**IN THE HIGH COURT OF JUSTICE** **CO/618/2021**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

**BETWEEN:**

**THE QUEEN**
**on the application of**
**THE FDA**

***Claimant***

**- and -**

**THE PRIME MINISTER AND MINISTER OF THE CIVIL SERVICE**

***Defendant***

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**SKELETON ARGUMENT OF THE DEFENDANT**
***For hearing on 17-18 November 2021***

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**SFG §*** = Statement of Facts and Grounds for Judicial Review dated 19 February 2021
**CSkel §*** = Claimant's skeleton argument dated 27 October 2021
**(CB/*)** = Core Bundle, p.*
**(SB/*)** = Supplementary Bundle, p.*
**McNeil §*** = Witness statement of Rupert McNeil dated 1 June 2021

**Essential reading (t/e: 2 hours)**
The skeleton arguments (which materially replicate the pleadings)
The Ministerial Code, August 2019 **(CB/92-127)**
The advice of Sir Alex Allen **(CB/150-151)**
Decision of the Defendant dated 20 November 2020 **(CB/152)**
Witness statement of David Penman dated 19 February 2021 **(CB/193-217)**
Witness statement of Rupert McNeil dated 1 June 2021 **(CB/287-296)**

## INTRODUCTION

1. The Prime Minister asked the Cabinet Office to conduct an investigation under the Ministerial Code into allegations made concerning the conduct of the Home Secretary.[1] He took advice on the investigation from his Independent Adviser, Sir Alex Allan. On

[1] On 2 March 2020, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office made a statement to the House of Commons confirming that the complaints of breaches of the Ministerial Code were taken seriously, and that in line with the procedure set out in the Code, the Prime Minister had asked the Cabinet Office to establish the facts **(CB/130)**.

20 November 2020, the Prime Minister published a statement in which he summarised Sir Alex's advice[2] and concluded:

> "*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. The Prime Minister has full confidence in the Home Secretary and considers this matter now closed.*" **(CB/152)**

2. The Claimant's claim disavows any challenge to the decisions of the Prime Minister that the Home Secretary had his full confidence, that no further actions were required and that the matter was closed.[3] No challenge is raised against the Prime Minister's statement that he had considered the advice of Sir Alex Allan and weighed up ***all*** the factors. The Claimant does not dispute that the Prime Minister is the arbiter of the Ministerial Code.

3. Instead, the Claimant seeks to circumvent these points, and the logical implications to which they give rise, by seeking judicial review of the Prime Minister's decision that "*the conduct of the Home Secretary did not breach paragraph 1.2 of the Ministerial Code*" (Section 3 of the Claim Form) **(CB/6)**. The ground of review is that the Prime Minister misinterpreted the meaning of "*bullying*" in §1.2 of the Ministerial Code "*by considering that lack of awareness on the part of the putative wrongdoer of the distress or impact caused by their actions, or lack of intention to cause upset, means that conduct does not constitute bullying*." (SFG §69) **(CB/35)** (Ground 1 of the pleaded claim). The term "*bullying*" is not defined in the Ministerial Code.

4. It is submitted that the challenge to the Prime Minister's decision that the conduct of the Home Secretary did not breach §1.2 of the Ministerial Code should be rejected for the following summary reasons.

5. **First**, the claim is not justiciable.

   (1) The Ministerial Code does not create or impose any legal duties on Ministers or the Prime Minister; still less does it give rise to any legal rights or legitimate expectations in this respect on the part of third parties. It is not required by law. Its content is not regulated by law. It is not a document which is legally enforceable policy as to how, for example, a statutory or common law power is to be exercised to the benefit or detriment of individuals affected by such exercise. Rather, it is a political statement by the Prime Minister as to how he intends to operate his relationship with his Ministers and the standards he will judge them by when considering whether they retain his confidence. Having published the Code, it is of

[2] Sir Alex's advice was also published in full **(CB/150-151)**.

[3] "*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. Those are matters for the Prime Minister outside the scope of this legal challenge. Moreover, it is not suggested that the misinterpretation of the Ministerial Code was intentional*" (SFG §7) **(CB/13)**.

course available to Parliament, to the press and to the public and provides an aspect of accountability accordingly. Publication does not convert it into the equivalent of a policy or in some way render it or the language in which it is framed or judgements made about it by the Prime Minister justiciable.

(2) The Claimant expressly states that it does not ask the Court to adjudicate on the conduct of the Home Secretary nor on what the consequences should be if she has breached the Code (SFG §7) **(CB/13)**: those are evidently matters of political judgement for the Prime Minister and are not justiciable, as the Claimant appears to acknowledge. But the Prime Minister's judgment of whether the conduct of the Home Secretary was in breach of the Code is inextricably linked with his judgment of whether he retains confidence in her and is also a matter of political judgement. It is equally non-justiciable.

(3) The Claimant's analogy with employment contexts is inapt, as is its analogy with other governmental policies aimed at regulating its decisions with regard to the public in other contexts. The Code is a document of political conventions and it is *sui generis.*

6. **Secondly**, and in any event, there has been no misdirection of law. There is no basis for concluding that the Prime Minister erred in his approach to the proper interpretation of the Ministerial Code generally or the specific provisions relating to "*bullying*" in §1.2 of the Code.

(1) The Code does not expressly or implicitly incorporate any definition of "*bullying*" whether derived from a particular departmental policy or other source. Nor is there any single uniform meaning of the term "*bullying*" in a workplace context, departmental policies or the law which would be apt to be incorporated. Subjective experience and objective intention are elements to be considered in relation to any bullying claim but there is no single correct approach to the weight that must be given to them in a given case.

(2) The Prime Minister's conclusion that the Home Secretary had not breached the Code was a matter of judgement for him having regard to the nature and content of the Code, his functions under it, and all the circumstances of the case. His decision on the issue reveals no error of law.

7. The Claimant invites the Court to address the substantive argument first, and only to consider justiciability having answered the proper legal interpretation of the Code. That puts the cart before the horse. Justiciability should be addressed first both as a matter of principle and because of the determinative nature of the outcome to the claim more generally. Nor is it correct that the Court must have carried out the interpretative exercise in order to establish the nature of the issue said to be non-justiciable. The only issue

raised in the claim is the interpretation of the word "*bullying*" in §.2 of the Code. Nothing further is required to determine whether such an issue is justiciable.

## THE CONSTITUTIONAL CONTEXT

8. The Ministerial Code sits in a particular constitutional context: the appointment, conduct and dismissal of Ministers of the Crown.

9. Ministers of the Crown are holders of office in Her Majesty's Government: see, e.g. s.8(1) of The Ministers of the Crown Act 1975. They hold that office at the pleasure of Her Majesty, whose appointments to Ministerial office are exercised on the advice of the Prime Minister. The removal of a Minister from office is likewise constitutionally a matter for Her Majesty, acting on the advice of the Prime Minister. The appointment and removal of a Minister, and *a fortiori* the maintenance of a Minister in office, can be for any reason whatsoever: it is a matter for the political judgement of the Prime Minister which individuals he or she considers have his or her confidence to be appointed, or have lost that confidence such as to be removed, and to advise Her Majesty accordingly.

10. Ministers are not employees, nor in a position analogous to employees. They have no contract – the Ministerial and Other Salaries Act 1975 as amended sets the remuneration of Ministers – and are not contractually bound by any policy or suite of policies which may apply in the Department for which they have responsibility.

11. The Ministerial Code is a source of guidance to Ministers as to the standards expected of them, and the conventions the Prime Minister decides from time to time should be applicable to their office. The background to the Ministerial Code is set out in Annex A to Detailed Grounds of Resistance **(CB/281-286)**. In short, a written form of guidance for Ministers has been in existence since the first Attlee administration in 1945, which produced '*Questions of Procedure for Ministers*' (drawing on established principles which long-predated that administration). It was published for the first time in 1992. The document was reissued with the title of '*The Ministerial Code*' in 1997. Whether to have a Code at all, and if so its content, is entirely a matter of political judgement for the Prime Minister. There is no legal obligation to issue a Code and it has no statutory backing (unlike, for example, the Civil Service Code, which is required to be issued under section 5 of the Constitutional Reform and Governance Act 2010). Since 1997, on taking office each Prime Minister has issued a new Code. The present Prime Minister published the Code with a new foreword in August 2019 **(CB/92-127)**.

12. The present Code is split into ten sections, which deal with the following matters: (1) Ministers of the Crown; (2) Ministers and the Government; (3) Ministers and Appointments; (4) Ministers and their Departments; (5) Ministers and Civil Servants; (6)

Ministers' Constituency and Party Interests; (7) Ministers' Private Interests; (8) Ministers and the Presentation of Policy; (9) Ministers and Parliament; (10) Travel by Ministers.

13. The constitutional function of the Code is apparent from its content. The Code sets out, *inter alia*, the standards of conduct to which Ministers of the Crown will be held by the Prime Minister, and in respect of which they may be required to justify themselves to him (and to Parliament and the public), offering guidance as to how Ministers should act and arrange their affairs in order to uphold those standards.

14. The array of matters addressed by the Code underline the practical impossibility of applying legal standards enforceable by the courts to the Code as a whole, or to identifying a principled basis upon which to do so for some but not all of the Code. For example:

    (1) Many aspects of the Code encapsulate constitutional conventions, such as that of collective responsibility in Section 2 **(CB/100-102)**.

    (2) Section 9 of the Code concerns how Ministers conduct Government business in Parliament **(CB/119)**. Judicial consideration of these standards would contravene Article 9 of the Bill of Rights.

    (3) Many aspects of the Code address intrinsically political issues, such as the presentation of Government policy: e.g. Section 8 **(CB/116-118)**.

    (4) The Code seeks to constrain the conduct of Ministers in certain respects after having left office, when they no longer owe specific duties to the Crown: e.g. §7.25 **(CB/115)**.

15. In addition, many of the provisions of the Code are expressed in 'high-level', non-legalistic, terms which reflect the political nature of the document and its function. This is particularly true of Section 1. The Code is not intended for a legal audience; it is intended to capture political standards and norms in a flexible way, allowing the Prime Minister to reach conclusions on individual cases which reflect the necessary political judgement he or she must make to determine whether confidence is retained.

16. §1.2, the provision with which this claim is concerned, provides:

> "*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*" **(CB/97)**.

None of the terms used in §1.2 are defined within the Code.

17. §1.3 continues:

> "*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*…" **(CB/97)**

18. The principles set out in §1.3 are derived from the text of resolutions of both Houses of Parliament in 1997 and Lord Nolan's '*Seven Principles of Public Life*' (which are also annexed to the Code **(CB/286)**). That the principles and standards of professional conduct set out in the Code are matters of political rather than legal responsibility is emphasised in §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*" **(CB/98)**.

19. §1.5 summarises the basic function of the Code:

> "*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*" **(CB/98)**.

20. §1.6 provides:

> "*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*" **(CB/98-99)**.

21. §1.6 is significant in that it emphasises that:

    (1) Ministers are personally responsible for their actions and may have to justify them by reference to the Code when accounting to Parliament and to the public. These are forms of political accountability.

    (2) The reference to the Prime Minister's role in determining whether or not a Minister has breached the Code was added following a recommendation in the First Report

by the Committee on Standards in Public Life chaired by Lord Nolan and has been retained. The pre-existing QPM referred to the personal responsibility of Ministers. The Committee observed that: "*Yet Ministers do not make their ethical judgements in isolation. To remain in office they must retain the confidence of the Prime Minister, and, in a question of conduct that will involve the Prime Minister's own judgement of the ethics of the case. This is axiomatic and should be reflected in QPM*" (Part 3, §13).[4] The Committee therefore recommended that QPM be amended to state that it is for the Prime Minister to determine whether or not a Minister has breached the Code in any particular circumstances. Language which reflected the decision-making role of the Prime Minister was added as a result of that recommendation and is currently reflected in the reference in §1.6 to the Prime Minister being the ultimate judge of the Code. This provision necessarily reflects the constitutional position that the retention or removal of a Minister is a matter for Her Majesty acting on the advice of the Prime Minister.

(3) Ultimately, whether or not a Minister remains in office is not a question of whether they have breached any particular standard in the Code, but whether they retain the confidence of the Prime Minister.

(4) Whether or not a Prime Minister has full confidence in a Minister is a uniquely political judgement. It requires assessment of all manner of political considerations, as well as of the Minister's personal conduct and qualities.

## SUBMISSIONS

### (1) The claim is not justiciable

22. The Claimant invites the Court to adjudicate on the decision of the Prime Minister concerning the Home Secretary's compliance with the Ministerial Code. That is a political matter in which the Court has no role to play. For the courts to accept jurisdiction over the application of the Ministerial Code would be fundamentally contrary to the separation of powers and the proper constitutional role of the courts. The claim is non-justiciable for the linked reasons that: (a) both the Code itself and the relevant decision under it are entirely political in nature; and (b) there is no legal dispute for the Court to determine.

23. The Claimant seeks to avoid the impermissible nature of the exercise by characterising the issue as one of interpretation of a particular word within the Ministerial Code ("*bullying*"): CSkel, §67. The Claimant does not advance any good reason why, if the Prime Minister's substantive decisions under the Code (as to confidence, and whether a Minister should remain in office) are non-justiciable – as it implicitly concedes they are

[4] See the discussion and quotations in the Annex to the Detailed Grounds **(CB/282)**.

by the deliberate framing of the claim – it is nevertheless open to the Court to adjudicate on his interpretation of the Code in reaching that decision. And even framed as a matter solely of interpretation, the Claimant is inviting the Court to delineate the standards of conduct which are expected of Ministers as a matter of *political* responsibility within Government and by which the Prime Minister can judge issues of confidence.[5] That is a quintessentially non-justiciable exercise.

24. As the joint judgment of Lords Neuberger, Sumption and Hodge in *Shergill v Khaira* [2015] AC 359 at §§41-43 explains, there are generally two categories of case which are non-justiciable in the sense that they are inherently unsuitable for judicial determination by reason of their subject matter. Some care is needed on the basis that the judgment does not appear to have been intended to (and certainly, on the facts, did not need to) provide a complete taxonomy of non-justiciability for all purposes and contexts. However, the present context falls squarely within both categories.

    (1) The first category is those cases "*where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers*". Such cases may be rare, but they include important subsets such as transactions of foreign states and of proceedings in Parliament. A challenge to a decision of the Prime Minister that a Minister of the Crown has not breached a provision of the Ministerial Code, including by reference to the interpretation of that provision, is a matter which falls within the first *Shergill* category.

    (2) The second category are matters which are "*based neither on private legal rights or obligations, nor on reviewable matters of public law*", and a matter of this sort may be non-justiciable in some contexts – such as in the abstract – but justiciable in others – such as "*if their resolution is necessary in order to decide some other issue which is in itself justiciable*". (The context of the case in *Shergill* itself was whether various matters of religious practise and doctrine could be determined by the courts when raised in the context of claims giving rise to issues in trust law. The Court held that the context was one of the second category: religious matters would not in and of themselves be appropriate for judicial determination, but where they were necessary to decide other, justiciable, issues in private law litigation the courts had to determine them.) The Code is not reviewable in public law for all the reasons dealt with below including its political nature and the fact that it is on no view akin to policy designed to guide the exercise of statutory or common law powers affecting the rights, obligations and interests of the public. The resolution of the point of interpretation raised by the Claimant is not necessary to decide any

[5] The Claimant says that the matter is not political because the Prime Minister might have to address the same subject matter in determining a grievance concerning the same facts: CSkel, §§70(1), 77(1). That is no answer at all: a grievance brought by a civil servant is a part of employment procedures relating to that civil servant; adjudication under the Code and forming a decision as to the degree of confidence in a Minister are matters of high politics and in no way constitutionally analogous.

other justiciable issue: there is no other issue before the court. The question of interpretation is a free-standing and abstract one.

25. **First, the decision in issue in the present case is non-justiciable because it concerns a political act/question**. Whether a matter is justiciable turns on the nature and subject matter of the particular power being exercised: *R (Miller) v Prime Minister* [2020] AC 373 at §35; *Shergill* at §§41-43.

26. Political acts "*cannot be challenged, declared unlawful or struck down in a court of law*": *R (McClean) v First Secretary of State* [2017] EWHC 3174 (Admin) at §20 *per* Sales LJ (a challenge to the confidence and supply agreement between the Conservative Party and the DUP). See too: *R (Miller) v Prime Minister* at §31 ("*the courts cannot decide political questions*") and *Shergill* at §40 ("*The issue was non-justiciable because it was political*"). As Richards LJ noted in *R (Wheeler) v the Office of the Prime Minister* [2008] EWHC 1409 Admin at §41 (in the context of an alleged promise to hold a referendum on what became the Lisbon Treaty): "*The subject-matter, nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter*." The Supreme Court has recently reiterated the importance, even in the determination of an individual's Convention rights (as opposed to an abstract challenge of the present type), of respecting "*the boundaries between legality and the political process*": *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at §162 *per* Lord Reed. The operation and meaning of the Ministerial Code could scarcely be more obviously the political process.

27. Nor will the Court rule on the operation or scope of political conventions: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at §146 (the courts "*can recognise the operation of a political convention in the context of deciding a legal question…but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world*"). In *CCSU v Minister for Civil Service* [1985] 1 AC 374, Lord Roskill identified "*the appointment of ministers"* as an exercise of prerogative power which is not susceptible to judicial review by virtue of its inherently political subject matter (at p.418). No case has ever doubted this proposition.[6] The Code directly concerns both.

[6] The Claimant sought in the SFG to cast doubt upon the proposition that the appointment of Ministers is non-justiciable, citing by way of example a scenario in which the Prime Minister "*purported to appoint a person who was not a member of either the House of Commons or the House of Lords*" (SFG §90) **(CB/47)**. The argument is not repeated in the skeleton, but in any event, there are relatively recent examples of Ministers being appointed without being members of either House: the Wilson Government elected in October 1964 appointed two Ministers, including the Foreign Secretary, who had failed to be elected to the Commons and were unable to contest a by-election until January 1965. It is not uncommon for a Minister to be appointed prior to their introduction into the House of Lords and thus not be a member of either House for a period of time.

28. The non-justiciability of political questions and conventions is a proper function of the separation of powers: see *Shergill* at §42. Questions of law are the constitutional competence of the courts; questions of politics are the constitutional competences of Parliament and the Executive. The decision of the Prime Minister in issue in the present claim was political in this sense and non-justiciable for that reason.

29. The political and therefore non-justiciable nature of decisions made by the Prime Minister under §1.6 of the Code is apparent from the nature and content of the Code itself. Significant aspects of the Code concern and reflect political and constitutional conventions (including individual and collective responsibility). Other aspects of the Code concern the duties and accountability of Ministers to Parliament. Although Parliament does not enforce the Code itself – that being a matter for the Prime Minister alone – many aspects of the Code would, were the court to consider them justiciable, involve a considerable infringement of Parliamentary privilege.

30. The Claimant argues that the present claim does not concern an aspect of the Code which encapsulates a convention. But this fails to respect or reflect what is revealed about the nature of the Code from the fact that it contains such conventions. The Code in its entirety is a political document: compliance with it by Ministers is a matter of political convention and accountability, and decisions taken by the Prime Minister by reference to it are political not legal. The academic commentary, to the extent relevant or of interest, supports the Defendant's position, and the Claimant has identified none in support of its own:

    (1) The Ministerial Code is described as "*not authorised by legislation or enforced by the courts*" but rather enforced by the Prime Minister "*acting in the light of public and parliamentary opinion*" in Bradley, Ewing & Knight, *Constitutional and Administrative Law* (2018, 17th ed.), pp.25-26.

    (2) Elliott & Thomas, *Public Law* (2020, 4th ed.), p.138, states that "*The Code is not therefore a set of legally binding rules possessing the force of law.*"

    (3) In his leading treatise, Professor Brazier explains in *Ministers of the Crown* (1997), p.271, that "*Nor can the courts police the doctrine of ministerial responsibility, for the fitness of office of a Minister is not a justiciable issue*".

    (4) Similarly, Bamforth explains in a discussion of Ministerial responsibility for the standards set out in the Code that "*While the Code sets out the political accountability requirements of ministers to Parliament in a fashion which is clearer and more accessible than was previously the case, it is nevertheless still a constitutional convention which is enforceable only at the political level*", going on to note that it "*is very likely that most constitutional theorists would* not *want the courts to become involved in enforcing ministerial accountability to Parliament (as*

*currently explained in the Ministerial Code)*" (original emphasis) and that the issue requires the adoption of a position "*concerning the appropriate boundary between the legal and the political*": Bamforth, 'Accountability of and to the Legislature', in Bamforth & Leyland (ed.s), *Accountability in the Contemporary Constitution* (2013), pp.269-270. The Claimant tellingly fails to provide that appropriate boundary.

31. Nor does the Claimant explain on what basis the Court could coherently or permissibly carve up bits of the Code between those which are justiciable and those which are not, or even whether a provision of the Code has by the time of judicial consideration become a convention. The Claimant provides no way in which the Court can avoid being drawn into the political.

32. The Claimant places reliance (CSkel, §70(2)) on the judicial consideration of various conventions in appeals and litigation under the Freedom of Information Act 2000. But in these cases the statute creates a legal right to information, subject to exemptions the application of which necessarily requires consideration of the convention (e.g. as to law officers' advice under s.35(1)(c) and collective responsibility under s.36(2)(a)(i)). The existence of such a statutory regime does not provide any support for the Claimant's contention that the Prime Minister's quite separate decisions under §1.6 of the Code are justiciable.

33. The core point is, as the Code makes clear, that the standards and conventions set out within it form an essential element of the political judgement the Prime Minister must make as to whether he has confidence in a Minister, an issue which goes to his decision on whether to advise Her Majesty to appoint or dismiss a Minister from office. The fact that the Court can and does interpret legislation and the meaning of policy concerning the exercise of powers affecting individuals does not render every document published by Government justiciable. Focusing on interpretation of one term in the Code does not alter its fundamental nature, nor create a discrete or justiciable issue which, divorced from its proper context, the Court can or should determine.

34. **Secondly, the courts only have jurisdiction to determine legal issues**. A claim where no legal right or obligation is engaged whether as a matter of public or private law will not be justiciable: see *Shergill* at §43.

35. The Code is not a source of law and does not create any separate legal duties or obligations on Ministers: cf *R (Gulf Centre for Human Rights) v Prime Minister* [2016] EWHC 1323 (Admin) at §8-9, and [2018] EWCA Civ 1855 at §§17-19. It necessarily follows that the Code does not confer any enforceable legal rights on third parties as against Ministers, nor legal obligations on the Prime Minister with respect to his interpretation of the Code. A Minister could not seek judicial review of a decision by the Prime Minister to dismiss him; still less can any third party bring such a claim on their

behalf. A judgement by the Prime Minister that there has or has not been a breach of the Code is itself of no legal effect. It may result in the Prime Minister asking the Minister to resign; it may lead to a Minister being required to justify themselves to Parliament and to the public or to apologise; or it may lead to no action. But these are not legal issues.[7] The Court accordingly has no role to play in how they should be determined.

36. The Claimant seeks to avoid this conclusion by asserting that "*the Ministerial Code is a published policy which is intended to be relied upon by Ministers, civil servants, the public and others*" (SFG §102) **(CB/51)** and is amenable to judicial review on this basis. As set out at §5(1) above, the Code is a political statement by the Prime Minister as to how he intends to operate his relationship with his Ministers and the standards he will judge them by when considering whether they retain his confidence. The Code is not a policy document published for the purpose of regulating how decisions will be made by Government which affect the public, in a sphere in which policy does and is intended to indicate how a legal power will be exercised. It is not akin to Government policies published in a wholly different contexts upon which the Claimant relies, and cannot attract the public law obligations that may attach to such policies. It is fundamentally distinct in nature from such policies. The importance of the role of the courts in interpreting policies, codes and equivalent documents is because they do, or may, affect the rights and obligations of individuals: *In re McFarland* [2004] 1 WLR 1289 per Lord Steyn at §24; see also *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 at §§2-3. The Ministerial Code does not. It follows that no question of legal interpretation arises: in effect, the Claimant is asking the Court to rule on a non-justiciable issue and to do so "*in the abstract*": *Shergill* at §43.[8]

37. The Claimant relies on *R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389 and *R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806. Neither assist it. The former was a challenge to guidance issued to the security and intelligence services which was said to have misstated the legal standards imposed by Article 3 ECHR, and so would permit unlawful conduct. It was a straightforward application of the principle in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, in which the court was asked to address the terms of the guidance to ensure there was compliance with the law. In contrast, the Code neither imposes legal duties nor seeks to regulate them. The *Walker* case concerned a claim made under an ex gratia military injuries compensation scheme on the basis of an alleged legitimate expectation. That case provides no analogy at all to an abstract complaint about the Prime Minister's approach to the Ministerial Code.

[7] For the avoidance of doubt, a Minister has no legal right to remain in office once the Prime Minister's confidence has been lost, regardless of the reason for that loss of confidence.

[8] It is striking that no individual civil servant with any interest in the Prime Minister's decision under the Code in relation to the Home Secretary has brought this claim, and the Claimant is not purporting to act on behalf of any such civil servant or to challenge or place in issue any aspect of the Home Secretary's conduct. These are not proceedings in which any civil servant is claiming a breach of any duty.

38. The Claimant's reliance on *Gulf Centre* is also misplaced and does not lead to any different conclusion on justiciability. The Court of Appeal in that case was concerned, as a preliminary matter, with the question whether there had been any substantive change of meaning between two versions of what was then §1.2 of the Code. This was a preliminary issue which went to arguability, since Arden LJ had granted conditional permission on the basis that the grounds of appeal could not be arguable unless there had been a change of substance between the two versions of the Code (see §13). In light of its decision on the preliminary issue, the Court did not express its view on the "*further arguments raised*" (see §27; the arguments included justiciability). This manner of dealing with the issues was entirely open to the Court. It involved them concluding that there had been no change of meaning (and to that extent interpreting the Code and assuming justiciability for that purpose). But it is quite clear that they did so without prejudice to the arguments advanced by the Defendants in that case as to justiciability. There was no conclusion, implicit or otherwise, that the claim would otherwise have been justiciable – the course taken was purely pragmatic in the context of that case. Moreover, the claimant in that case was seeking to challenge a decision to change the content of the Code rather than the terms of the Code itself – no doubt in recognition of the fact that the content of the Code could not be amenable to judicial review. The Court of Appeal's decision in *Gulf Centre* that the Code does not create any separate legal duties or obligations is both accurate and consistent with its being non-justiciable. It is certainly no authority for the Code being justiciable.

39. In its skeleton argument, the Claimant appears no longer to assert that the Code engages any legal right of any civil servant. That implicit concession is inevitable, and fatal under this second line of analysis. Instead, it is now said that the meaning of the Code will have "*practical effects for the civil service*" (CSkel, §78(2)). This is irrelevant. Every time the Prime Minister appoints a Minister there are practical effects for the civil service, but that does not render the appointment justiciable. Had the Supreme Court intended the second *Shergill* category to encompass mere practical effects, it would have said so. (In any event, the Claimant's submission on practical effect is itself predicated on the assertion that the term "*bullying*" is a reference to and incorporation of that term as it appears in departmental policies applicable to civil servants; any different interpretation would therefore, it is said, undermine the effect of those policies. But that is wrong, for the reasons set out at §§45-47 below.)

40. The claim is thus non-justiciable as seeking to mount a challenge to a political document and a political decision in circumstances in which no legal right, obligation or power is in issue.

41. Finally, the inappropriate nature of the exercise is underlined by two further consequential matters:

(1) The Court concluded at the permission stage that it is unarguable that the court could review a decision not to amend the content of the Code **(CB/238, 248)**. The Claimant does not appeal that decision. The Claimant gives no explanation for why it is nonetheless permissible for the Court to interpret the Code, if both the content of the Code, and any operative decision made under it (namely the Prime Minister's decision as to whether a Minister should or should not remain in office, having regard to his confidence in them) are accepted to be non-justiciable. The dividing line lacks coherence.

(2) The relief sought by the Claimant is a declaration that the Prime Minister misinterpreted the Code. Given that the Prime Minister has publicly explained his decision, by reference to ***all*** the circumstances, that the Home Secretary retains his full confidence, and the Claimant disavows any attempt to challenge that, the claimed relief is entirely academic and should be refused in any event. This serves to illustrate the fact that the decision under challenge – whether or not the Code has been breached – is of no legal effect.

## (2) There has been no misdirection of law

42. If, contrary to the submission above, the claim is justiciable, the Defendant submits that there has been no misdirection of law by the Prime Minister.

43. The Claimant asserts that the Prime Minister "*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*" (CSkel, §2). This mischaracterises the Prime Minister's decision and imputes reasoning to him that is unsupported. The Prime Minister's decision was that the Home Secretary had not breached the Ministerial Code **(CB/152)**. In reaching that conclusion he took into account the fact that concerns were not raised at the time with the Home Secretary and that she was unaware of the impact she had. Those were matters which went to the seriousness of the Home Secretary's conduct and the Prime Minister clearly considered them relevant, alongside other factors, to the question of whether her conduct could be said to amount to a breach of the Code and whether he continued to have confidence in her. There is no basis for imputing any wider reasoning or understanding of the Prime Minister as to the meaning of "*bullying*" whether under §1.2 of the Code or for any other purpose.

44. The Claimant seeks to support its claim that the Prime Minister's approach was wrong in law by contending that the term "*bullying*" in §1.2 of the Code is not a standard "*that was created by the Code or to which some specific meaning is attributed under the Code*" (SFG §74) **(CB/39)**. Rather, it is said to be a reference to an external legal standard (SFG §74). The Claimant contends, in substance, that applying such a standard, awareness or

intention on the part of the putative bully must be treated as irrelevant (SFG §77) **(CB/42)**. The Claimant's position is wrong for the following reasons.

45. **First**, "*bullying*" as it appears in the Ministerial Code is not a reference to or incorporation of "*standards defined and protected in workplace terms and conditions, in departmental workplace policies and in the law"* (SFG §74) **(CB/39)**. The term "*bullying*" is used without definition or qualification. If the intention had been to incorporate an external definition (whatever that definition may be), it could and would have said so.

(1) The function of §1.2 of the Ministerial Code is not to "*protect workplace standards across Government*" (*contra* SFG §3 **(CB/12)**; CSkel §§57-59) or to "*reflect and reinforce legal duties applicable to employees*" (CSkel §45). The function of the Code as a whole, including §1.2, is to set out, *inter alia*, the standards of conduct to which Ministers of the Crown will be held by the Prime Minister, and in respect of which they may be required to justify themselves to the Prime Minister, Parliament and the public, in accordance with §1.6. To the extent that standards of professional conduct are encompassed by the Code, it is in furtherance of those functions, rather than any employment function as suggested by the Claimant.

(2) The Code sets out standards by which a Minister's personal conduct may be judged. It does not form part of civil servants' employment terms. The question whether a Minister's conduct constitutes a breach of a civil servant's rights is a distinct issue which will be determined by the relevant terms and conditions of service in any given case. The relevant workplace standards are governed by an individual's employer, which will be the relevant Government department. Government departments have their own grievance and workplace policies, with civil servants' rights being governed by individual terms and conditions of service. The function of those policies and contracts, in contrast to the Code, is to offer protection to workers and regulate the rights and responsibilities of civil servants of all levels of seniority. The question whether those policies or rights are engaged or have been breached will be determined in the usual way by reference, where necessary, to an interpretation of the terms used in their context.

(3) The particular references in §1.2 of the Code are, in the context of the investigation into the Home Secretary, aspects of the wider principle set out in §5.1 of the Code that "*Ministers should be professional in their working relationships with the Civil Service and treat all those with whom they come into contact with consideration and respect*". The concepts of professionalism and respect are highly judgemental ones, with no particular or settled legal meaning. The artificiality of the Claimant seeking to impose a single legal meaning on one word, when others intrinsically linked are not so susceptible reveals the impermissibility of the claim.

(4) The Claimant accepts in clear terms that "*[i]t is clear that complaints relating to the Home Secretary fell to be addressed under the Civil Service HR Dispute Resolution Policy … as well as the Home Office Grievance Resolution Policy and Procedure*" (CSkel §59). That is obviously correct. The function of those policies is to protect the employment rights of civil servants. The existence and implementation of those policies provides a complete answer to the Claimant's assertion that the position adopted by the Defendant in this case results in civil servants being "*under-protected*" (CSkel §58).

(5) The Claimant is wrong insofar as it suggests that investigations under the Code in practice form part of departmental grievance policies (see further McNeil §§16-30 **(CB/291-295)**) and that the Prime Minister's judgement as to the outcome of such investigations would be determinative of any given grievance (see further McNeil §§24-26 **(CB/294)**). Keeping these two matters separate does not produce "*absurd*" results (SFG §82) **(CB/44)**. Nor is it "*divorced from reality*" (SFG §83) **(CB/44)** or "*unrealistic*" (CSkel §63). The need to distinguish between those separate procedures is a necessary corollary of their very different functions; similar to the way in which disciplinary procedures are separate to grievance procedures in the employment context. A complaint under a grievance policy would not be (indeed could not be) treated as "*vexatious*" or "*malicious*" on the basis that the same matter had been addressed by the Prime Minister as part of an investigation in relation to a potential breach of the Ministerial Code: see McNeil §§27-29 **(CB/294-295)**. The Claimant's assertion to the contrary has no evidential foundation and is wrong.

(6) Even if the Code's function was to "*protect workplace standards across Government*" (which it is not), it would be entirely impractical to incorporate some undefined set of external workplace standards (and see further §46 below). The Claimant refers to civil service policies, but Ministers must deal with individuals from across government departments and organisations, each of which have their own internal grievance and workplace policies, adopting different workplace standards. §1.2 of the Code refers to Ministers' working relationships not only with civil servants, but also with ministerial and parliamentary colleagues.

(7) The Court of Appeal's conclusion in the *Gulf Centre* case that "*[t]he Code did not create new or different duties; it simply referenced existing duties outside the Code*" does not support the proposition that the term "*bullying*" refers to and incorporates a legal standard existing outside the Code (*contra* CSkel §42). The point in that case was that the duty on Ministers to comply with the law was a pre-existing duty and not one imposed by the Code itself, which was concerned instead with identifying their *political* obligations. There is no suggestion in the Court of Appeal's reasoning that the reference to existing duties amounted to an incorporation of those duties for the purposes of determining the existence of a breach *of the Code itself*. Quite the opposite: the point is expressly made that the

relevant provision of the Code did not create or impose any separate legal duties upon Ministers. It was simply of no legal effect.

(8) Accordingly, although the terms used in the Code may to some extent mirror concepts used in other contexts, they must have their own *sui generis* meaning determined in the light of the context in which they appear, their wider constitutional function, and the consequences which may flow from a finding of breach. It is not possible simply to transpose the meaning of those terms as they may appear in a fundamentally disanalogous employment context.

46. **Secondly**, the above is *a fortiori* in circumstances where there is no single uniform external standard or definition of bullying that is capable of incorporation.

(1) "*Bullying*" is not prohibited by any statutory provision, does not give rise to any independent cause of action and is not the subject of any statutory definition. Nor is there any single definition as a matter of workplace practice. Across government departments there is no uniform definition of "*bullying*": see McNeil §13 **(CB/290-291)** and Exhibit RM1/3 **(CB/297-312)**). Equally, there is no settled definition of "*bullying*" amongst other public and private sector employers: see McNeil §14 **(CB/291)** and Exhibit RM1/4 **(CB/313-316)**. This is accepted by the Claimant (CSkel §64).

(2) As to the question of intention, the Civil Service HR model definition of bullying does not expressly state whether or not intention is required; and see McNeil §§6-12 **(CB/288-290)**.[9] Different approaches to intention are adopted in different departmental and workplace policies: see McNeil (supra). Contrary to the Claimant's submissions, there is no legal rule or accepted standard which determines the weight that must be afforded to perception or subjective experience, intention or purpose, objective standards of behaviour, or any other circumstance of the case. Whether bullying is made out in any given case, for the purposes of the application of any given policy or procedure, will depend on context and circumstances.

(3) The Claimant seeks to rely on the definition of "*harassment*" in s.26 of the Equality Act 2010 to support the submission that intention must be irrelevant when determining if bullying has occurred for the purposes of the Code (SFG §67 **(CB/35)**; CSkel §49). The term "*harassment*" when used in the Code is not to be assumed to be coterminous with that term in the Equality Act; it is only in the latter

[9] *Contra* CSkel §45(3). The Claimant relies heavily on this definition at CSkel §45(3), however fails to acknowledge or address the fact that the definition says nothing about intentionality. The fact that there is to be a "*zero tolerance approach*" to bullying and that the Government does not tolerate "*any form of bullying*" says nothing about what the concept of bullying entails. It is not the case, as the Claimant contends, that the approach adopted by the Prime Minister is incompatible with the Civil Service HR model definition: *contra* CSkel §64.

context in which it can be authoritatively interpreted by the courts and tribunals which have jurisdiction over cases which rely upon it. But in any event the definition of harassment in the 2010 Act does not support the Claimant's submission. It does not include any reference to bullying. It also expressly provides that, in addition to the perception of the person who alleges harassment, other factors must be taken into account which include "*the other circumstances of the case*".

(4) Further, bullying is a concept apt to include a wide range of behaviours which may be less or more serious. (See e.g. Gateway Guide referred to in CSkel §§50-51.) Under departmental policies, intention is expressly relevant to determining a range of decisions in connection with an allegation of bullying, including whether bullying is to be treated as "*minor misconduct*" or "*gross misconduct*."[10] The Ministerial Code (in keeping with its different nature and function) does not seek to draw distinctions of this kind. But there is no reason in law or principle why it should not be interpreted as setting a threshold for breach which permits intention as well as subjective experience to be taken into account (*contra* SFG §52) **(CB/29)**.

47. **Thirdly**, even if interpretation of the Code is a justiciable matter, and given the analysis above, there is nothing in the Prime Minister's statement recording his decision to suggest that he misdirected himself in law as to the proper meaning of the Code as a whole or the term "*bullying*" in §1.2.

(1) The term "*bullying*" clearly has a range of meanings, and is apt to cover a range of behaviours.[11] The Courts "*have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision*": *c.f. R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32-33 *per* Lord Mustill finding that "*substantial*" in the Fair Trading Act 1973 had a broad meaning calling for "*the exercise of judgment rather than exact quantitative measurement*" and that "*there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment*".[12] This approach must apply *a fortiori* in a context involving the interpretation and application of standards of behaviour which: (i) involve evaluative judgment; and (ii) concern the Prime Minister's ongoing confidence in a Minister of the Crown, and any

[10] The Home Office definition of bullying states, inter alia, that "*Bullying 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*". But under Home Office grievance and disciplinary procedures intention in relation to bullying is expressly stated to be relevant to: whether and if so what form of grievance process should be followed **(SB/241-243)**, whether disciplinary proceedings should be commenced **(SB/291)**, whether if misconduct is made out it is minor, serious or gross **(SB/293)**, and when considering mitigation **(SB/312)**.

[11] See eg ACAS Guide "*Most people will agree on extreme cases of bullying and harassment but it is sometimes the 'grey' areas that cause most problems*" **(SB/172)**.

[12] Applied in *BBC v Sugar (No 2)* [2012] 1 WLR 439 at §80 *per* Lord Walker.

recommendation he may make to the Queen that a Minister be dismissed. This is plainly a context where the Prime Minister is to be "*accorded a great deal of latitude*": *R (Miller) v Prime Minister* at §58.

(2) In any event, contrary to the Claimant's assertion, nothing in the Prime Minister's decision supports the inference that he directed himself that conduct could not amount to bullying under §1.2 of the Code unless intention or awareness of the impact of conduct on the part of a Minister was established. His decision was simply that, taking into account ***all*** the circumstances of the case, including the extent to which matters were raised with her at the time and the extent to which she was aware of the impact of her conduct, the Home Secretary was not in breach of the Code. Such an approach does not reveal any misdirection in law, nor does it demonstrate that the Prime Minister took into account an irrelevant consideration.

## D. CONCLUSION

48. In these circumstances, the Court is invited to dismiss the claim and award the Defendant his costs of these proceedings.

**SIR JAMES EADIE QC**

**CECILIA IVIMY**

**CHRISTOPHER KNIGHT**

**JASON POBJOY**

3 November 2021