***FDA* v *Prime Minister*: the Ministerial Code, justiciability, and the limits of judicial review**

**Michael Gordon\***

The High Court’s decision in *FDA* v *Prime Minister* provides a significant opportunity to reflect on the position of courts in the UK’s matrix of constitutional accountability.[[1]](#footnote-1) In this case, while the High Court dismissed a challenge to the Prime Minister’s decision-making under the Ministerial Code, which concerned his response to allegations of bullying against the Home Secretary, it also held that certain questions relating to the meaning of the Code could be justiciable.

In this article, I want to challenge the reasoning in the judgment in *FDA*, and then reflect on the wider consequences of the decision. As we will see, in practical terms the consequences of this case are limited, but (in part because of those limited practical consequences) it nevertheless raises some significant questions about the nature of constitutional accountability. In particular, I will argue that the *FDA* case shows that the courts cannot and should not take on the role of an all-purpose accountability forum in the constitution. There were good doctrinal and practical reasons for the High Court to avoid intervening in this case, and its judgment instead serves to highlight the tensions between legal reasoning and political modes of holding the government to account.

**The Judgment**

The case concerned the decision of Prime Minister Boris Johnson in November 2020 that the Home Secretary, Priti Patel, had not engaged in conduct which amounted to bullying of civil servants in her department. Bullying was explicitly contrary to the Ministerial Code: ‘Harassing, bullying or other inappropriate or discriminating behaviour wherever it takes place is not consistent with the Ministerial Code and will not be tolerated’.[[2]](#footnote-2) Sir Alex Allan, the Prime Minister’s Independent Adviser on Ministers’ Interests, concluded that Patel’s behaviour was ‘in breach of the Ministerial Code, even if unintentionally’ because ‘[h]er approach on occasions has amounted to behaviour that can be described as bullying in terms of the impact felt by individuals’.[[3]](#footnote-3) The Prime Minister, in contrast, ‘having considered Sir Alex’s advice and weighing up all the factors’, decided that the Ministerial Code had not been breached, and Patel would not be sacked or otherwise sanctioned.[[4]](#footnote-4) Four reasons were given for this: concerns had not been raised with the Home Secretary at the time; she was unaware of the impact her behaviour had; she was sorry for causing inadvertent upset; and relationships in the Home Office were now much improved. His findings having been overruled, Sir Alex Allan resigned as Independent Adviser.

The FDA, a trade union representing civil servants, sought judicial review of the Prime Minister's decision. In particular, the FDA argued that the Prime Minister had ‘misinterpreted’ para 1.2 of the Ministerial Code in so far as he took the meaning of ‘bullying’ to require the accused person to be aware of the upsetting or intimidating impact of their conduct on others. Permission for this claim was granted by Linden J, who refused a second claim concerning the Prime Minister’s refusal to update the relevant definitions in the Ministerial Code, as had been proposed by the FDA in pre-action correspondence.[[5]](#footnote-5) In the substantive claim before the Divisional Court (Lewis LJ and Steyn J), there were two distinct issues: first, whether the claim was justiciable; and second, if so, did the Prime Minister misinterpret the Code. While on the second point the court held that the Prime Minister had not misinterpreted the Code when making his decision regarding Priti Patel, on the first point it held that in principle aspects of the Ministerial Code were justiciable.

**Justiciability**

This first conclusion regarding justiciability is open to question in a number of respects. Non-justiciability is inevitably a controversial matter, given it amounts to the courts effectively disclaiming the possibility of judicial oversight in relation to particular issues or in particular areas. In *FDA*, the High Court cited (at length) the speech of Lords Neuberger, Hodge and Sumption from *Shergill v Khaira*,[[6]](#footnote-6) which identified two main categories of non-justiciability: first, where an issue is beyond the constitutional competence of the courts, and second, where no legal right of the citizen is engaged in private or public law. In *FDA*, Lewis LJ and Steyn J then took the ‘starting point’ that ‘the words “harassment”, “bullying”, and “discriminating behaviour” are capable of being interpreted by a court’.[[7]](#footnote-7) They relied on an approach based on ‘subject-matter’ rather than ‘source’,[[8]](#footnote-8) and on this basis held that while many parts of the Ministerial Code would not be justiciable because they ‘involve political matters’ (giving the examples of collective responsibility or relations with Parliament), it did not follow from this that all the provisions of the Code were non-justiciable. And in the view of the High Court, para 1.2 concerning bullying was not a provision unfit for judicial analysis.

This argument is framed in negative terms: essentially, that some provisions of the Code are not justiciable because they are political, but para 1.2 is not such a provision. This makes the positive case for the justiciability of para 1.2 difficult to precisely discern. The High Court’s core reasoning appears to be that these provisions did not simply exist to frame the exercise of the Prime Minister’s discretion in selecting or removing members of the government, but also to set ‘standards’ and provide ‘guidance’ to ministers.[[9]](#footnote-9) And these standards relating to bullying in particular were viewed by the judges as constituting part of the governance of the workplace, from which they drew the inference that they applied in the same way within government as in any other regular workplace. This reading of the Code is based on a quote from the foreword to the 2018 Ministerial Code issued by the former Prime Minister Theresa May, suggesting that the same standards should govern Parliament and Whitehall as ‘any other workplace’. This idea is not repeated anywhere in the substantive provisions of May’s 2018 Code, nor was it retained in the 2019 Code issued by Johnson.

There are a number of difficulties with the High Court’s reasoning in relation to justiciability. First, it starts by collapsing the question of justiciability into that of capability. It is unsurprising that words like ‘bullying’ and ‘harassment’ are capable of being interpreted by judges, because surely all words are capable of being interpreted by judges. While the first test in *Shergill v Khaira* is focused on competence, it is explicitly concerned with the *constitutional* competence of the courts rather than functional competence in this sense. The question here is not whether the courts can interpret the words, but whether they should, in light of the wider institutional context, with particular reference to the different roles and powers allocated to the legislature, the executive and the judiciary. The High Court gestures at some of these considerations in passing, when giving examples of ‘political’ matters which should be left to others to decide, but never really explains why the courts have the institutional or constitutional competence to offer definitive interpretations of any provisions used in the Ministerial Code.

The second difficulty is that the approach of the High Court significantly underestimates the nature of the Ministerial Code as a political, and not a legal, document. In part this flows from the judges’ adoption of an approach based on ‘subject-matter’ not ‘source’ – it allows the court to separate specific provisions in the Code which are non-justiciable from those which are justiciable, based on assessment of the extent to which their substance is ‘political’. Yet this distinction between subject-matter and source originated in a very different context to the *FDA* case. It is a distinction deployed in the judgment of Lord Scarman in *GCHQ*, a case which concerned a challenge to an exercise of royal prerogative power.[[10]](#footnote-10) When Lord Scarman argued that ‘the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter’, this was in the context of a dispute about which different kinds of *legal* powers could be subject to judicial review. The shift from source to subject-matter was therefore justified in *GCHQ*, because the legal character of the source of power was not in dispute. However, in *FDA*, the rules contained in the Ministerial Code are not legal rules, nor is the Code issued in exercise of a legal power. It is also irrelevant that the Prime Minister’s discretion to appoint ministers is itself rooted in the prerogative, because the claimants in *FDA* were explicit that they made no challenge to the exercise of that legal power, but only contested the interpretation of the non-legal rules contained in the Code associated with ministerial conduct. In this context, it is a misapplication of Lord Scarman’s distinction to focus on subject-matter to the exclusion of source.

This is further evident when looking at the line of case law which deals with the justiciability in domestic courts of questions of international law. In cases like *CND*[[11]](#footnote-11) (concerning the interpretation of UN Resolution 1441 prior to the 2003 war in Iraq) and *Al-Haq*[[12]](#footnote-12) (concerning the UK government’s responsibilities under international law towards Israel following bombing of Gaza in the Occupied Palestinian Territories), it might make sense to focus on subject-matter to delineate between claims about the law which are and are not suitable for determination in the domestic courts. Yet where the source of the rules is not legal, it is wrong to bypass questions about source-based justiciability entirely by focusing on the subject-matter instead. This approach is also out of line with that taken unanimously by the Supreme Court in *Miller (No.1)* where the court held that ‘judges are neither the parents nor the guardians of political conventions; they are merely observers’.[[13]](#footnote-13) In declining to rule on the application of the Sewel convention to the decision to commence Brexit negotiations, the Supreme Court was here dealing with a convention which had been given a (relatively thin) statutory basis, and yet even then it held it was beyond the ‘constitutional remit of the judiciary’ to police its scope or operation.[[14]](#footnote-14) This aspect of *Miller (No.1)* is not addressed at all in the judgment in *FDA*.

In contrast, the case of the *Gulf Centre for Human Rights*[[15]](#footnote-15)may appear to provide an authority which indicates that questions concerning the Ministerial Code are potentially justiciable, despite its political nature as a constitutional source. Yet this case (which again does not feature at all in the substantive reasoning of the High Court in *FDA*) was concerned with a clear question of law: whether changes to the Ministerial Code made by Prime Minister David Cameron to remove a specific reference to the duty for ministers to comply with international law, rather than the law in general, had any impact on their legal obligations. In concluding that it did not, the Court of Appeal was actually reinforcing the political nature of the Ministerial Code as a constitutional source, which did not create (and could not have created) new legal duties, and instead ‘simply referenced existing duties outside the Code’.[[16]](#footnote-16) Similarly, while cases in Northern Ireland have dealt with the ‘significant legal effects’ of the Northern Ireland Executive Ministerial Code,[[17]](#footnote-17) this Code is crucially different to that which applies to the UK government, since it has a substantial statutory basis in the Northern Ireland Act 1998.[[18]](#footnote-18)

Finally, the fact that the Ministerial Code is a political rather than legal source of constitutional norms highlights a number of problems with the reasoning of the High Court in relation to the subject-matter of the specific rules relevant in *FDA*. For example, while it is uncontentious that the Code establishes standards or guidance for ministers, if that is the core purpose of the provisions, it is not clear why that converts them into generally applicable workplace policies, which as the court notes, already exist independently. To base the claim that parts of the Ministerial Code regulate workplaces rather than ministers on an old assertion in the foreword to a past iteration of the document makes this reasoning seem even more tenuous, especially when the forewords tend to be the place for Prime Ministerial rhetoric rather than serious norms.[[19]](#footnote-19)

The judgment is also careful to separate the question of interpretation from any decision to dismiss or retain a minister, which the High Court accepts would be non-justiciable.[[20]](#footnote-20) Yet once we accept these provisions are to guide ministers in making decisions, it becomes harder to see why the court should step in when – in contrast with cases such as *Wightman*[[21]](#footnote-21)or *Cherry / Miller (No.2)*[[22]](#footnote-22)– the claimants are not the decision-makers seeking confirmation of the meaning or application of terms in the Code. It is also hard to see how this question of interpretation can be addressed in isolation from the wider facts of this case – the High Court notes the risk that ‘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’.[[23]](#footnote-23) Remarkably, however, it concludes that this is not such a case, despite the fact that the issue is almost exclusively framed around a single statement issued to exonerate one minister from a specific set of bullying allegations, and which is analysed exhaustively in the ‘Discussion’ section of the judgment.[[24]](#footnote-24)

The analysis of justiciability in *FDA* is therefore, in my view, unconvincing. And the failure of the court to recognise the political nature of the Ministerial Code as a constitutional source also raises questions about the second issue dealt with by the High Court: whether the concept of bullying had been misinterpreted.

**Interpretation of the Code**

The High Court’s analysis of the substantive issue in this case is also problematic. Having held that the question of whether the Prime Minister misinterpreted the Ministerial Code is justiciable, the court concluded that behaviour of the kind carried out by the Home Secretary ‘could constitute bullying… whether or not the perpetrator is aware or intends, that the conduct is offensive, intimidating, malicious or insulting’.[[25]](#footnote-25) This definition of bullying was adopted by the court based on a ‘broad consensus’ discerned from a range of different departmental policies, even though neither the Ministerial Code nor the Civil Service Code (which has a statutory basis in the Constitutional Reform Act 2005) define bullying specifically or in this way.[[26]](#footnote-26) Yet beyond concerns about the courts reading definitions into the Ministerial Code which are not present in the text, the more fundamental difficulty is the way in which this conception of bullying is put to work in relation to the decision to exonerate Priti Patel.

In order to establish whether the Prime Minister failed to apply the definition of bullying established by the High Court, the case effectively turns on a detailed and highly legalistic analysis of the five paragraph ‘Government Statement’ made by Johnson clearing Patel of violating the Code. This statement becomes canonical as to the reasons for the Prime Minister's decision-making, rather than an announcement of what has been decided. But there is a crucial disjunction between the question the court is asking and the approach taken by the Prime Minister, because the Johnson statement is short and vague, and offers no interpretation of the concept of bullying at all. This leads to a bewildering, triple negative conclusion: ‘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.’[[27]](#footnote-27) In essence, the Prime Minister had not misdirected himself as to the meaning of bullying because his statement provided no evidence that he had even directed himself to the question being assessed.

In one sense this is unsurprising, because the intention of the ‘Government Statement’ was most likely to obscure, rather than to clarify, the extent to which the Prime Minister was taking the controversial step of overruling the findings of his Independent Adviser. It was also, inevitably, based on a wider political assessment of whether the conduct ought to be described as bullying, in the context of wider environmental and other mitigating factors. The Prime Minister clearly wanted to retain the Home Sectary in his government, and took an approach which minimised (so far as possible, in light of the contrary findings of the Independent Adviser) the extent of her bullying. While this is hardly responsible government, it would be naïve to assume that political factors do not shape political decision-making.

This reveals the core problem with the decision in *FDA*. The court held that it had jurisdiction because the issue was one with which it was capable of dealing. Yet the substantive reasoning demonstrates that this was not the case: the judgment is a perfect demonstration of the way in which questions of political accountability can be reframed to the point of distortion through the filter of judicial review. The courts may be capable of interpreting the words in the Code, but a legal analysis of the meaning of these concepts ultimately tells us little or nothing about how political accountability operated, or ought to have operated, in this scenario. In framing the matter to make it compatible with the process of judicial review, the questions become so far removed from the substantive issues that they are emptied of any great significance – the precise conception of bullying adopted by the Prime Minister is a sideshow, because the Prime Minister adopted no conception of bullying, and given his willingness to overrule his Independent Adviser, was almost certainly taking whatever approach allowed him to get away with what he wanted.

In such circumstances, the temptation for the High Court to offer some avenue of accountability is understandable. However, the courts should be slow to extend the reach of judicial review to take on the role of an all-purpose accountability forum. In addition to the limited capacity of legal analysis to engage with questions of political accountability in a meaningful way, there is also the risk that the courts give an undeserved veneer of legitimacy to the Prime Minister’s decision in ruling that it was not flawed.[[28]](#footnote-28) In terms of political responsibility, it seems clear this was an objectionable decision, especially in light of the Independent Adviser’s findings that some of the Home Secretary’s conduct could be classified as bullying on the basis that it was ‘intimidating or insulting behaviour that makes an individual feel uncomfortable, frightened, less respected or put down’, and included ‘occasions of shouting and swearing’.[[29]](#footnote-29) Yet even a narrow finding in favour of the Prime Minister as a matter of law allows the case to be presented as a victory for him, and validates his actions even when, understood from other perspectives, they were manifestly problematic. In that sense, the abstract and artificial reasoning of the High Court not only creates confusion concerning the basic operation of political accountability, but also has the potential to dilute its potency by sanctifying bad decisions behind a veil of rational rule interpretation and application.

**The Implications**

While it is therefore a problematic judgment, it is worth considering whether the decision in *FDA* is simply an exceptional, and largely isolated, problem. The specific consequences of the case seem limited, although it may have some implications of more general significance.

In specific terms, it seems unlikely that the decision in *FDA* will alter constitutional practice in any dramatic way. While the FDA responded to the judgment by describing it as ‘a significant step forward’,[[30]](#footnote-30) it is hard to see anything more than false hope for future litigants seeking accountability for decisions made under the Ministerial Code. If artificial questions of interpretation led nowhere in this context, it is likely to be the same in relation to any other potentially justiciable provisions. Similarly, Lord Geidt – who succeeded Sir Alex Allan as Independent Adviser some six months after the decision to clear Priti Patel, before also resigning as Boris Johnson’s adviser on ministerial standards[[31]](#footnote-31) – concluded that nothing in the decision would cause him to alter his practice concerning the investigation of alleged breaches of the Ministerial Code.[[32]](#footnote-32) The intervention by the High Court might conceivably have an impact on debates about proposals to put the Ministerial Code on a statutory basis – in particular by opening up a discussion about the need for an ouster clause in any such future legislation – although reform of this kind appears a long way off without a change of government.[[33]](#footnote-33) Experience in Northern Ireland suggests that litigation relating to a statutory Ministerial Code has been no more successful in solving problems which are at their core political.[[34]](#footnote-34)

More generally, the *FDA* case raises questions about the effectiveness of using legal processes to create political pressure. The remedy sought in this case, an advisory declaration, was clearly designed to generate political pressure rather than settle any questions concerning ministerial sanctions: the claimants accepted it would ‘be for the Prime Minister to decide what course of action to take in the light of any declaration granted’.[[35]](#footnote-35) In this sense, *FDA* is not an isolated example – in addition to some of the many cases relating to Brexit,[[36]](#footnote-36) others concerning procurement, the awarding of public contracts, official appointments, and policies relating to care homes during the pandemic,[[37]](#footnote-37) and those relating to use of WhatsApp in internal government communications,[[38]](#footnote-38) the courts are regularly being asked to hear claims which seem constructed to produce political embarrassment rather than vindicate specific legal rights. One question is whether these cases are especially effective – even in those instances when unlawful conduct is identified, the legal consequences of a victory may be such that it actually changes little or nothing in practice.[[39]](#footnote-39) A second question is therefore whether it may foster public disillusionment with the institutions of government in general if the courts are making declarations of unlawfulness which produce a hollow form of accountability. The authority of the process of judicial review is also in the spotlight when, as in the *FDA* case, the courts extend themselves to little effect.

The *FDA* case also suggests we need to reflect on the place of non-justiciability in the UK’s constitutional law, especially in the aftermath of the high-profile dismissal of such arguments in the case of *Miller (No.2)*.[[40]](#footnote-40) Arguments about non-justiciability should not be rejected as inherently objectionable, because to consider the limits of judicial review is also to try to understand the operation of different forms of accountability in the constitution more broadly. It can also be about guaranteeing the reputation of the courts, with the perplexing substance of the decision in *FDA* highlighting that there are practical as well as doctrinal justifications in favour of non-justiciability. While it would be wrong to think that non-justiciability has no contemporary purchase,[[41]](#footnote-41) the shrinking of this doctrine is simply likely have knock on consequences elsewhere, especially if it prompts greater legislative recourse to ouster clauses.[[42]](#footnote-42) This may both relocate and reintensify debate about the scope of the judicial role, especially if the courts continue to see ouster clauses as an issue on which they may attempt to challenge parliamentary sovereignty.[[43]](#footnote-43)

Most fundamentally, however, the FDA case reveals the significant disjunction between legal and political modes of accountability. There is of course still an important relationship between them, and accountability will (and should) often be pursued through both law and politics simultaneously in many contexts and in relation to many specific government decisions. Future courts should, however, be reluctant to take on claims relating to decision-making under the Ministerial Code, for to do so misjudges the scope of judicial review. There is much to be said about the many weaknesses of political accountability in the UK. But these problems will not, and cannot, be solved in the courts, where legal standards of rationality or modes of interpretation simply mischaracterise the political and constitutional considerations which are unavoidably (and legitimately) at stake in relation to ministerial conduct and standards. The constitutional role of the courts is not to provide an all-purpose accountability forum in the UK, and there are good reasons for them to leave questions of political accountability to be confronted (even imperfectly) according to a framework of political responsibilities. For meaningful change to occur, the UK’s framework of political responsibility needs to be reinvigorated rather than litigated.

1. \* I’m grateful to Adam Tucker and the reviewer for their helpful comments.

   [2021] EWHC 3279 (Admin). [↑](#footnote-ref-1)
2. Ministerial Code (2019), para 1.2. [↑](#footnote-ref-2)
3. Findings of the Independent Adviser (Cabinet Office, 20 November 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/937010/Findings\_of\_the\_Independent\_Adviser.pdf [↑](#footnote-ref-3)
4. Ministerial Code Investigation: Government Statement (Cabinet Office, 20 November 2020): https://www.gov.uk/government/news/ministerial-code-investigation [↑](#footnote-ref-4)
5. [2021] EWHC 2192 (Admin). [↑](#footnote-ref-5)
6. [2014] UKSC 33, esp at [41]-[43]. [↑](#footnote-ref-6)
7. [2021] EWHC 3279 (Admin) at [38]. [↑](#footnote-ref-7)
8. [2021] EWHC 3279 (Admin) at [39]. [↑](#footnote-ref-8)
9. [2021] EWHC 3279 (Admin) at [41]. [↑](#footnote-ref-9)
10. *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] UKHL 9. [↑](#footnote-ref-10)
11. *Campaign for Nuclear Disarmament* v *Prime Minister* [2002] EWHC 2777 (Admin), eg at [47]. [↑](#footnote-ref-11)
12. *R (Al*-*Haq)* v *Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), eg at [41], [53]. [↑](#footnote-ref-12)
13. [2017] UKSC 5 at [146]. [↑](#footnote-ref-13)
14. [2017] UKSC 5 at [151]. [↑](#footnote-ref-14)
15. [2018] EWCA Civ 1855. [↑](#footnote-ref-15)
16. [2018] EWCA Civ 1855 at [19]. [↑](#footnote-ref-16)
17. Safe Electricity A&T Limited [2021] NIQB 93 at [101]. [↑](#footnote-ref-17)
18. Northern Ireland Act 1998, s.28A. [↑](#footnote-ref-18)
19. See eg, among others: Johnson in 2019 on seizing the opportunities from Brexit; Cameron in 2015 suggesting that Parliaments around the world have copied the Westminster system of good government; and Cameron at the start of the austerity era in 2010 on the need to be careful with public money. [↑](#footnote-ref-19)
20. [2021] EWHC 3279 (Admin) at [41]. [↑](#footnote-ref-20)
21. *Wightman* *v Secretary of State for Exiting the EU* [2018] CSIH 62. [↑](#footnote-ref-21)
22. *Miller* v *Prime Minister, Cherry* v *Advocate General for Scotland* [2019] UKSC 41. [↑](#footnote-ref-22)
23. [2021] EWHC 3279 (Admin) at [42]. [↑](#footnote-ref-23)
24. [2021] EWHC 3279 (Admin) at [52]-[59]. [↑](#footnote-ref-24)
25. [2021] EWHC 3279 (Admin) at [50] [↑](#footnote-ref-25)
26. Constitutional Reform Act 2005, s.5. [↑](#footnote-ref-26)
27. [2021] EWHC 3279 (Admin) at [59] [↑](#footnote-ref-27)
28. See eg the reporting of the outcome in the media: ‘UK High Court backs Boris Johnson over Priti Patel bullying decision’, *Financial Times* (6 December 2021); ‘Boris Johnson Wins Court Bid Over Patel Bullying Investigation’, *Bloomberg UK* (6 December 2021). [↑](#footnote-ref-28)
29. Findings of Independent Adviser (n.3). [↑](#footnote-ref-29)
30. See eg https://www.fda.org.uk/home/Newsandmedia/Features/A-significant-step-forward.aspx [↑](#footnote-ref-30)
31. Correspondence from Lord Geidt and the Prime Minister’s response (16 June 2022): https://www.gov.uk/government/publications/correspondence-from-lord-geidt-and-the-prime-ministers-response [↑](#footnote-ref-31)
32. # Annual Report of the Independent Adviser on Ministers’ Interests (May 2022),[24].

    [↑](#footnote-ref-32)
33. See eg proposals from the Committee on Standards in Public Life, *Upholding Standards in Public Life* [2.26]-[2.35]. [↑](#footnote-ref-33)
34. See eg *Napier* [2021] NIQB 86 and [2021] NIQB 120 concerning a DUP boycott of the North South Ministerial Council, contrary to the Ministerial Code of Northern Ireland. [↑](#footnote-ref-34)
35. [2021] EWHC 3279 (Admin) at [46]. [↑](#footnote-ref-35)
36. See eg *Webster v Secretary of State for Exiting the EU* [2018] EWHC 1543 (Admin); *Wilson* v *Prime Minister* [2019] EWCA Civ 304; and generally A McHarg and C McCorkindale, ‘Litigating Brexit’ in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom* (CUP, 2021). [↑](#footnote-ref-36)
37. *Good Law Project* v *Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); *Good Law Project* v *Cabinet Office and Public First Limited* [2021] EWHC 1569 (TCC); *Good Law Project and Runnymede Trust* v *Prime Minister* [2022] EWHC 298 (Admin); *Gardner* v *Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin). [↑](#footnote-ref-37)
38. *All the Citizens* v *Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin). [↑](#footnote-ref-38)
39. See eg the limited effects of the declarations granted in the three Good Law Project cases cited in n.37, which invalidated none of the contested decisions relating to procurement or appointments taken during the coronavirus pandemic, and also the single finding of irrationality in *Gardner* (a ‘very wide-ranging claim for judicial review’, at [295]) which related to the operation of a policy for one month. [↑](#footnote-ref-39)
40. Contrast the decision of the Supreme Court [2019] UKSC 41 with that of the Divisional Court [2019] EWHC 2381 (QB), which was persuaded by claims of non-justiciability relating to the prorogation of Parliament. [↑](#footnote-ref-40)
41. See eg *McClean* v *First Secretary of State* [2017] EWHC 3174 (Admin), [↑](#footnote-ref-41)
42. See eg Dissolution and Calling of Parliaments Act 2022, s.3. [↑](#footnote-ref-42)
43. See eg *R (Privacy International*) v *Investigatory Powers Tribunal* [2019] UKSC 22, esp at [144]. [↑](#footnote-ref-43)