Claim No. CO/618/2021

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

FDA

Claimant

- and -

THE PRIME MINISTER AND MINISTER OF THE CIVIL SERVICE

Defendant

SKELETON ARGUMENT FOR THE CLAIMANT FOR THE RENEWAL HEARING 27.04.21

Key reading 1.5 hrs:

Permission decision of Mrs Justice Farbey 01.04.21
Statement of Facts and Grounds ("SFG") (Bundle pp.2-49)
Summary Grounds of Defence
Key authorities (in permission authorities bundle):

- *Gulf Centre for Human Rights v Prime Minister* [2018] EWCA Civ 1855 ("GCHR Case").
- *Miller & Cherry v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [31] ("*Miller II*")
- *R (EHRC) v Prime Minister* [2011] 1 WLR 1389 ("EHRC Case") (head note only)
- *R (Miller) v Secretary of State for Exiting the EU* [2016] UKSC 5, [2018] AC 61 ("*Miller I*") at [146]

1. Where the Court is "*satisfied that there is an arguable ground for judicial review having a realistic prospect of success*" permission should be granted (Administrative Court Guide, 8.1.3). In the present case, permission was refused on the papers by Mrs Justice Farbey on the basis that it is not even arguable that the Ministerial Code ("Code") is justiciable.

2. For the reasons given below, it is submitted that the Judge was wrong and that it cannot be said that this judicial review is not even arguably justiciable.

3. Furthermore, since the principle of non-justiciability has the effect of barring an otherwise proper legal claim, it is submitted that the court should be slow to invoke the principle to dismiss a claim on a summary basis, absent full argument on the issue. This is especially important where it is unclear what rule of non-justiciability is said to be in play. If a claim sought to litigate about proceedings in Parliament summary dismissal would be justified because there is a clear rule of non-justiciability. That is however very far from the present

case. Indeed, the Defendant appeals to a ragbag of arguments in support of the claim that the claim is non-justiciable without identifying any clear rule or principle.

4. Moreover, in the *GCHR Case* Burnett LCJ, Etherton MR and Hamblen LJ held that, having regard to the language used in paragraph 1 of the Code and the fact that it referred to external norms, the deletion of the reference to international law "does not involve any change in substance" in the meaning of the Code (at [23]). The Court of Appeal in that case therefore ruled on the meaning of the Code. It is powerful authority for the justiciability of the Code and certainly sufficient to surmount the threshold of arguability.

5. The basic complaint in this case also relates to the interpretation of paragraph 1 of the Code, which since 2018 has prohibited harassment, bullying and discrimination, and specifically this claim challenges the misunderstanding of the term "bullying" by the Prime Minister in applying the Code. The inclusion of these prohibitions in the Code has an important protective function, to protect civil servants in the workplace from harassment, bullying and discrimination by Ministers (of which there are well over 100), as was made clear when the relevant provisions were introduced in 2018:

> "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 other 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." Foreword by Theresa May [Bundle page 83]

6. As explained in paragraph 70 of the SFG, it is well established that public officials must give codes, guidance and other such documents their objective meaning (a document "means what it means, not what anyone … would like it to mean" per Bingham MR ex p. Save Our Railways, quoted at SFG [70(3)) **[Bundle page 33]**. The fact that the issue of interpretation arises in relation to an investigation into the conduct of the Home Secretary and the fact that the alleged error of law occurred in a decision of the Prime Minister does not transform an otherwise straightforwardly justiciable issue of public law into a non-justiciable one.

7. As the Supreme Court stated in *Miller II* at [31]:

> "… although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense."

8. In refusing permission, the Judge did not address the *GCHR Case* and did not identify any ground of non-justiciability, still less a ground that demonstrates that the claim is not even arguably justiciable. The Judge referred to the following reasons for the claim being non-justiciable,

   (1) The Code is "not a creature of law". This is not a ground of non-justiciability. Many decisions, instructions, policies are not based on any positive law but this does not mean that they are not subject to judicial review. See e.g. *EHRC Case* (SFG at [95(1)]) concerning the Consolidated Guidance on Intelligence Sharing.

   (2) The Code is "within the political world". As explained in paragraph 7 above by reference to [31] of *Miller II*, the fact that the decision is "within the political world" does not make it non-justiciable. The Judge cited [146] of *Miller I* in which the Supreme Court referred to constitutional conventions not being justiciable. But this claim does not relate to constitutional conventions.

   (3) The standards in the Code are "an element of Ministerial accountability to the Prime Minister and Parliament". This is not a correct characterisation of the Code. The Code sets out the standards that everyone, including civils servants, can expect of Ministers.[1] It provides a standard for them to justify their actions to "Parliament and the public" (Code, [1.6] **[Bundle p.97]**).

   (4) The Code "does not create legally enforceable rights". This is not a ground of non-justiciability. Many policies, codes, guides and other documents are subjected to judicial review without them creating legally enforceable rights (see e.g. *EHRC Case*, *Ex p. Walker* (SFG at [95] **[Bundle pp.45-47]**)).

   (5) The Code is "not arguably characterised as, or analogous to, a workplace policy". In fact, the relevant part of the Code is closely analogous. But this is not a ground of non-justiciability.

   (6) The Code is "not arguably characterised as, or analogous to, a policy document regulating the exercise of a ministerial discretion". This again is not a ground of non-justiciability.

   (7) Finally, the Judge held that the consequences "are not matters for the court". However, as made clear in the SFG at [7] the Court is not required by the judicial review to consider or express any view on whether the Home Secretary committed the acts alleged against her or the consequences that should follow.

[1] The Code also applies to Parliamentary Private Secretaries who are not Ministers or members of the Government: see [1.5].

9. In short, there is no rule or principle of non-justiciability which has been identified as rendering the claim non-justiciable, still less that is *unarguable* that it is justiciable.

10. In conclusion therefore, it is arguable that the claim is justiciable, no basis for finding it to be non-justiciable has been identified and the issue is not appropriate for determination on a summary basis absent full argument.

TOM HICKMAN QC

Blackstone Chambers

23 April 2021