as well as to misunderstand and depreciate the actions of civil servants who acted courageously in raising complaints and cooperating with Sir Alex Allan's investigation. The issue was not political, it was purely and simply about workplace bullying.

(4) The Defendant contends that outcomes such as resignation, public apology or a Minister being required to justify themselves to Parliament or the public "*are not legal issues*" and "*accordingly the Court has no role to play*" (DGR §29 **[CB/C/2/272]**). This is difficult to understand. Many decisions of public officials are important because they lead to practical outcomes of this sort and are subject to judicial review. Public inquiries and investigations of all descriptions have no legal effects, for example, but they can result in persons being held accountable to the public or Parliament and might result in resignations or apologies. Nobody would suggest that an investigation or inquiry was not subject to judicial review because it does not generate "*legal issues*" or "*legal effects*".

(5) Policies are often subject to judicial review although they do not determine legal rights, but have a protective function or benefit individuals in some way (e.g. *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401, [2012] 1 WLR 1389; *R v Ministry of Defence, ex parte Walker* [2000] 1 WLR 806).

(6) The Defendant's reliance on textbooks is also misplaced (DGR §35 **CB/C/2/274]**). The citations merely make two uncontroversial points. The first of these is that the Ministerial Code is not a law and is not enforceable in the courts for its breach, as laws are (Bradley, Ewing, Knight, *Constitutional and Administrative Law* (2018, 17th) pp. 25-26; Elliott & Thomas, *Public Law* (2020, 4th ed.), p.138). It is self-evidently a policy and to be treated as such. The second proposition is that ministerial accountability to Parliament is not enforced by the courts (Brazier, *Ministers of the Crown* (1997), p.271; Bamforth & Leyland (eds), *Accountability in the Contemporary Constitution* (2013), pp.269-270). Not only is this also uncontroversial, but Ministerial accountability to Parliament has nothing to do with the facts of this case which does not involve Ministerial accountability to Parliament

F. CONCLUSION AND REMEDIES

79. For the reasons given above, the court is requested to declare that Prime Minister misinterpreted the term bullying in the Ministerial Code.

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27 October 2021