IN THE COURT OF APPEAL **Case No. 2016/1314**

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT) (MITTING J)

BETWEEN:-

R (GULF CENTRE FOR HUMAN RIGHTS)

Appellant

-and-

(1) THE PRIME MINISTER
(2) THE CHANCELLOR OF THE DUCHY OF LANCASTER

Respondents

RESPONDENTS' SKELETON ARGUMENT

Suggested reading list (time estimate 1 hour):

- JR Grounds
- Order of Cranston J
- Order of Mitting J and transcript of judgment
- Order of Arden LJ
- GCHR's Appeal Skeleton

A summary chronology of the relevant factual background and proceedings to date (with bundle references, including to the reading list above) is attached as an Annex to this Skeleton

Introduction

1. GCHR challenges the Order of Mitting J; and seeks permission to apply for judicial review.

1.1. In relation to Mitting J's Order, GCHR contends that he mischaracterised the significance of §1.2 of the Ministerial Code ("the Code"); wrongly held that a change from one lawful wording to another could not give rise to a judicial review with any prospect of success and wrongly concluded that changes to §1.2 did not give rise to an arguable challenge because the content of §1.2 did not give rise to a direct legal obligation.

1.2. The grounds on which judicial review are sought are that the decision to remove from §1.2 of the Code of the words (following the word "*law"*) "*including international law and treaty obligations"*[1] ("the Deletion") breached the principle of legality because it was taken in secret and without consultation; the decision to make the Deletion was irrational and the Code was amended for an improper purpose/in an improper manner.

2. Arden LJ rightly refused permission to appeal on the first ground of appeal. That is because, contrary to GCHR's submissions, Mitting J did not mischaracterise §1.2 of the Code. As he observed, and as Arden LJ upheld, §1.2 is simply a background statement against which the seven principles of public life should be read.

3. Arden LJ gave GCHR permission to appeal on the second and third grounds of appeal. However, she gave permission to appeal, *"**only** in so far as [GCHR] contends and is able to show that the new version of clause [1.2] of the Ministerial Code has a different meaning from that which the 2010 Code had… **I do not consider that the grounds of appeal are arguable if there is no change of substance in the two versions of the Code**"*(emphasis added). The threshold issue is thus whether the 2015 version of §1.2 of the Code means something substantively different from the 2010 version of §1.2. The answer to this question is "no", for the reasons at §§5-6 below. On that basis, and in accordance with the permission given by Arden LJ the second and third grounds of appeal are unarguable; and the appeal (and judicial review claim) should be dismissed.

4. The Respondents make supplementary submissions, which proceed on the premise that the 2015 version of §1.2 did make a substantive change to the 2010 version at §§8-10 below.

No substantive change in §1.2 of the 2015 Code

5. In its Appeal Skeleton, §2, GCHR contends that the effect of the Deletion was to change the meaning and effect of the Code. It is said that, *"ministers no longer owe an*

[1] See the Annex for the full text as it was and after revision.

obligation under the Code … to comply with international law and treaty obligations which do not themselves form part of domestic law." [2]

6. Three submissions are made on GCHR's contention that the nature of the change was substantive:

   6.1. The 2015 version of §1.2 simply refers to "*law*": it does not refer to "*English*" or "*domestic*" law. The Deletion is not to be taken, even as a matter of language, to imply a limitation to that effect.

   6.2. The Government has made clear, in three contemporaneous, public explanations, that the 2015 version of §1.2 did not change the obligation to comply with the law which existed in the 2010 version of §1.2.[3] The Deletion was made to clarify the Code and bring it in line with the Civil Service Code. See the statements in Hansard and by the Cabinet Office, respectively:

   - *"Neither Parliament nor courts are bound by international law, but a member of the Executive, including a Minister such as myself, is obliged to follow international law, whether it is reflected in the Ministerial Code or not. All Ministers will be aware of their obligations under the rule of law"*;[4]
   - *"The updated Code makes it clear that Ministers must abide by the law. The obligations on Ministers under the law, including international law, remain unchanged"*,[5] and
   - *"'Comply with the law' includes international law."*[6]

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[2] This part of GCHR's case contends that, whatever the true nature of the relevant part of the Code in either version, the revision to §1.2 effected a substantive change. The true nature and status of the Code is considered further below at §§8-9 below.

[3] Contrary to the assertion at §36(d) of GCHR's Appeal Skeleton there is no difference between these public explanations and the statement in the Respondents' Skeleton Argument for the Renewal Hearing, §4(a): *"the change in the Code continues to make clear the obligation of Ministers to comply with the law; which clearly includes, where relevant and applicable, international law."* It would be absurd if the obligation on Ministers was to comply with irrelevant and inapplicable international law.

[4] House of Lords Hansard 28 October 2015, Column 1170. This answer, by Lord Faulks (Minister of State, Ministry of Justice), was given in response to a question that expressly referred to the Deletion and continued, *"Will the Minister please give the House a categorical assurance that the amendment to the Ministerial Code will make absolutely no difference to Ministers' existing duty to comply with international law and treaty obligations?"*

[5] House of Lords Hansard 3 November 2015, Column 1522. This answer, by Lord Faulks, was given in response to a question asking why the Ministerial Code had been changed. Lord Faulks made clear in that session that the purpose of the Deletion was to clarify the Code.

[6] This statement, from the Cabinet Office, was reported in the Guardian on 22 October. The statement goes on to explain, *"The wording was amended to bring the code more in line with the civil service*

6.3. There is no merit in GCHR's attempt to impugn these public explanations. GCHR contends that there is *"serious reason"* to doubt these public explanations and that they *"cannot be squared"* with *"evidence"*.[7] This *"serious reason"* and *"evidence"* consists of (a) an allegation that Mr Cameron was irritated by the 2010 version of the §1.2 and (b) an inference sought to be drawn from a Conservative Party document regarding the European Court of Human Rights.[8] Neither touches the meaning of §1.2; or undermines the clear statements referred to above.

7. Since the Deletion made no substantive change to §1.2, GCHR's complaints regarding Mitting J's reasoning (in the second and third grounds of appeal) and regarding the decision to make the Deletion (i.e. all three grounds of judicial review) are unarguable. Thus, as Arden LJ observed, in relation to the second ground of appeal/irrationality and the third ground of judicial review/improper purpose respectively: "*The proposition that a change in wording with no change in meaning was irrational is unarguable"* and *"purpose is immaterial in the absence of any change in substance"* (both §2's in the Appendix to her Order). It is similarly unarguable that the Respondents should be obliged to consult prior to making such a non-substantive change or explain the Deletion beyond the public explanations already given.

Supplementary, alternative submissions even if there was a substantive change in §1.2

8. Three linked submissions are made on this premise. **First**, the Code may be described as an expression of Prime Ministerial policy. It (and §1.2) does not create legal obligations – it is not a source of law. Nor does it interfere with or alter existing legal rights and/or

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code." The Cabinet Office statement is referred to in the House of Commons Library Briefing Paper, 12.1.17, "The Ministerial Code and the Independent Adviser on Ministers' Interests". The Summary (p.3) states, *"The 2015 edition of the Ministerial Code, published by the Prime Minister David Cameron, had attracted some comment following its publication in October 2015, due to the removal of the explicit reference in the 2010 Code of Ministers' duty to "comply with the law including international law and treaty obligations." The 2015 Code stated instead that Ministers had a duty to "comply with the law". Concern was raised that this change may ease the pressure on Ministers to follow international law. However, the Cabinet Office indicated that the phrase "comply with the law" includes international law."*

[7] §§21; 22(c), GCHR's Appeal Skeleton.

[8] §22(a)-(b), GCHR's Appeal Skeleton.

obligations[9]. Nor does it attract public law obligations that may attach to Government policies – for example, to comply with it unless there is good reason not to do so. It is distinct in nature from such policies. As stated in §1.5 of the Code itself, it is the Prime Minister's guidance document to her Ministers setting out the principles underpinning the standards of conduct and behaviour expected of them in Government; whilst the Code is enforced by the Prime Minister it also provides the framework for Ministerial accountability to Parliament. As was observed at §4 in ***R (Hemming) v Prime Minister*** [2006] EWHC 2831: *"the Ministerial Code is a matter for enforcement in Parliament and is not amenable to judicial review."*[10] No doubt for these reasons, GCHR correctly accepts that the content of the Code is not amenable to judicial review.

9. **Secondly,** a decision to change the content of the Code cannot be amenable to judicial review in circumstances in which the content of the Code is not and could not be challenged. If the content is not subject to judicial review, for the reasons set out in §8 above, the same must apply – indeed *a fortiori* – to the process by which the content is arrived at. For this reason the Appellant's contention that the claim *"attacks the decision to alter the Code, rather than the new content of the Code itself"*[11] goes nowhere.

10. In any event, Mitting J rightly held that the change from one lawful wording in the Code to another cannot give rise to a judicial review claim with any prospect of success. If the content of the Code cannot be challenged, and given that the Code does not interfere with existing legal rights or obligations, it is impossible to see why public law should seek to constrain the process of alteration.

11. **Thirdly**, the two cases on which GCHR places reliance[12] are plainly not in point. The context of each was very different to the present: ***Axon*** concerned a "best practice" sexual health document and ***EHRC*** concerned guidance on detainees. Neither case advances or even addresses the suggestion that judicial review will run to challenge the

[9] See in this respect, Arden LJ's observation that: *"The principle [of legality] has no application to a change in the ministerial code which does not purport to interfere with any legal obligation"* (first §1, Appendix to her Order).
[10] Contrast s.28A of the Northern Ireland Act 1998.
[11] §3.2, Grounds of Appeal.
[12] §§28-30, GCHR's Appeal Skeleton citing ***R(Axon) v Secretary of State for Health*** [2006] QB 539 and ***R (EHRC) v Prime Minister*** [2012] 1 WLR 1389.

process by which a policy whose content cannot be challenged is altered. Neither involved a code or document of the nature of the Code.

12. **Finally**, and as a discrete submission, GCHR lacks sufficient interest to bring this claim.[13] GCHR is a NGO based in Ireland and its asserted purpose is to provide support and protection to *"human rights defenders"* in the Gulf States and Syria. Its role in the UK, and its relationship with the UK government, is negligible: according to its evidence, it has signed two petitioning letters, attended a *"day of action"* in support of Saudi Arabian human rights and issued a challenge which was later withdrawn. Contrary to the GCHR's assertion[14], this does not show that the GCHR is *"actively engaged in lobbying the UK Government"* and nor is it consistent with the assertion that the UK is *"one of the focal points"* for the Claimant's activities.[15]

Conclusion

13. The Court is therefore invited to dismiss the appeal and refuse permission to apply for judicial review.

JAMES EADIE Q.C.
SHAHEED FATIMA Q.C.

12 April 2017

[13] In the reasons for his Order, Cranston J concluded that standing was "*arguable*" but that this issue would need to be addressed if the case went further, including in the light of *R(Al-Haq) v SSFCO* [2009] EWHC 1910 (Admin).
[14] §5, JR Grounds.
[15] §28, Witness Statement of Melanie Gingell.

ANNEX

Date	Event	Appeal Bundle
15.10.15	§1.2 of the Ministerial Code is amended. The amendment at the heart of this claim is that the underlined words were deleted from the previous version of §1.2: *"The Ministerial Code should be read alongside the Coalition agreement and the background of the overarching duty on Ministers to comply with the law <u>including international law and treaty obligations</u> and to uphold the administration of justice and to protect the integrity of public life"*[16].	Section 3/Tab 15
14.1.16	GCHR's Claim Form and JR Grounds	Section 3/Tab 7
10.2.16	Respondents' AoS and Summary Grounds of Resistance	Section 3/Tab 8
11.2.16	Order by Cranston J refusing permission for JR[17] and ordering GCHR to pay Respondents £2,500.	Section 3/Tab 9
19.2.16	GCHR's Notice of Renewal	Section 3/Tab 10
17.3.16	Renewal hearing and Order by Mitting J refusing permission for judicial review	Section 2/Tabs 4 and 5
23.3.16	GCHR's Appellant's Notice and Grounds of Appeal	Section 1/Tab 1
28.12.16	Arden LJ grants permission to appeal on two grounds	Section 1/Tab 2
22.3.17	GCHR's Appeal Skeleton	Section 1/Tab 3

[16] §1.2 of the amended Ministerial Code 2015 stated, *"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."* The Ministerial Code was amended in December 2016 but no changes were made to §1.2. §1.2 of the 2015 version of the Code also deleted *"and to uphold the administration of justice"*. GCHR relied on this below but has not been given permission to appeal on this point: see Order of Arden LJ, §1).

[17] After observing that GCHR "arguably" has standing, the Order reads: *"(2) The Ministerial Code is not justiciable nor is it for the courts to interfere. It is guidance which the Prime Minister gives to his Ministers as to how they should behave. It affects in no way their obligation to comply with the law, in particular their obligation (if any) to comply with international law. Consequently, the grounds of breach of the principle of legality and acting for an improper purpose and/or irrationality go nowhere. No doubt if Ministers are in breach of the Code that may support a case brought on other grounds but the Code itself is not amenable to judicial review. (3) For this reason, the decision to amend the Code is not of "real constitutional significance". The content is a political matter. As the claimant's grounds state, the Code may inform political debate. The claimant's remedy lies in the political, not the legaal, sphere. Consequently, there is no basis for any protective costs order."*