Neutral Citation Number: [2021] EWHC 3279 (Admin)

Case No: CO/618/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2021

Before:

LORD JUSTICE LEWIS

MRS JUSTICE STEYN

- -

Between:

THE QUEEN (on the application of the FDA)	**Claimant**
- and -	
THE PRIME MINISTER AND MINISTER FOR THE CIVIL SERVICE	**Defendant**

- -
- -

Tom Hickman Q.C. (instructed by **Slater and Gordon**) for the **Claimant.**
Sir James Eadie Q.C., Cecilia Ivimy, Christopher Knight and Jason Pobjoy (instructed by **Government Legal Department**) for the **Defendant.**

Hearing dates: 17 and 18 November 2021

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Judgment Approved

Lord Justice Lewis handed down the following judgment of the Court:

INTRODUCTION

1. This is a claim brought by way of judicial review for a declaration that the defendant, the Prime Minister, misinterpreted paragraph 1.2 of the Ministerial Code. That paragraph provides that harassing, bullying or other inappropriate or discriminating behaviour is not consistent with the Ministerial Code and will not be tolerated.

2. In brief, following allegations of inappropriate behaviour by the Home Secretary towards civil servants, the Prime Minister asked the Cabinet Office to investigate, and he sought advice, to determine whether the Home Secretary's behaviour was consistent with the Ministerial Code. The claimant, the FDA, which is a trade union which represents civil servants, contends that, in dealing with the matter, the Prime Minister misinterpreted paragraph 1.2 as he considered that conduct would only constitute bullying if the person concerned was aware that his or her conduct was upsetting or intimidating. It contends that whether conduct amounts to bullying depends upon the impact upon the individual concerned and it is not necessary for the person carrying out the conduct to intend or be aware of the harmful consequences of his or her actions. The claimant stresses that it is not asking this court to express any view on whether the

Home Secretary, in fact, did any of the things she was alleged to have done nor as to what sanctions, if any, would be appropriate. Those, the claimant accepts, would be matters for the Prime Minister if it succeeds in its claim and if the Prime Minister decides to re-open the matter.

3. The defendant contends first, that decisions of the Prime Minister concerning compliance with the Ministerial Code are not justiciable, that is they raise matters not suitable for adjudication by a court. Secondly, the defendant contends that the statement announcing the Prime Minister's decision, read properly, does not demonstrate the misinterpretation of the Ministerial Code alleged by the claimant.

THE MINISTERIAL CODE

The Emergence of the Code

4. Ministers of the Crown are appointed by Her Majesty the Queen on the advice of the Prime Minister. They hold office at the pleasure of Her Majesty. They are not employees and the terms of their office are not governed by contract. Removal of a minister from office is a matter for the Queen acting on the advice of her Prime Minister.

5. Written guidance to ministers of the Crown on the standards of conduct expected of them in the discharge of their ministerial duties was issued by Prime Minister Attlee in 1945. At that stage, two documents were produced one entitled "Cabinet Procedure" and one " Questions of Procedure." They drew on a document issued in 1917 by the then Cabinet Secretary entitled "The War Cabinet: Rules of Procedure". In 1946, Prime Minister Attlee re-issued the guidance as a single document entitled "Questions of Procedure for Ministers". Subsequent Prime Ministers have issued revised versions. The document was first published in 1992 by the then Prime Minister Sir John Major, and all subsequent versions have been published. In 1997, the then Prime Minister, Mr Blair, issued revised guidance entitled the "Ministerial Code: A code of conduct and guidance on procedures for Ministers". Subsequent versions of the Ministerial Code have been issued by subsequent Prime Ministers.

Amendments dealing with harassment, bullying and discriminatory behaviour

6. In January 2018, the then Prime Minister, Mrs May, re-issued the Ministerial Code. This version included, for the first time, guidance relating to harassment, bullying and discrimination. In her foreword to the Ministerial Code, the then Prime Minister wrote:

> "This Code sets out the standards of behaviour expected from all those who serve in Government. The values it promotes should underpin our conduct as we tackle the challenges of our times and seek to build that fairer Britain, a country of genuine opportunity for all where everyone plays by the same rules. 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."

7. The Ministerial Code itself was amended to include the following new paragraph.

> **"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."**

The Current Code

8. The present Ministerial Code was issued by the Prime Minister, Mr Johnson, in 2019. It is divided into ten sections entitled (1) Ministers of the Crown; (2) Ministers and 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; and (10) Travel by Ministers. There are two annexes. Annex A sets out the seven principles of public life identified by the Committee on Standards in Public Life ("the Committee") appointed in 1994 by Sir John Major and chaired by Lord Nolan. Annex B deals with business appointment rules for former ministers.

9. The Prime Minister wrote a foreword to the 2019 Ministerial Code. The foreword primarily focuses on the Prime Minister's view of the mission of the government. The Prime Minister also said this:

> "To fulfil this mission, and win back the trust of the British people, we must uphold the highest standards of propriety – and this code sets out how we must do so.
>
> There must be no bullying and no harassment; no leaking; no breach of collective responsibility…."

10. For present purposes, the material parts are contained in section 1. It is necessary to set that section out in full.

> "**1 MINISTERS OF THE CROWN**
>
> **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.

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. They are expected to observe the *Seven Principles of Public Life* set out at Annex A, and the following principles of Ministerial conduct:

a. The principle of collective responsibility applies to all Government Ministers;

b. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;

c. It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;

d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the *Freedom of Information Act 2000*;

e. Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the *Civil Service Code*;

f. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;

g. Ministers should not accept any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation;

h. Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;

i. Ministers must not use government resources for Party political purposes; and

j. Ministers must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way which

would conflict with the *Civil Service Code* as set out in the *Constitutional Reform and Governance Act 2010*.

1.4 It is not the role of the Cabinet Secretary or other officials to enforce the Code. If there is an allegation about a breach of the Code, and the Prime Minister, having consulted the Cabinet Secretary, feels that it warrants further investigation, he may ask the Cabinet Office to investigate the facts of the case and/or refer the matter to the independent adviser on Ministers' interests.

1.5 The Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations. It applies to all members of the Government and covers Parliamentary Private Secretaries in paragraphs 3.7 – 3.12.

1.6 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct to Parliament and the public. However, Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.

1.7 Ministers must also comply at all times with the requirements which Parliament itself has laid down in relation to the accountability and responsibility of Ministers. For Ministers in the Commons, these are set by the Resolution carried on 19 March 1997 (*Official Report* columns 1046-47), the terms of which are repeated at b. to e. above. For Ministers in the Lords, the Resolution can be found in the *Official Report* of 20 March 1997 column 1057. Ministers must also comply with the Codes of Conduct for their respective Houses and also any requirements placed on them by the Independent Parliamentary Standards Authority."

11. Paragraphs 1.1 and 1.2. are in bold in the published text. The words "General Principle" appear against paragraph 1.1. Paragraph 1.2 first appeared in the version of the Ministerial Code issued by Prime Minister May. Paragraph 1.4 was amended in the version issued by Prime Minister Johnson to provide that the Prime Minister "may ask the Cabinet Office to investigate the facts of the case". Previously paragraph 1.4 provided only for consultation with the Cabinet Secretary and for the Prime Minister to refer a matter for independent advice.

12. Prior to 1997, the Ministerial Code stated that it was for ministers to judge how best to act in order to uphold the applicable standards of conduct. The First Report of the Committee noted that ministers did not make such judgements in isolation and that, to remain in office, they needed to retain the confidence of the Prime Minster. In matters of conduct, the Committee noted, that would involve the Prime Minister's own judgement of the ethics of the situation. To that end, the Committee made the following recommendation:

> **"We recommend that the first paragraph of the Questions for Procedure for Ministers should be amended to say: "It will be for individual Ministers to judge how best to act in order to uphold the highest standards. It will be for the Prime Minister to determine whether or not they have done so in any particular circumstance."**

13. That recommendation was accepted and a revised Ministerial Code with appropriate amendments issued. The present version is contained in paragraph 1.6 of the Ministerial Code.

THE FACTUAL BACKGROUND

The Making of Allegations

14. On 29 February 2020, the then Permanent Secretary to the Home Office resigned. He made a public statement in which he stated that he intended to issue legal proceedings against the Home Office claiming that he had been constructively dismissed and that the dismissal was unfair. He gave brief details of the circumstances which he said gave rise to his complaint of unfair dismissal. In addition, he referred to the fact that he had received allegations of inappropriate conduct on the part of the Home Secretary towards officials within her department.

15. This court has not been provided with details of the allegations made, although it is possible from the evidence to form an idea of some of the allegations. In particular, it appears that allegations were made of the Home Secretary shouting and swearing at officials. We do not have any details of those allegations (for example, the number of occasions on which this was said to have happened, the number of staff said to be involved, or the words allegedly used).

The Investigation

16. In accordance with paragraph 1.6 of the Ministerial Code, the Prime Minister asked the Cabinet Office to establish the facts. We understand that the Cabinet Office prepared a report dated 30 July 2020 indicating what evidence had been received and what facts had been established. We have not been provided with a copy of the Cabinet Office report. The Prime Minister was not provided with a copy of the report. We were, however, told by counsel during the hearing and in a note following the hearing that a section of the report (said to contain the findings of the Cabinet Office) was provided to the Prime Minister as an annex to a submission made by the Cabinet Secretary on 31 July 2020. Neither that section of the report nor the submission itself were provided again to the Prime Minister when he took his decision on 18 November 2020 on what, if any, action to take in light of the allegations that had been made.

17. The Prime Minister also sought advice from Sir Alex Allan, the independent adviser on ministers' interests. The Prime Minister was provided with a copy of that advice. This was the only document placed before the Prime Minister when he took his decision in November 2020. The advice is in evidence before us. It reads, in full, as follows:

> "The Ministerial Code says "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." 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. The evidence is that this has manifested itself in forceful expression, including some occasions of shouting and swearing. This may not be 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 issues that she could otherwise have addressed.

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 no 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."

The Prime Minister's Conclusions

18. The Prime Minister's conclusions are contained in a document entitled Government Statement. It says, in full, the following.

> "Government Statement
>
> The Prime Minister has taken advice from his Independent Adviser, Sir Alex Allan, in relation to the allegations made earlier this year around the Home Secretary's conduct. The Prime Minister takes this issue very seriously and recognises that it is always difficult for individuals to come forward and raise concerns and is grateful to those who have done so. The Prime Minister is grateful to Sir Alex for his advice and has considered his conclusions carefully.
>
> It was clear from Sir Alex's advice that at times there have been difficult working relationships all round. 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 has 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.
>
> 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.
>
> The Prime Minister has full confidence in the Home Secretary and considers this matter now closed. He is grateful to the thousands of civil servants working extremely hard to support delivery of the Government's priorities."

Additional Matters

19. There is a Home Office Grievance Resolution Policy and Procedure ("the grievance procedure"). The process and principles in that document are described as non-

contractual but the grievance procedure states that they must be followed to ensure that the principles laid down by the Advisory, Conciliation and Arbitration Service in the statutory code of practice are followed. The purpose of the grievance procedure is said to be to enable concerns and grievances to be resolved at an early stage and wherever possible informally. It encompasses grievances involving allegations of bullying, harassment and discrimination. It envisages that complaints may be made not only against employees in the Home Office but also against ministers and special advisers. On the evidence before this court, no action was taken by anyone within the Home Office to deal with any of the allegations as concerns to be addressed in accordance with the informal procedure set out in the grievance procedure and no grievance was formally notified by a member of staff in relation to the allegations about the Home Secretary's conduct. The allegations were considered only within the context of the Ministerial Code.

THE CLAIM

20. The claimant brought a claim for judicial review challenging the decision of the Prime Minister that the conduct of the Home Secretary did not breach paragraph 1.2 of the Ministerial Code.

21. The basis of the claim is that, in the course of reaching his decision, the Prime Minister misinterpreted paragraph 1.2 of the Ministerial Code in that he considered that in order for conduct to constitute "bullying" for the purposes of that paragraph a person must be aware that their actions were upsetting or intimidating. That error was described in the claim form as a misinterpretation or misapplication of paragraph 1.2 of the Ministerial Code.

22. The remedy sought was a "declaration that the Prime Minister misinterpreted the term bullying in the Ministerial Code" although there was also a reference to such other relief as may be appropriate to ensure that the unlawful conduct was rectified. The claim form expressly states that the court was not being asked 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 as those were matters for the Prime Minister.

23. Permission was granted by Linden J. following an oral hearing to advance that single ground of claim. Permission was refused to bring a claim on a second ground, relating to a second decision, namely a decision not to amend the Ministerial Code.

24. Prior to the hearing, the parties agreed that there were two issues for determination, namely,

    (1) Is the claim justiciable?; and

    (2) Did the defendant misdirect himself as to the meaning of the word "bullying" in paragraph 1.2 of the Ministerial Code?

THE FIRST ISSUE – JUSTICIABILITY

Submissions

25. Mr Hickman Q.C. for the claimant submitted that the issue was whether the particular issue in question was justiciable. Here the issue was the proper meaning of harassment, bullying and discrimination within paragraph 1.2 of the Ministerial Code. It was necessary to consider the subject-matter of that claim, not the source of the Ministerial Code. The words in issue were not, by their nature, non-justiciable in the sense that a court could not interpret the words. Indeed, the same words were used in the context of grievance and discipline policies and would be capable of interpretation by a tribunal or court. Further, the fact that the Prime Minister was the ultimate arbiter of whether a breach had occurred did not mean that he was entitled to give the words used any meaning he chose. The words used in paragraph 1.2 of the Ministerial Code had to be interpreted objectively, as was the case with any other statement of policy. In particular, they were a reference to an external standard fixing the appropriate standard of conduct within the workplace.

26. Mr Hickman relied upon a series of cases to that effect, including the observations of Lord Steyn at paragraph 24 of his judgment in *In re McFarland* [2004] 1 WLR 1289. Lord Steyn dissented on the issue of what was the proper meaning of the policy in issue but his observation that the process was one of interpretation to "be approached objectively and without speculation as to what a particular minister had in mind" has been approved as correct: see the judgment of Bean LJ, with whom Males and Simler LJJ agreed, in *R (Bloomsbury Institute Limited) v Office for Students* [2020] EWCA Civ 1074 at paragraph 56. Mr Hickman relied upon a number of authorities confirming that approach. In particular, Mr Hickman relied upon the decision of the Court of Appeal in *R (Gulf Centre for Human Rights) v The Prime Minister and the Chancellor of the Duchy of Lancaster* [2018] EWCA Civ 1855 where the Court of Appeal considered the meaning of an amendment made in 2015 to paragraph 1.2 (now 1.3) of the Ministerial Code. It had previously stated that ministers were under an overarching duty to comply with the law including international law and treaty obligations. In the version issued in 2015, it referred simply to the duty to comply with the law. The Court of Appeal were able to determine the meaning of the opening sentence of paragraph 1.2 of both versions of the Ministerial Code and concluded that the change was not one of substance as it referenced existing duties outside the Ministerial Code and "the law" included international law and treaty obligations. Further, the fact that the Prime Minister could amend the provisions in the Ministerial Code did not alter the meaning to be given to the words used until they were changed: see *R (Adath Yisroel Burial Society) v Inner North London Coroner* [2018] EWHC 969 (Admin), [2019] QB 251 at paragraph 46.

27. Mr Hickman submitted that the Supreme Court had identified the two categories of cases which were, generally, unsuitable for judicial determination in *Shergill v Khaira* [2015] UKSC 33, [2015] AC 350 at paragraphs 46 to 48. One concerned issues beyond the constitutional competence assigned to the courts under the conception of the separation of powers forming part of the constitutional framework of the United Kingdom. The second concerned issues which did not involve any issue of private legal right or any reviewable matter of public law. Mr Hickman submitted that the interpretation of the phrase used in paragraph 1.2 of the Ministerial Code did not involve either of those situations. The interpretation of the relevant words did not undermine the separation of powers. The proper meaning of the words in paragraph 1.2 of the Ministerial Code did raise a reviewable matter of public law. The public, and

civil servants in particular, were entitled to ensure that the Ministerial Code was being correctly interpreted.

28. Sir James Eadie Q.C, with Ms Ivimy, Mr Knight and Mr Pobjoy, for the Prime Minister, submitted first that it was important to understand the context in which the Ministerial Code was issued and its nature. The Ministerial Code was concerned with the appointment, conduct and removal of ministers. There was no underlying legal right conferred by the Ministerial Code. There was no legal right to be appointed to ministerial office and removal from office depended upon whether the individual minister retained the confidence of the Prime Minister. There were no legal controls over the judgement of the Prime Minister on those issues. The Ministerial Code was not issued pursuant to any statutory power. It was not a policy governing the exercise of a discretion. There was no legal obligation to have a Ministerial Code at all. The Ministerial Code was a political document issued in a political context. It did not set legal standards enforceable by a court and did not impose any legal obligations on the Prime Minister in relation to its interpretation. It simply fixed the standards against which a minister's ability to remain in office would be judged by the Prime Minister. That was further reflected in the fact that large parts of the Ministerial Code dealt with matters that were inherently non-justiciable, such as the convention of collective Cabinet responsibility for decisions or relations between ministers and Parliament. Further, many of the concepts, and the language used to describe them, were set at a high level of generality reflecting the essential political quality of the document and the absence of any intention that it be enforceable in the courts.

29. Sir James submitted that issues concerning the interpretation of the Ministerial Code, properly understood in that context, did not create private law rights and did not give rise to reviewable matters of public law within the second category identified in *Shergill v Khaira*. In any event, the observations of the Supreme Court in that case were not intended to be, and were not, an exhaustive analysis of the matters that were not justiciable. Issues arising out of the Ministerial Code were political, not legal, and were not justiciable in the courts. That approach also accorded with the description of the scope of judicial review given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at pages 408E to 409D. Sir James submitted that the decision in *the Gulf Centre for Human Rights* case did not assist. There, conditional or limited permission to appeal had been granted, that is permission was granted only in so far as the appellant could show that the later version of the Ministerial Code had a different meaning from the 2010 version. The Court, therefore, dealt (pragmatically) with the appeal on the basis upon which leave had been granted and considered whether the paragraph of the Ministerial Code in issue bore different meanings in the 2010 and 2015 versions. The written submissions on behalf of the Prime Minister had raised justiciability, but the Court of Appeal did not, and was not asked to, address the question of whether the interpretation of provisions in the Ministerial Code itself was justiciable.

30. In summary, therefore, Sir James submitted that the claim was non-justiciable in the court as it sought to bring a challenge to a political document, and a political decision, in circumstances in which no legal right, obligation or power was in issue.

Discussion and conclusion

Preliminary Observations

31. The concept of justiciability concerns the question of whether a dispute is suitable for and capable of judicial determination. There are certain disputes, or more accurately certain issues, which do not raise a legal question upon which the courts can properly adjudicate.

32. The question of whether an issue is non-justiciable is, ultimately, to be determined by legal principles or rules setting the proper limits for the involvement of the court in the determination of a dispute. It is not a question of discretion for the courts: see the observations of Maurice Kay J and Richards J (as they then were) in *R (Campaign for Nuclear Disarmament) v Prime Minister* [2020] EWHC 2777 (Admin) at paragraphs 50 and 60; and of Pill LJ and Cranston J in *R (Al Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) at [34] and [53]. There are other discretionary reasons why a court may not deal with a dispute or may refuse to grant a remedy. These include matters such as the existence of an alternative remedy or the fact that the claim has become academic as between the parties (although the courts retain a discretion to deal with the issue in exceptional circumstances). In other instances, a claimant is seeking an advisory declaration, that is a declaration, granted in the abstract, as to the meaning of a provision in a statute or other instrument. In many ways, the claim here is for an advisory declaration, that is a declaration as to the meaning of a sentence in paragraph 1.2 of the Ministerial Code. Courts are now recognised as having jurisdiction, in exceptional circumstances, to grant an advisory declaration. There may be a number of reasons, however, why they may decline to do so, not least the fact that, generally, it is preferable to consider questions of interpretation against a background of actual, rather than hypothetical or assumed facts.

33. In the present case, the objection of the defendant is that the claim for a declaration relating to the meaning of a sentence in the Ministerial Code raises a non-justiciable issue, that is, an issue which is not suitable for judicial determination. The first question, therefore, is whether that is the case.

The Approach to Determining Justiciability

34. The subject-matter of a dispute may render it inherently unsuitable for determination by a court applying rules of law. There are a variety of situations where issues in dispute are not ones suitable, or capable, of being resolved by a court as part of legal proceedings. Certain disputes raise issues recognised, under our conception of the separation of powers, as lying beyond the constitutional competence assigned to the courts, such as the actions of the executive in matters affecting relations with foreign states. Cases in this category are rare: *Shergill v Khaira* [2015] AC 359 at paragraph 42. Certain disputes would involve questioning activities within Parliament. The courts have always recognised that such matters are exclusively matters for Parliament and are not justiciable in a court of law: see, e.g. *R (Wheeler) v Office of the Prime Minister and others* [2009] EWHC 1409 (Admin) at paragraphs 46 to 49, and *R (McClean) v First Secretary of State and the Attorney General* [2017] EWHC 3174 (Admin) at paragraph 22. Other issues are recognised as raising purely political issues not susceptible of resolution by courts. We would include within this category the appointment or dismissal of a minister, or the decision of the Prime Minister to retain a minister in office. There are no judicial standards by which such purely political decisions can be judged. Lord Roskill expressed the view, obiter, that the appointment of ministers would not give rise to a justiciable issue in *Council of Civil Service Unions v Minister for the Civil Service* at page 418B-C. The range of situations which give rise

to a non-justiciable issue is varied and the above is intended to give examples of, not an exhaustive description, of situations giving rise to non-justiciable issues.

35. It is also useful to bear in mind that the courts have on occasions recognised that certain aspects of a decision may give rise to a non-justiciable issue but other aspects of that decision may give rise to a justiciable issue.

36. A general description of the operation of the non-justiciability principle (again, not an exhaustive analysis) is contained in the judgment of Lord Neuberger PSC, Lord Sumption JSC and Lord Hodge JSC, with whom the other members of the Court agreed) in *Shergill v Khaira* at paragraphs 41 to 43 in the following terms.

> "41. There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases generally fall into one of two categories.
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> 42. The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms . The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 935–937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. The second is based on the constitutional limits of the court's competence as against that of Parliament: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. The distinctive feature of all these cases is that once the forbidden area is identified, the court

> may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2001] 1 AC 395.
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> 43. The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] AC 1356, para 8, there are
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> > "issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude."

The Present Case

37. The issue raised in the present case is the proper interpretation of the words "Harassing, bullying or other inappropriate or discriminating behaviour" in paragraph 1.2 of the Ministerial Code. More particularly, it is said that those words must be given an objective meaning, and that offensive conduct which otherwise falls within the definition of bullying would not cease to be bullying because the perpetrator was

unaware of, or did not intend to cause, upset. It is said that the Prime Minister mis-directed himself when deciding that there had been no breach of the Ministerial Code.

38. As a starting point, the words "harassment", "bullying" and "discriminating behaviour" are capable of being interpreted by a court. A court could, in principle, determine whether the wording in the Ministerial Code was intended to refer to a standard of conduct or behaviour applicable in civil service workplaces generally, and whether such conduct or behaviour would include certain types of offensive behaviour such as swearing or shouting at others. Furthermore, the subject-matter – the applicable standards of workplace conduct and behaviour – is such that a court or tribunal could determine, in an appropriate case, what was meant by the relevant words. By way of example, the same phrase involving similar subject matter and included in a departmental grievance procedure or discipline policy could be adjudicated upon by a court or tribunal in an appropriate case. Again, by way of example, if a court determined that on a proper interpretation the reference to "harassment" in the Ministerial Code was intended to be understood by reference to section 26 of the Equality Act 2010 ("the 2010 Act"), the courts could, in an appropriate case, rule on whether an interpretation which did not include sexual harassment was consistent with the words set out in the current version of the Ministerial Code. Similarly, the courts could rule on whether an interpretation of "bullying" which limited it to physical but not verbal aggression was consistent with the words as currently set out in the Ministerial Code. In principle, therefore, we consider that the question of whether the Ministerial Code in its present form excludes offensive conduct from the definition of bullying in paragraph 1.2 if the perpetrator was unaware of, or did not intend, the harm caused is justiciable.

39. We turn then to the particular reasons why it is said that the interpretation of those words is not justiciable. We accept that the Ministerial Code has no statutory basis but that of itself is not conclusive. We accept that the interpretation of parts, perhaps most, of the provisions of the Ministerial Code would not be justiciable because they involve political matters (such as references to collective Cabinet responsibility) or ministerial relations with Parliament. Such matters are intended to be subject to the judgement of the Prime Minister not the courts. But it does not follow that all parts of the Ministerial Code should be treated as non-justiciable. Such an approach would be inconsistent with the need to focus not on the source but on the particular subject-matter.

40. We do not consider that the third sentence of paragraph 1.2 of the Ministerial Code is of such a nature. We reject Sir James's submission that the reference in the opening two sentences of paragraph 1.2 to concepts such as "consideration and respect" show the third sentence is non-justiciable. The opening two sentences of that paragraph set the context for the third sentence. The statement that "Harassing, bullying or other inappropriate or discriminating behaviour" is not consistent with the Ministerial Code "and will not be tolerated" is a clear statement of the standards to be expected within the workplace. That is reinforced by the foreword to the 2018 version of the Ministerial Code where these words first appeared. That foreword, too, forms part of the context for assessing the relevant words in paragraph 1.2. The then Prime Minister said that Parliament and Whitehall are "places of work too, and exactly the same standards and norms should govern them as govern any other workplace".

41. We accept that certain decisions – such as the decision to dismiss or retain a minister in office – would not be justiciable. We do not, however, accept the submission of the defendant that the sole purpose of the Ministerial Code is to determine the standards

that ministers must meet in order to retain the confidence of the Prime Minister. The Ministerial Code prescribes the standards that ministers are expected to comply with. As it says in paragraphs 1.5 and 1.6 in the present version, it gives guidance to ministers on how they should act and arrange their affairs. Ministers are personally responsible for deciding how to act and how to conduct themselves in the light of the Ministerial Code and for justifying their actions including to the public. As such, the Ministerial Code does more than simply describe circumstances in which the Prime Minister may cease to have confidence in a minister. Indeed, while the fact that a minister only holds office if the Prime Minister continues to have confidence in him or her has always been the context in which the Prime Minister issued the Ministerial Code, it was only in 1997 that that fact was explicitly included in the way now provided for in the final sentence of paragraph 1.6 of the current version of the Ministerial Code.

42. We recognise that in certain instances, a dispute about the interpretation of something in the Ministerial Code may be so closely connected with a decision to dismiss or retain a minister that it may not be possible to separate out the issue of interpretation from the position of the minister. In those circumstances, the dispute may not be justiciable. But that is not this case. This case concerns the question of whether the Prime Minister has mis-interpreted the Ministerial Code by interpreting the words in paragraph 1.2 as not including conduct which is offensive where the perpetrator was unaware of, or did not intend to cause, upset or offence. We are satisfied that that particular issue is justiciable.

43. We also recognise that there might be other reasons why as a matter of discretion a court would decline to entertain a claim. It may, for example, be that the remedy sought – essentially an advisory declaration – in circumstances where the facts are not known or not clear would be inappropriate. But the first issue concerns a different, discrete and narrower issue, that is whether as a matter of law, this particular claim is not justiciable. For the reasons given, we consider that this particular claim is justiciable.

THE SECOND ISSUE – THE PROPER INTERPRETATION OF PARAGRAPH 1.2 OF THE MINISTERIAL CODE

44. The second issue concerns two discrete questions: first, the meaning of the word "bullying" in paragraph 1.2 of the Ministerial Code and secondly, whether the Prime Minister misdirected himself as to the meaning of the Ministerial Code when considering the allegations against the Home Secretary.

Submissions

45. Mr Hickman submitted that, on a proper interpretation of paragraph 1.2 of the Ministerial Code, the reference to harassment, bullying and discrimination is a reference to concepts external to the Ministerial Code itself. Harassment is defined in section 26 of the 2010 Act. Discrimination is defined in Part 2 of the 2010 Act. "Bullying" in the context of paragraph 1.2 was a reference to the Government's workplace policies, embodied primarily in the Civil Service Human Resources Policy contained in the document entitled "Bullying, Harassment and Discrimination A Gateway Guide for Leaders and Managers" ("the Guide") issued initially in 2017. The expectation was that all departments would adopt the model definition of bullying, harassment and discrimination in the Guide. That did not include any requirement that conduct capable of being bullying (offensive, intimidating, malicious or insulting behaviour, or abuse or misuse of power in a way that undermined, humiliated,

denigrated or injured the recipient) required that the perpetrator be aware of, or intend, the harm caused.

46. Mr Hickman submitted that the Prime Minister must have misdirected himself. The government statement recorded the advice of Sir Alex Allan that the Home Secretary's approach had on occasions amounted to behaviour that can be described as bullying in terms of the impact felt by individuals. Yet, the Prime Minister decided that the "Ministerial Code was not breached". The only reasonable inference was that the Prime Minister thought that conduct which would otherwise fall within the definition of bullying did not do so because the Home Secretary was unaware at the time of the impact that her behaviour had had. That was to misinterpret the word "bullying" in the Ministerial Code. Mr Hickman submitted that the Court should therefore grant a declaration that the Prime Minister had misdirected himself. He did not seek to quash the decision of the Prime Minister. He did not ask the Court to express a view on whether the Home Secretary had committed the alleged actions nor what sanction, if any, was appropriate. It would, he submitted, be for the Prime Minister to decide what course of action to take in the light of any declaration granted.

47. Sir James Eadie submitted that "bullying" as it appeared in the Ministerial Code was not a reference to, or an incorporation of, standards defined in workplace terms and conditions, or departmental policies or the law. Rights or obligations relating to workplace standards would be governed by the terms and conditions of service in any given case, and any obligations imposed by statute. Individual civil servants retained those rights and could enforce them including, in appropriate circumstances, by bringing a grievance under any relevant departmental policy. The function of paragraph 1.2 of the Ministerial Code was not to protect workplace standards across government. Rather it set standards by which a minister's personal conduct would be judged. Furthermore, there was no one recognised definition of "bullying" in departmental policies. The Gateway did not expressly state whether intention was required before conduct could be described as bullying.

48. Sir James submitted that, in any event, there was no basis for inferring or concluding that the Prime Minister had misdirected himself. Rather, the Prime Minister had considered the advice of Sir Alex and he had further considered all the circumstances of the case. Those included the fact that concerns were not raised at the time, the Home Secretary was unaware of the impact her behaviour had had and regretted the upset caused, and that relationships, practices and culture in the Home Office were much improved. In the light of all those circumstances, the Prime Minister judged that the Ministerial Code was not breached. That was not based on any view that, as the conduct was unintentional, it did not fall within the concept of bullying and therefore there was no breach. Rather it was a statement, properly understood, that whatever behaviour might have occurred, the circumstances viewed as a whole did not warrant a formal finding that there had been a breach of the Code, or, alternatively, that the circumstances as a whole did not undermine the confidence of the Prime Minister in the Home Secretary and so dismissal would not be appropriate.

Discussion

49. First, in providing that harassment, bullying and discrimination was not consistent with the Ministerial Code and was not to be tolerated, the Ministerial Code was, viewed objectively, intending to set a standard of behaviour for ministers in respect of their

treatment of civil servants among others. That appears from the wording and the subject-matter of paragraph 1.2 of the Ministerial Code. The context is that ministers should be professional in their dealings with those with whom they come into contact. "Working relationships" had to be proper and appropriate. It was in that context that harassment, bullying and discriminating behaviour was said not be consistent with the Ministerial Code and would not be tolerated. Furthermore, it is appropriate to have regard to the foreword written by the then Prime Minister when she first included those provisions in the Ministerial Code. The then Prime Minister recognised that Parliament and Whitehall were "places of work" and "exactly the same standards and norms should govern them as govern any other workplace". The present Prime Minister put it more pithily in the present version of the Ministerial Code when he said, "There must be no bullying and no harassment."

50. Secondly, there is within the different departmental policies and documents in evidence before us, a broad consensus that conduct will fall within the description of "bullying" if it can be characterised as (1) offensive, intimidating, malicious or insulting behaviour or (2) abuse or misuse of power in ways that undermine, humiliate, denigrate or injure the recipient. That is provided for in the Guide which sets the standards that government departments are expected to follow. The definition reflects that used by the Arbitration, Conciliation and Advisory Service. Furthermore, none of the departmental policies that we were shown expressly required that the person responsible for engaging in conduct falling within the first limb above had to be aware of, or intend, the harm or offence caused. Some did expressly say that it was not the intention of the perpetrator that was relevant rather it was the perception of the individual who was the subject of the conduct which mattered. Conduct may fall within the first limb of the definition, and so constitute bullying (within the meaning of paragraph 1.2 of the Ministerial Code) whether or not the perpetrator is aware or intends, that the conduct is offensive, intimidating, malicious or insulting.

51. There are some policies which, in relation to the second limb, refer to the abuse or misuse of power being intended to undermine, humiliate, denigrate or injure the recipient. That is in truth a reflection of that type of conduct. An example discussed in argument was a decision to take away some of a particular civil servant's responsibilities or duties. That may be a legitimate management choice. It may, however, be done with the aim (or, expressed differently, the intention) of denigrating or humiliating the person concerned. Only in the latter case would that type of conduct be regarded as bullying and so within paragraph 1.2 of the Ministerial Code.

52. In the present case, so far as can be discerned from the evidence, the allegations appear to be allegations of swearing and shouting at civil servants. They would appear to be allegations of conduct which fell within the first limb of the definition. But in any event, the critical factor is that the advice of Sir Alex was that the evidence was that the Home Secretary's frustration at the lack of responsiveness of the Home Office leadership had manifested itself in forceful expression including some occasions of shouting and swearing. Sir Alex considered that that conduct would fall within the definition of bullying adopted by the Civil Service. He concluded that the Home Secretary's approach had on occasions amounted to behaviour that could be described as bullying in terms of the impact felt by individuals. The question is whether the Prime Minister reached his conclusion that there had been no breach of the Ministerial Code because he took a different view and considered that unless the perpetrator of the conduct was

aware of, or intended, the harm or offence caused it would not amount to conduct falling within the description of bullying in paragraph 1.2 of the Ministerial Code. That, in turn, depends on a fair reading of the statement as a whole, bearing in mind the context.

53. In terms of context, it is relevant to bear in mind that the Ministerial Code describes the standards to be expected of ministers. It contemplates that ministers will arrange their affairs in a way that accords with those standards and they are responsible for justifying their conduct to Parliament and the public. They retain office only so long as they retain the confidence of the Prime Minister and he is the ultimate judge of whether ministers have met the standards of behaviour expected of them and the appropriate consequences in cases involving a failure to adhere to those standards. It is not the role of the Cabinet Secretary or other officials to enforce the Ministerial Code. See paragraphs 1.4 and 1.6 of the Ministerial Code.

54. The Ministerial Code is therefore different from the departmental policies, or workplace policies, governing the behaviour of employees. Typically, workplace policies concerning conduct as between employees will include a grievance policy and a disciplinary policy. As well as providing a definition of unacceptable behaviour, they will, usually, be structured to take account of a wide range of factors including the nature and seriousness of the conduct, the reasons, understanding and intentions of the alleged perpetrator, questions of mitigation including expressions of regret or apologies, and the ability to ensure proper work practices in future. Such considerations may be relevant to the way in which a grievance is dealt with, for example, informally, by management action, mediation or resort to a formal disciplinary process. Disciplinary policies typically take such matters into account in various ways, for example, by defining certain conduct to be minor, serious or gross misconduct or in providing for a range of sanctions. The language and structure of the Ministerial Code does not reflect that ability to consider all relevant matters in deciding how to deal with conduct which falls within the description in paragraph 1.2. Against that background, we turn to consider the government statement to determine whether the Prime Minister did misdirect himself as to the meaning to be given to bullying in paragraph 1.2 of the Ministerial Code.

55. The statement confirms in the first paragraph that the Prime Minister has taken advice from Sir Alex Allan and he had considered Sir Alex's conclusions carefully. The second paragraph summarises, in effect, the advice given by Sir Alex. It noted the advice that there had been difficult working relationships all round in the Home Office and that the Home Secretary had become frustrated, in many instances justifiably, by the lack of responsiveness in the Home Office (and in a different department in which she had served three years ago). He noted that Sir Alex had found that the Home Secretary had not always treated her civil servants with the consideration and respect that would be expected and that her conduct could be described as bullying in terms of the impact felt by individuals. The statement notes in the third paragraph that Sir Alex had advised that the Home Secretary had not consistently met the high standards required of her under the Ministerial Code.

56. In the fourth paragraph, the statement goes on to note that many of the concerns had not been raised at the time and that the Home Secretary was unaware of the impact that she had. It said that the Prime Minister was re-assured that the Home Secretary was sorry for inadvertently upsetting those with whom she is working. It said that the Prime

Minister was also re-assured that relationships, practice and culture in the Home Office were much improved.

57. It is at that stage that the statement says that as "the ultimate arbiter of the code" and having considered Sir Alex's advice "and weighing up all the factors" the Prime Minister's judgment was that the Ministerial Code was not breached. The next paragraph goes on to note that the Prime Minister had full confidence in the Home Secretary. That of course would be relevant to dismissal: if the Prime Minister did not have full confidence in the Home Secretary the expectation, perhaps the implication, is that she would not have remained in office.

58. Viewing the statement as a whole and in context, the Prime Minister either accepted that aspects of the conduct of the Home Secretary could be described as bullying, or, at least, did not form a concluded view on that question. The statement did not expressly state any disagreement with what Sir Alex is recorded as having found, that is that her approach on occasions could be described as bullying.

59. The fourth paragraph of the statement then considers other matters. They include factors such as the Home Secretary's understanding of her behaviour (she was unaware of the upset that she had caused) and the fact that she was sorry for inadvertently upsetting those with whom she worked. Those are matters which put the conduct into context. They are not expressed as matters which negate the finding of Sir Alex that the conduct could be described as bullying. That is also clear from the fact that the statement then refers to the fact that relationships and practices have improved. That is looking to the current and likely future state of working relationships within the Home Office. Those factors are not used to suggest that conduct could not amount to bullying if the person concerned had been unaware of, or had not intended, the harm or offence caused. They are also expressed to be matters that give the Prime Minister reassurance not as matters causing him to doubt the accuracy of Sir Alex's findings. In that context, the statement that the Prime Minister's judgement was that the Ministerial Code was not breached is not therefore a finding that the conduct could not be described as bullying. Rather, it is either a statement that the Prime Minister does not consider, looking at all the factors involved, that it would be right to record that the Ministerial Code had been breached, or alternatively, that the conduct did not in all the circumstances warrant a sanction such as dismissal as it did not cause the Prime Minister to lose confidence in the minister. It is not necessary to express a view as to whether that state of affairs is aptly described by saying that the Ministerial Code was not breached. The question for this court is whether the Prime Minister proceeded on the basis that conduct would not fall within the description of bullying within paragraph 1.2 of the Ministerial Code if the person concerned was unaware of, or did not intend, the harm or offence caused. Reading the statement as a whole, and in context, we do not consider that the Prime Minister misdirected himself in that way.

60. For completeness, we note that that view is reinforced by, but not dependent on, the reference to the Prime Minister being the "arbiter of the code". That is not intended to mean that it is for the Prime Minister to give any interpretation he chooses to the words used in the Ministerial Code. It reflects the fact that, ultimately, the Ministerial Code sets the standards that the Prime Minister expects of ministers and it is for the Prime Minister to determine, ultimately, whether there has been such a departure from the standards expected of ministers that he can longer have confidence in them.

CONCLUSION

61. In considering the allegations in the present case, the Prime Minister did not proceed on the basis that conduct would not amount to bullying contrary to paragraph 1.2 of the Ministerial Code if the minister concerned was unaware of, or did not intend to cause, offence or harm. Consequently, there was no misdirection as alleged. For that reason, this claim is dismissed.