CONSTITUTIONAL LAW

Interpreting ministerial codes, justiciability and the rule of law

R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service [2021] EWHC 3279 (Admin)

Dr Steve Foster*

Introduction

In an eagerly awaited decision, the High Court has now held that the Prime Minister had not misinterpreted paragraph 1.2 of the Ministerial Code on bullying when deciding that the Home Secretary had not breached the Code, following allegations that she had shouted and sworn at civil servants.[1] This followed an investigation in November 2020, via an inquiry carried out by the Prime Minister's head of standards, Sir Alex Allan, who found that she had 'unintentionally' broken the ministerial code; her approach to staff, on occasions, amounting to behaviour that can be described as bullying in terms of the impact felt by individuals.[2] The Prime Minister had thus not acted unlawfully in failing to take action against the Home Secretary.

The main question for the court to consider raised the issues of justiciability and accountability: should we have to accept the Prime Minister's finding on the matter, that her conduct did not on 'proper' interpretation breach the code, or is this a decision that can and should be reviewed by the courts? The case is an important one with respect to the control of executive power in the UK constitution, as it raises questions about the appropriate role of the courts in what many see as a matter of purely political behaviour, which should be addressed in the political arena. As we shall see, the High Court accommodated the legal challenge insofar as finding it to be justiciable, but the final outcome suggests that it would be rare for any such challenge to succeed and that the courts might find it uncomfortable in ruling on such issues despite having initial jurisdiction to do so.

The facts and decision in *FDA*

In this case, a civil servants' union sought a declaration from the High Court that the Prime Minister had misinterpreted paragraph 1.2 of the Ministerial Code when he concluded that the Home Secretary had not breached that paragraph by her conduct. In 2020, allegations had been made that the Home Secretary (Priti Patel) had behaved inappropriately towards civil servants, primarily by shouting and swearing at them. Paragraph 1.2 of the Code provided that harassing, bullying or other inappropriate or discriminating behaviour was not consistent with the Code and would not be tolerated. The Prime Minister was advised by the independent adviser on ministers' interests that the Home Secretary had not consistently treated her civil servants with consideration and respect, and that on occasion her behaviour could be described as bullying in terms of the impact felt by individuals. It concluded therefore that, to that extent, she had breached paragraph1.2 of the Code, even if unintentionally. However, the Prime Minister concluded that the Code had not been breached and that the Home Secretary retained his confidence. The union argued that he had misinterpreted para.1.2 by effectively taking the view that conduct would only constitute bullying for the purposes of that paragraph if the perpetrator was aware that their conduct was upsetting or intimidating. In defence, the Prime Minister argued that, firstly, the claim was for a declaration as to the interpretation of the Code and was therefore

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* Associate Professor in Law, Coventry Law School.

1 Dominic Casciani, 'High Court to look at PM's Patel 'bullying' decision' BBC News, 28 April

2 'Findings of the Independent Adviser':
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937010/Findings_of_the_Independent_Adviser.pdf. The report also stated that Patel – who had offered a fulsome apology - had sometimes 'legitimately, not always felt supported' by others within the Home Office.

non-justiciable; and secondly, that in any event, he had not misdirected himself as to the meaning of paragraph 1.2.

In dismissing the application, the High Court first held that the matter was indeed justiciable. The Court noted that the issue raised by the claim was the proper interpretation of the words 'harassing, bullying or other inappropriate or discriminating behaviour' contained in paragraph 1.2 of the Code, and accordingly that those words were capable of interpretation by a court of law. In the Court's view, as a matter of principle, the question of whether the Code excluded offensive conduct from the paragraph 1.2 definition of bullying if the perpetrator was unaware of, or did not intend, the harm caused, was justiciable; and the fact that the Code had no statutory basis did not, of itself, render that question non-justiciable. Further, in the Court's view, the fact that some parts of the Code were non-justiciable because they involved political matters did not mean that all parts should be treated as non-justiciable. Thus, in its view, certain decisions, such as the decision to dismiss or retain a minister in office, were not justiciable, being a political matter for the Prime Minister; but that did not take questions of legal interpretation beyond the role of the courts.

However, despite that initial finding, the Ministerial Code did more than merely describe the standards that ministers had to meet in order to retain the Prime Minister's confidence. In addition, it prescribed the standards with which they were expected to comply and gave guidance on how they should act and arrange their affairs. In the Court's view, if a dispute about the interpretation of a part of the Code was impossible to separate from a decision to dismiss or retain a minister, then the dispute might not be justiciable. However, the Court stressed that that was not the situation in this case, and the question of whether the PM had misinterpreted paragraph 1.2 was justiciable.[3]

The Court then turned to the question of whether the Prime Minister had indeed misinterpreted the Code. The Court noted that the Code was intended to set a standard of behaviour for ministers in respect of their treatment of civil servants, and the context was that working relationships should be proper and appropriate. It also noted that within the various departmental policies, there was a broad consensus that conduct would be 'bullying' if it was either: (a) offensive, intimidating, malicious or insulting; or (b) an abuse or misuse of power in a way that undermined, humiliated, denigrated or injured the recipient. On the court's interpretation of that provision, conduct could fall within (a) above, and thus constitute bullying within the meaning of paragraph1.2, whether or not the perpetrator intended their behaviour to be, or was unaware that it was, offensive, intimidating, malicious or insulting. In the Court's view, the alleged conduct of the Home Secretary fell clearly within limb (a) of the code.[4]

However, despite that finding, the Code was different from workplace policies governing the behaviour of employees. Such policies would typically include grievance and disciplinary policies and would provide for all relevant factors to be taken into consideration in determining how to deal with a breach. Such factors might include the nature and seriousness of the conduct; the reasons, understanding and intentions of the perpetrator; questions of mitigation; and the ability to ensure proper work practices in future. On the other hand, the language and structure of the Code did not reflect an ability to consider such matters. In his written decision, following the report, the Prime noted the independent adviser's observations that the Home Secretary had become frustrated (sometimes justifiably) by the lack of responsiveness by her department. He also noted that she had been unaware of the impact of her behaviour and was sorry for inadvertently upsetting civil servants; and that the culture in the Home Office was now much improved. The Prime Minister then indicated that she retained his confidence, but it was important to stress that his conclusion that she had not breached the Code was not a finding that her conduct did not amount to bullying. Rather, the Prime Minister was saying either that it would

[3] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 37-43

[4] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 49-50

not be right to record that the Code had been breached, or that her conduct did not warrant a sanction such as dismissal. The Court stressed that contrary to what was alleged by the union, he had not proceeded on the basis that conduct would not be 'bullying' within the meaning of paragraph 1.2 if the perpetrator was unaware of, or did not intend, the harm or offence caused.

That finding, in the Court's view, was reinforced by the fact that the Prime Minister was the arbiter of the Ministerial Code. Although the Court stressed he could not give its language any interpretation he chose, it was for the Prime Minister alone to determine whether a minister had departed from it to such an extent that he could no longer have confidence in them.[5] Accordingly, the application was dismissed.

Commentary

It is important to note that the claim was based on the Prime Minister's alleged misinterpretation of the code, rather than his failure to take any action against the Home Secretary. On its website, the Association of First Division Civil Servants (FDA) explained why it was bringing the action.[6] This was because; despite the evidence of the report, the Prime Minister sought to give weight to the Home Secretary's assertion that any behaviour was unintentional and therefore concluded that she had not breached the code.

'Our challenge in the court is essentially that the Prime Minister's decision was irrational given the obligations of the Code, and indeed his own words in its foreword that "there will be no bullying and no harassment". *It is entirely a matter for the Prime Minister to consider the factors he feels appropriate in determining any sanction following a breach, and that is not a matter on which we seek to intervene*. Our contention, however, is that given the clear obligations under the Ministerial Code in relation to bullying and harassment, the Prime Minister's decision effectively concludes that the Home Secretary did not bully civil servants as she states this was not her intent. (italics added)

In particular, the FDA pointed out that the Home Office itself deals with the issue of intent in its definition of bullying: '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'. The FDA's argument was, therefore, that the elements of the code on bullying - and a judgement on whether someone has been victimised - must be open to scrutiny under employment law. Thus, it had been pointed out that if the FDA wins the case it would mean that some of the Prime Minister's conduct might be open to scrutiny under employment law, as if he were any other kind of boss.[7] That in turn would be a substantial legal and constitutional question for the courts, who could be asked to redefine the boundary between politics and the law.

It should be pointed out that the union's claim that the code was to be treated as akin to an employment contract, thus attracting the rules of employment law, failed in the High Court. Thus, although the interpretation of the code was justiciable, the reason for that lies in public, administrative law, rather than private, employment law. The Code was a public law source of controlling ministerial behaviour, with the Prime Minister being the initial arbiter of its application. That did not exclude the court's intervention if he misinterpreted his powers, but he was not bound to take into account particular substantive principles when deciding whether the code had been violated, or what sanction, if any to impose. That would be the case if this was an employment issue, but not in this context.

The issue of justiciability over matters of the UK constitution was raised in the Brexit saga concerning our withdrawal from the European Union after the 2016 referendum. Challenging the government's decisions to withdraw, and then to suspend Parliament so as to frustrate the political debate over the

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[5] *R. (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin), at paras. 49-60.
[6] See 'Why we've launched a judicial review of the Home Secretary's breach of the Ministerial Code', fda: the union for managers and professionals in public service: https://www.fda.org.uk/.
[7] Dominic Casciani, n. 1.

conditions of withdrawal, raised fundamental questions of government within the law, and the rule of law. In other words, should government be allowed to take such a momentous decision without parliamentary and legal regulation; and if the answer was no, what would that tell us about the state or existence of our constitution as a legal restraint on governmental power? In the end, both the decision to withdraw from the EU, by triggering Article 51 of the Treaty without Parliamentary involvement,[8] and the decision of the Prime Minister to suspend Parliament in an attempt to frustrate Parliamentary debate on the government's withdrawal plans,[9] were held to be justiciable and then unlawful. Both decisions caused great political, public and indeed legal debate, with the courts being accused of undermining the democratic process and acting beyond their constitutional powers.[10]

To sum up, should such decisions and actions be considered as matters of law in a court of law? It is argued that both decisions, although contentious, were vital to the maintenance of our fragile constitution and the role of the rule of law within it. The UK constitution is, of course, heavily dependent on who holds the political power at any given time – the dominant executive in an essentially democratic Parliament. However, without some *legal* control of the government, Parliament is simply bulldozed into accepting government policy, particularly where that policy is given effect through residual prerogative, or in the present case, administrative powers. That situation would question the very nature or existence of any UK constitution, and the Supreme Court rescued us from the possibility that executive powers would be beyond legal control.

In the present case, the High Court found no difficulty in finding the interpretation of the code to be a justiciable matter, but that of course was tempered by the finding that the Prime Minister's decision on whether she had broken the code, and whether to take any disciplinary action against her was not so justiciable. It is conceded that the interpretation and application of the code should, at least initially, be a matter for politicians and not the courts. That is the case in other areas where the courts are unwilling to intervene until the relevant authorities have had the opportunity to rule on the matter internally.[11] However, given the constitutional importance of this issue with respect to accountability and ministerial standards, it cannot be right that the interpretation and application of the code is left to one person, who might have political reasons for their determination. In this sense, the judgment of the Court on justiciability is to be welcomed. However, the ruling on the Prime Minister's *application* of the code to the Home Secretary is disappointing. Under the rules of administrative law, decisions should be supported by evidence and even the most political of decisions should be subject to some review, including basic rationality.

The courts have developed the principle of excess of jurisdiction, where a decision can be questioned if it contains an error of law or jurisdictional fact.[12] That would include a decision which is based on the misinterpretation of the relevant legal power (in this case the code, but in most other cases the enabling statute or prerogative), but also where the decision is clearly not supported by the evidence which is necessary in order to substantiate the decision, and the decision-maker's understanding of the legal power.[13] The review of that decision does not have to be robust, and can give the decision maker a certain element of discretion, but to say that a decision maker must appreciate the legal boundaries of its jurisdiction, but then to give absolute discretion as to how that legal power is applied, makes the initial finding of justiciability fruitless. Further, there does not appear to be a good reason why the application of the code should not be subject to the rules on fettering and abuse of discretion,[14] or the

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[8] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.
[9] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41.
[10] See Chris Monaghan, *'The Prorogation Litigation: 'which was as if the Commissioners had walked into Parliament with a blank piece of paper' (2019) 24 (2) Coventry Law Journal 7.*
[11] For example, the courts either insist on or encourage internal disciplinary procedures in employment, universities and other associations.
[12] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[13] *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371.
[14] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

principles of irrationality.[15] Such supervision would not destroy the distinction made in the present case between the interpretation of the code on the one hand, and its application and enforcement on the other hand. Greater discretion can be afforded to the latter as it involves matters of politics and policy, but that should not forbid the courts from examining the decision so as to satisfy itself that there has been no further illegality or abuse beyond its base misinterpretation.

As it stands, this case is a further example of politicians, and the existing government, taking action in the belief that as we have spoken and that will be the end of the matter. Such an attitude is damaging to a healthy democracy and the rule of law, despite the possibility of political and electoral accountability for such behaviour.[16] The decision in *FDA* is encouraging in some respects, but provided the Prime Minister did not make the error of admitting that he had misinterpreted the code or other legal document, he is given *carte blanche* to apply or not apply it in whatever way he chooses. That cannot be right, or consistent with true judicial review, and an appeal to the Court of Appeal on this issue would be very welcome.

[15] The 'Wednesbury' test: *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 QB 223.
[16] A further example of the government's indifference and hostility to regulation and accountability was seen in the recent Owen Patterson affair. In order to thwart an investigation into the Conservative MP's alleged breach of lobbying rules, the government instead called for an overhaul of the MPs standards watchdog instead. Later the government backed down and abandoned the overhaul and the MP resigned: Jennifer Scott, 'Owen Patterson quits as MP over lobbying row 'nightmare, BBC News, 4 November 2021.