In the High Court of Justice **CO/11538/2010**
Queen's Bench Division
Administrative Court

In the matter of an Application for Judicial Review

The Queen on the Application of

CASEY WILLIAM HARDISON

Claimant

– v –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

DRAFT STATEMENT OF FACTS

"The creation of a system to assess the harmfulness of drugs on a more structured and transparent basis, as presented earlier in this paper, could be extended to cover alcohol and tobacco".

Review of the UK's Drugs Classification System
A Public Consultation
Home Office
May 2006

Prepared By

Casey William HARDISON

1 November 2010

CO/11538/2010

Casey William HARDISON — Claimant

– v –

Secretary of State for the Home Department — Defendant

Draft Statement of Facts

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1. This statement of facts accompanies an application by the Claimant, Mr Casey William Hardison, requesting permission for judicial review of:

    1) the 10 August 2010 decision ("the decision") by the Secretary of State for the Home Department ("the Defendant") not to consult the Advisory Council on the Misuse of Drugs ("the Advisory Council") on the possibility of controlling the dangerous drugs alcohol and tobacco under s2 of the Misuse of Drugs Act 1971, c38 ("the Act"); and

    2) the Defendant's policy ("the policy") not to control alcohol and tobacco (and thus persons concerned with these drugs) under the Act, as evinced in the decision letter and similar statements before and after.

2. The Claimant, a self-litigant, requests judicial review in the public interest as this claim raises public law issues of general importance to the nation's health and welfare: alcohol and tobacco kill more than 120,000 citizens annually; and it is vital that dangerous drugs legislation operates correctly.

3. The Claimant's interest in the structure, function and purpose of the Misuse of Drugs Act 1971 began in earnest with his imprisonment for contravention of the Act's provisions relating to the unauthorised production, supply and possession of controlled drugs that alter mental functioning; though, he has been actively involved in drug policy reform since December 1993.

4. Through diligent study of English constitutional law, the Act, Hansard and Government documents, most notably Command Paper Cm 6941,[1] the Claimant has come to believe that the Act is being administered arbitrarily and contrary to Parliament's intention. The Claimant believes that this arbitrariness starts with the Defendant misunderstanding the Act's structure, function and purpose; in turn, this results in the exclusion of the dangerous drugs alcohol and tobacco from the Act's provisions.

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[1] Home Office (2006) Cm 6941 *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06* HC 1031 *Drug classification: making a hash of it?*, 13 October 2006

Statement of Facts

A Promise?

5. On 19 January 2006, a predecessor of the Defendant, the Rt Hon Charles Clarke MP, told the House of Commons with respect to the Act:

> "The more that I have considered these matters the more concerned I have become about the limitations of our current system. Decisions on classification often address different or conflicting purposes and too often send strong but confused signals to users and others about the harms and consequences of using a particular drug and there is often disagreement over the meaning of different classifications. […] For these reasons I will in the next few weeks publish a consultation paper with suggestions for a review of the drug classification system, on the basis of which I will in due course make proposals". (*Hansard*, HC Deb, 19 Jan 2006, Vol 441, Col 983)

6. On 2 March 2006, Lord Bassam of Brighton clarified the Government's position with respect to the consultation on the drugs classification system:

> "The Government's review on classification will begin in a few weeks with the publication of a consultation paper. […] I should say at the outset that the consultation document will take forward an improved system of control. (*Hansard*, HL Deb, 2 March 2006, Vol 679, Col 414)

The consultation document

7. On 6 May 2006, the Rt Hon Charles Clarke MP resigned as Secretary of State for the Home Department.

8. Consequently, the promised consultation paper *Review of the UK's Drug Classification System – a Public Consultation* ("rDCS") was shelved. (The Claimant would not know why it was shelved until 9 July 2010, when the Defendant finally disclosed it to him – after the Information Commissioner's Office ordered her to, and after her withdrawn appeal to the First Tier Tribunal).

9. The rDCS consultation document is the earliest known record of the Defendant's misconstruction of the Act in the form challenged in Claim 1 of the Statement of Claim:

> "The drugs classification system is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". (Paragraph 4.15)

10. The rDCS appears to be the origin of the Defendant's 13 October 2006 response to recommendation 50 of the Fifth Report of the House of Commons Science and Technology Committee Session 2005-06 HC 1031 *Drug classification: making a hash of it?* on page 24 of Command Paper Cm 6941.

HC 1031

11. On 31 July 2006, after a rigorous investigation into the production and use of scientific advice and evidence in decisions to control and classify drugs under s2(5) of the Act, the Fifth Report of the House of Commons Science and Technology Committee Session 2005-06 HC 1031 *Drug classification: making a hash of it?* ("HC 1031") opined, with emphasis:

> "With respect to the ABC classification system, we have identified significant anomalies in the classification of individual drugs and a regrettable lack of consistency in the rationale used to make classification decisions. […W]e have concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm. […] In light of the serious failings of the ABC classification system that we have identified, we urge the Home Secretary to honour his predecessor's commitment to review the current system". (Summary)
>
> "One of the most striking findings highlighted in the paper drafted by Professor Nutt and his colleagues was the fact that, on the basis of their assessment of harm, tobacco and alcohol would be ranked as more harmful that LSD and ecstasy (both Class A drugs). The Runciman Report also stated that, on the basis of harm, "alcohol would be classed as B bordering on A, whilst cigarettes would probably be in the borderline between B and C". Various memoranda argued that the exclusion of tobacco and alcohol from the classification system was an anomaly". (Paragraph 106)

12. The "paper drafted by Professor Nutt and his colleagues" was published as Appendix 14 to HC 1031 in the name of the Advisory Council. Appendix 14 made clear that, in the Advisory Council's opinion, there was:

> "no clear distinction between socially accepted and illicit substances".

13. Reflecting this opinion, recommendation 50 of HC 1031 said:

> "In our view, it would be unfeasible to expect a penalty-linked classification system to include tobacco and alcohol but there would be merit in including them in a more scientific scale, decoupled from penalties, to give the public a better sense of the relative harms involved".

14. On a true construction of ss7(1)-(2), 22(a)(i)-(ii) & 31(1)(a)-(b) of the Act, it can be seen that it is "feasible to expect a penalty-linked classification system to include tobacco and alcohol". In this respect, it appears that the Science and Technology Committee misdirected themselves as to the Act's structure, function and purpose; but this point is irrelevant to the claim.

Statement of Facts

Pathways to Problems

15. On 14 September 2006, the Advisory Council published *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy* which said:

> "We believe that policy-makers and the public need to be better informed of the essential similarity in the way in which psychoactive drugs work: acting on specific parts of the brain to produce pleasurable and sought-after effects but with the potential to establish long-lasting changes in the brain, manifested as dependence and other damaging physical and behavioural side-effects. At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines, some of which are also covered by the Act. The insights summarised [here] indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis". (Paragraph 1.13, emphasis added)

16. The Advisory Council admitted, in *Pathways to Problems*, "neglect[ing]" their "duty" under s1 of the Act with respect to alcohol and tobacco:

> "The scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs. Both cause serious health and social problems and there is growing evidence of very strong links between the use of tobacco, alcohol and other drugs. For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate". (Introduction, p14, emphasis added)

17. Consistent with this, Recommendation 1 of *Pathways to Problems* read:

> "As their actions are similar and their harmfulness to individuals and society is no less than that of other psychoactive drugs, tobacco and alcohol should be explicitly included within the terms of reference of the Advisory Council on the Misuse of Drugs".

18. At the time, the Defendant did not respond publicly to this but the Claimant would later read in a July 2009 Advisory Council document (oddly not made public until 29 March 2010) *Pathways to Problems: A follow-up report on the implementation of recommendations from Pathways to Problems*, at 4.2, that:

> "the [Defendant] considered alcohol and tobacco to be implicit in the ACMD's terms of reference, as these are substances that can be misused".

19. Upon learning this, the Claimant requested, on 6 April 2010, under the Freedom of Information Act 2000, a copy of the document in which the Defendant had allegedly stated this. On 21 May 2010, the Defendant wrote the Claimant, T7234/10, attaching the document, FOI 14725, entitled "Draft response to Recommendation 1 of ACMD's Pathways to Problems Report calling for the explicit inclusion of alcohol and [tobacco] in the ACMD's terms of reference". The Defendant said that FOI 14725 "explains the reasoning which has been inherent from the outset of the Act's provisions, as to the absence of applying control of alcohol and tobacco under the Misuse of Drugs Act". Paragraph 1 of FOI 14725 had said:

> "Whilst the ACMD was established by an Act, the main function of which is to provide a framework within which criminal penalties are set with reference to the harm caused by a drug, their terms of reference are already sufficiently wide to include alcohol and tobacco. The penalty-linked framework has no place in the regulation of alcohol and tobacco, but this does not displaces ACMD's remit to include these substances, as notably the 1971 Act does not define "drugs", (it only defines controlled drugs)". (Emphasis added, parenthetical expression in the original)

20. Whilst not using the exact wording, it is clear that the Defendant accepts that "alcohol and tobacco [are] implicit in the ACMD's terms of reference".

Cm 6941

21. On 13 October 2006, the Defendant issued Command Paper Cm 6941, *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06* HC 1031 *Drug classification: making a hash of it?* that replied to Recommendation 50 of HC 1031 thusly:

> "Government [believes] the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning […]. Legal substances are therefore regulated through other means. […] However, the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs".

22. It was these six sentences from Cm 6941 that convinced the Claimant that the Defendant did not understand the Act that regulated her decision-making powers and therefore could not give proper effect to it:

    1) "Government fully [believes] that the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating … substances such as alcohol and tobacco". (Is the Act suitable or not? Has the Defendant misconstrued the Act?)

    2) "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis". (Does the SSHD really mean the distinction between alcohol/tobacco and 'controlled drugs'? Is this another misconstruction of the Act?)

    3) "It is … based in large part on historical and cultural precedents". (Are these relevant grounds for not applying a neutral law generally?)

    4) "A classification system that applies to [alcohol, tobacco and 'controlled drugs'] would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Is the SSHD confusing 'control' with 'prohibition' here, otherwise, why would it be unacceptable and how would this conflict with tradition? Is this a misconstruction?)

    5) "[Alcohol and tobacco] are therefore regulated through other means". (Is this rational and what Parliament intended?)

    6) "the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs". (Then why are they not controlled drugs?)

23. The Claimant believes that these six sentences from Cm 6941 show the Defendant's persistent misconstruction of the Act, her regard for irrelevant considerations and her disregard for relevant considerations; they fail to show good reasons for not applying the Act to persons concerned with alcohol and tobacco whilst showing excellent reasons for applying it. This belief motivates the present judicial review.

CO/687/2007

24. Too bad the Claimant did not understand this on 16 January 2007 when he sought judicial review of the Defendant's decision, at paragraph 12 of Cm 6941: "not to pursue a review of the classification system at this time".

25. The issues in CO/687/2007 were: a) whether the Claimant had a legitimate expectation to the Defendant's 19 January 2006 promise to review the Act's drugs classification system; and b) whether evidence of a need for review and the Claimant's embryonic exposé of the Defendant's erroneous reasoning made the 13 October 2006 decision to renege on the promise, at paragraph 12 of Cm 6941, so unreasonable as to be unlawful.

26. On 14 March 2007, while defending CO/687/2007, the Defendant made the following policy statement, which will become very familiar to this Court:

> "The Government's policy is to regulate drugs which are classified as illegal through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace".

The Nutt Matrix

27. On 24 March 2007, a paper by Professor David Nutt, the former Advisory Council Chairman, and Professor Colin Blakemore, the former Chief Executive of the Medical Research Council, appeared in *The Lancet* entitled *Development of a rational scale to assess the harm of drugs of potential misuse*. This paper, originally Appendix 14 to HC 1031, describes the first scientific ranking ("the Nutt Matrix") of the relative harmfulness of the 20 most commonly used drugs. The professors said that:

> "The current classification system has evolved in an unsystematic way from somewhat arbitrary foundations with seemingly little scientific basis. […] Our findings raise questions about the validity of the current Misuse of Drugs Act classification, despite the fact that it is nominally based on an assessment of risk to users and society. The discrepancies between our findings and current classifications are especially striking in relation to psychedelic type drugs. Our results also emphasise that the exclusion of alcohol and tobacco from the Misuse of Drugs Act is, from a scientific perspective, arbitrary. We saw no clear distinction between socially acceptable and illicit substances. The fact that the two most widely used legal drugs lie in the upper half of the ranking of harm is surely important information that should be taken into account in public debate on illegal drug use. Discussions based on a formal assessment of harm rather than on prejudice and assumptions might help society to engage in a more rational debate about the relative risks and harms of drugs". (*The Lancet* 369: 1047-1053, emphasis added)

28. On 26 March 2007, the Claimant requested, under the Freedom of Information Act 2000, the rDCS "consultation document which is in draft form in the department" on the proposed review of the classification system, referred to by the Defendant in evidence to Question 1205 of the House of Commons Science and Technology Committee on 14 June 2006.

Persistent Misconstructions?

29. Also on 26 March 2007, whilst drafting his reply to the Defendant's defence to judicial review CO/687/2007, the Claimant noticed that the Defendant believes that the inclusion of alcohol and tobacco in Schedule 2 of the Act would impose "Prohibition".

30. This belief is evidenced by paragraph 5 of the Defendant's defence statement in CO/687/2007. Counsel for the Defendant, Gerard Clarke, asserted that were the Defendant to seek the control of alcohol and tobacco under the Act this would "effectively impose Prohibition". A decision-maker believing this does not understand the Act correctly and, consequently, would not give proper effect to it.

31. On 22 May 2007, Mr J Sullivan said that the challenge to the reneged promise in CO/687/2007 was "in reality, if not in form, a challenge to the merits not the legality of the Government's drug policy". Nevertheless, on 31 May 2007, the Claimant requested an oral hearing for permission.

32. On 2 July 2007, the Defendant denied the Claimant's request for the rDCS "consultation document", proposing a review of the drug classification system, claiming it was exempt from disclosure under ss21 & 35(1)(a)-(b) of the Freedom of Information Act 2000.

33. On 29 July 2007, the Claimant identified, via Cm 6941, the Act and Hansard transcripts, a second formulation by which the Defendant misconstrues the Act: the Defendant believes that she has power to abdicate or ignore the discretion to control alcohol and tobacco under s2(5) of the Act.

34. These two errors of law, read together: explain the Defendant's refusal to seek the control of alcohol and tobacco under the Act: the precedent facts are established such that the Defendant should seek the control of alcohol and tobacco under the Act, but the electoral or "vast majority" prefer these drugs. And as the Defendant believes the Act mandates "Prohibition", the power to control alcohol and tobacco under the Act is ignored or abdicated.

35. It would take three more years for the Claimant to realise that the Defendant's hard-edged assertion that "the Misuse of Drugs Act 1971 is not a suitable mechanism" encapsulates both of these misconstructions.

A Policy Upheld?

36. On 31 August 2007, re CO/687/2007, Mr J Beatson denied the Claimant permission for judicial review of the Defendant's 13 October 2006 decision not to proceed with the review of the drug classification system: *R(Hardison) v SSHD* [2007] EWHC 2133 (Admin). In his judgment, Mr J Beatson agrees with Mr J Sullivan that the challenge was to "the merits not the legality of the Government's drug policy" and, at paragraph 10, he adopts the matter "put well in paragraph 7 of the Defendant's summary grounds":

> "The Government's policy is to regulate drugs which are classified as illegal through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace". (Emphasis added)

37. The Court will come to recognise this as the policy stated in the Defendant's LOR on 24 September 2010, which the Claimant now asserts is illegal as, *inter alia*, it persistently misconstrues the Act; it considers irrelevant matters and ignores relevant matters. At the time Mr J Beatson said of this policy:

> "it is difficult to see that … the decision to prefer a separate system of regulation for substances not prohibited is irrational". (Emphasis added)

In the current Statement of Claim, it will be seen that this sentence of Mr J Beatson misconstrues the Act; though, to be fair, he was not asked to construe the Act nor is his good faith in question.

38. On 4 September 2007, the Claimant sought permission to appeal against Mr J Beatson's decision in *R(Hardison) v SSHD* [2007] EWHC 2133 (Admin) refusing permission for judicial review, CO/687/2007.

39. On 27 September 2007, the Defendant reiterated verbatim the policy statement of 22 March 2007, as adopted by Mr J Beatson, in the Home Office *Response to the Better Regulation Executive re Misuse of Drugs Act Proposal.*

40. On 3 December 2007, the Rt Honourable Sir Henry Brookes *rightly* refused permission to appeal against Mr J Beatson's 31 August 2007 decision refusing permission to judicially review, CO/687/2007, the Defendant's decision not to carry out the drugs classification system review. He said:

> "Remedy for this grievance lies in the world of politics, not in the world of law". (Emphasis added)

41. On 4 February 2008, the Claimant requested an internal review from the Home Office Information Policy Team of the Defendant's decision to withhold the rDCS "consultation document". On 12 March 2008, the Home Office Information Policy Team upheld the 2 July 2007 decision by the Defendant not to disclose the rDCS "consultation document".

42. On 31 March 2008, the Claimant requested the Information Commissioner conduct an independent review of the 2 July 2007 decision by the Home Office Direct Communications Unit not to disclose the rDCS "consultation document". This review would take two years.

43. In the meantime, the Claimant learned by Freedom of Information Act 2000 requests of the Advisory Council and the Defendant that:

    1) The Advisory Council has not requested or received any legal advice as to the Act, their remit, or otherwise.

    2) The Advisory Council had no procedural guidelines even though Schedule 1 Section 3 of the Act suggests they should. However, since the *Lancet* paper by Nutt et al, structure has begun to emerge for advice on drug classification via the adoption of the Nutt matrix.

    3) The Advisory Council Chair believed the Act and the Advisory Council's advice was fettered to the 3 UN Drug Conventions, and the Defendant's "policy of prohibition", though only the executive have signed them, Parliament has not ratified them, and the Advisory Council is allegedly independent of the executive.

    4) The Advisory Council accepts that all drugs are capable of being controlled by the Act and that they have "neglect[ed]" their duty in relation to alcohol and tobacco. (Remarkably, this admission did not spurn them to recommend the control of alcohol and tobacco).

    5) The Advisory Council appear not to understand flexibility of ss7(1)-(2), 22(a)(i)-(ii) & 31(1)(a)-(b) of the Act but they concede that the only barrier to the lawful production, commerce and possession of a controlled drug, for whatever purpose, is the Defendant's authorisation.

    6) The Defendant had not reviewed the drug classification system nor has the ACMD reviewed it since 1979.

    7) The Defendant had not reviewed, in its 38 years of service, the Advisory Council as a Non-Departmental Public Body in line with Cabinet Office guidance. (Allegedly as of 2 November 2009 a review is underway)

The Nutt Sack Fiasco

44. On 30 October 2009, the Defendant's predecessor, the Rt Hon Alan Johnson MP, sacked Dr David Nutt as chair of the Advisory Council because he allegedly "lobbied for a change of government policy" in comments made in the July 2009 Eve Saville Lecture at King's College Centre for Crime and Justice Studies entitled *Estimating drug harms: a risky business* which were subsequently published on the College website in October 2009.

45. Dr Nutt had discussed the differences of opinion between the Advisory Council, the Defendant and the public with respect to recent drug classification decisions, most notable the decision to move *Cannabis* from Class C to Class B contrary to the Advisory Council's advice. However, what really appears to have got the Defendant's goat was Dr Nutt's statement that:

> "Alcohol and tobacco are more harmful than ecstasy and LSD".

46. The media pounced on this and throughout the day Dr Nutt answered all manner of questions regarding the Advisory Council but it always returned to: If alcohol and tobacco are more harmful then why are they not controlled drugs? However, Alan Johnson had had enough. In his letter of 30 October 2009, he said:

> "I have concerns regarding your recent comments that have received so much media attention. It is important that I can be confident that advice from the ACMD will be about matters of evidence. Your recent comments have gone beyond such evidence and have been lobbying for a change of government policy. This goes against the requirements on general standards in public life required by your position. As chair of the ACMD you cannot avoid appearing to implicate the Council in your comments and thereby undermine its scientific independence. When you wrote previously around the harms of drugs comparing ecstasy with the risks of horse riding my predecessor made clear that it is not the job of the chair of the Government's advisory Council to comment or initiate public debate on the policy framework for drugs. Given this I was surprised and disappointed by your further comments to the press this week. As Home Secretary it is for me to make decisions, having received advice from the ACMD. It is vitally, important that the public understands the Council's role and also understand what government is trying to achieve. It is important that the government's messages on drugs are clear and as an advisor you do nothing to undermine public understanding of them. […] I cannot have public confusion between scientific advice and policy and have therefore lost confidence in your ability to advise me as Chair of the ACMD. I would therefore ask you to step down from the Council with immediate effect". (Emphasis added)

47. Upon reading this, on 1 November 2009, the Claimant wrote the Defendant setting out his disagreement with the sacking and stating *inter alia* things that:

> "Dr Nutt's expressions were well within the remit of the Advisory Council found in s1 of the Misuse of Drugs Act 1971 ("the Act"). This remit includes:
>
> > "the duty of the Advisory Council [or its Chair]… to give to any one or more of the Ministers, where … the Council [or its Chair]consider it expedient to do so … advice on measures (whether or not involving alteration of the law) which in the opinion of the Council [or its Chair] ought to be taken for preventing the misuse of such drugs or dealing with social problems connected with their misuse … [and] for educating the public (and in particular the young) in the dangers of misusing such drugs, and for giving publicity to those dangers". (Emphasis added).
>
> "[…]What Dr David Nutt did is let the evidence speak for itself and now its time for the court of public opinion to decide because sacking Dr Nutt has publicly betrayed the underlying problem with your administration of the Act: the continued artificial exclusion of alcohol and tobacco from the Act's control.

48. Within the 1 November 2009 letter, the Claimant also set out what he thought were the Defendant's misconstructions of the Act. Five months passed without a response, so, on 6 April 2010, the Claimant wrote again:

> "I have yet to receive a response to my letter of 1 November 2009. More, it recently came to my attention via an ACMD document, "Pathways to Problems: A follow-up report on the implementation of recommendations from *Pathways to Problems*", at paragraph 4.2, that:
>
> > "the [Home Office] consider[s] alcohol and tobacco to be implicit in the ACMD's terms of reference, as these are substances that can be misused".
>
> When this is coupled with your predecessor's admission on page 24 of Cm 6941 that:
>
> > "the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs",
>
> … it boggles my mind as to why you have not sought control of alcohol and tobacco under the Misuse of Drugs Act 1971, or even sought the ACMD's advice on the harms of alcohol and tobacco and the possibility of their control and regulation under the Act".

49. On 9 March 2010, the Information Commissioner ordered, FS50198230, that the Defendant disclose the rDCS "consultation document" on the proposed review of the drugs classification system to the Claimant within 35 days.

50. On or about 10 April 2010, the Defendant appealed to the First Tier Tribunal against the Information Commissioner's 9 March 2010 Decision Notice, FS50198230, ordering the disclosure of the rDCS "consultation document".

51. On 26 April 2010, the Claimant wrote to the First Tier Tribunal requesting joinder as a party to the appeal to represent the public interest in the disclosure of the rDCS "consultation document".

52. On 4 May 2010, the Defendant responded to the Claimant's 1 November 2009 letter, making no comment on the exclusion of alcohol and tobacco from the Act, but stating *inter alia* that:

> "Professor Nutt has of course the right as an academic to express his views on drug risks. What a person in the position he held cannot do is to confuse this academic freedom with having a role as a Government advisor and confuse it in the public mind by repeatedly lobbying against the decisions taken in relation to drugs by ministers".

<u>rDCS Redacted</u>

53. On 7 May 2010, the Defendant disclosed a redacted copy of the May 2006 document *Review of the UK's Drugs Classification System – a Public Consultation* ("rDCS") to the Claimant. The remainder of the document would be the subject of the appeal by the Defendant against the Information Commissioner's Decision Notice of 9 March 2010.

54. In the redacted copy of the rDCS consultation document, the Claimant found <u>the</u> six sentences that appear on page 24 of Cm 6941, with minor variations, thus taking their date of origin back at least to May 2006.

> "The drugs classification system is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. The distinction between legal, prescription and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning […]. Legal substances are therefore regulated through other means". (Paragraph 4.15) "But alcohol and tobacco account for more health problems and deaths than illicit drugs". (Paragraph 6.8)

55. Section 6 of the redacted rDCS consultation document is crucial:

> "To many young people the regulation of tobacco and alcohol and the prohibition of drugs presents a dichotomy in terms of harm. They question why substances of considerable harm such as cigarettes and alcohol are able to be consumed relatively easily when possessing a drug like cannabis can lead to prosecution. (Paragraph 6.3, emphasis added)

It was this very "dichotomy" that propelled the Claimant's interest in drug policy. His family was riven with alcoholism and both his grandfather and father would later die of tobacco related disease.

56. After comparing the harms of alcohol and tobacco, paragraph 6.8 of the rDCS consultation document stated:

> There has not, in the UK, been any attempt to impose controls comparable to illicit drugs where it would be an offence to possess and supply alcohol and tobacco. The social acceptability of, for example, alcohol would make such controls unacceptable to the majority who use alcohol responsibly and therefore impractical. But alcohol and tobacco account for more health problems and deaths than illicit drugs. To many young people this presents problems in understanding the rationale behind controlling drugs such as cannabis and ecstasy when their misuse contributes less overall harm to society than the widely available drugs such as alcohol and tobacco".

57. The Claimant was born the year the Act came into force. Most members of his generation (or at least the members he's asked) have "problems in understanding the rationale behind controlling drugs such as cannabis and ecstasy when their misuse contributes less overall harm to society than the widely available drugs such as alcohol and tobacco". But thanks to the rDCS, we now know: on the Defendant's misconstruction of the Act, it would be "impractical" to apply it to persons concerned with alcohol and tobacco. One rule for the many, another for the few.

58. Paragraph 6.9 of the redacted rDCS was a real gem:

> "In terms of death, illegal drugs amounted to 1,388 in 2003 compared to about 20,000 for alcohol and 100,000 for tobacco".

59. Paragraph 6.10 and 6.11 of the rDCS were redacted. Why? The Claimant had a good idea, but he would have to wait until 9 July 2010.

60. On 12 May 2010, the Claimant submitted his "Public Interest" *amicus curiae* document to the First Tier Tribunal re the disclosure of the remainder of the rDCS document. That same day the Tribunal joined the Claimant as a party.

FOI 14725

61. On 21 May 2010, the Defendant wrote the Claimant, T7234/10, to convey an undated document, FOI 14725, entitled "Draft response to Recommendation 1 of ACMD's Pathways to Problems Report calling for the explicit inclusion of alcohol and [tobacco] in the ACMD's terms of reference" allegedly "explain[ing] the reasoning which has been inherent from the outset of the Act's provisions, as to the absence of applying control of alcohol and tobacco under the Misuse of Drugs Act". The cover letter went on to state:

> "The licensing controls on these substances already restrict the lawfulness of their sale and this represents a clear acknowledgment of their harmfulness to health and the need to provide adequate protection for the public. Successive Government's have considered that these provisions do not need to be replicated in the Misuse of Drugs Act. Harm reduction strategies have been, and are, in place to combat the considerable harm and misuse alcohol and tobacco cause and to achieve long term changes in attitude". (Emphasis added)
>
> "The Misuse of Drugs Act makes the unauthorised production, supply, possession with intent to supply, possession, import or export of drugs unlawful in a classification system coupled to a scale of penalties not suitable for applying to alcohol and tobacco". (Emphasis added)

62. Paragraph 1 and 2 of FOI 14725 had said:

> "1. Whilst the ACMD was established by an Act, the main function of which is to provide a framework within which criminal penalties are set with reference to the harm caused by a drug, their terms of reference are already sufficiently wide to include alcohol and tobacco. The penalty-linked framework has no place in the regulation of alcohol and tobacco, but this does not displaces ACMD's remit to include these substances, as notably the 1971 Act does not define "drugs", (it only defines controlled drugs). Its current remit gives full scope for making recommendations that do not (sic) include an alteration of the law (ie. Classification) and they are specifically charged with giving advice to prevent misuse of drugs". (Emphasis added, parenthetical expressions preserved, except for (sic))
>
> "2. Based on the position at point 1 above, there seems little to gain from an explicit reference to alcohol and tobacco and certainly not enough to justify a (single) change in the 1971 Act by primary legislation. The ACMD is already accountable to – and can be commissioned by – the key departments working on alcohol and tobacco policy – DH, DfES and Home Office". (Emphasis added, parenthetical expressions preserved)

63. Paragraph 5 of FOI 14725 continued:

> "5. There may be practical problems for ACMD in its current form to take a greater interest and responsibility in alcohol and tobacco. For instance its current membership may need to be revised significantly to provide the necessary expertise. The Government may welcome the ACMD's advice – *it is for those leading in the relevant policy area to say* – though it must be confident that the ACMD is equipped to give that advice and also, that ACMD is not distracted by what is considered to be its main function – advice on illegal drugs or those that can (realistically) be brought under the control of the 1971 Act". (Emphasis added, italics preserved)

64. On 27 May 2010 the Claimant wrote the Defendant to query, *inter alia*, what the Defendant would admit on 29 July 2010 was a drafting error, the "not" in paragraph 1 of FOI 14725. The sentence should read:

> "[the ACMD's] current remit gives full scope for making recommendations that … include an alteration of the law [not limited to classification] …"

65. The Claimant's 27 May 2010 letter again raised the exclusion of alcohol and tobacco from the Act and he asked a few follow-up questions:

> "The relevant and sufficient facts necessary to exercise your s2(5) discretion under the Act are made out re alcohol and tobacco. Section 2(5) states "the Secretary of State shall not lay a draft of such an Order before Parliament except after consultation with or on the recommendation of the Advisory Council": but when "shall" the Secretary of State act?"
>
> "2. Do you consider that alcohol and tobacco are "substances that can be misused"?
>
> "3. If as was said in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than illicit drugs", how does licensing controls on alcohol and tobacco "represent a clear acknowledgment of their harmfulness to health and the need to provide adequate protection for the public" as against: "the main function of [the Act] is to provide a framework within which criminal penalties are set with reference to the harm caused by a drug"? Why the special treatment of alcohol and tobacco?"
>
> "4. On what rational and objective basis does "[t]he penalty linked framework ha[ve] no place in the regulation of alcohol and tobacco"? Or said another way, why is the classification system's "scale of penalties not suitable for applying to alcohol and tobacco"?"

66. On 2 July 2010, the Defendant replied, T9943/10, to the Claimant's specific questions of 27 May 2010, with emphasis:

> "Whether the new Government will at some stage ask the Advisory Council on the Misuse of Drugs (ACMD) for advice relating to alcohol and tobacco in accordance with section 1(2) of the Misuse of Drugs Act is yet to be determined".
>
> "2. Yes. Alcohol and tobacco are substances that can be misused"
>
> "3. Government intervenes in many ways to prevent and minimise the harms caused by alcohol and tobacco. […] The means by which these substances are regulated is embedded in historical tradition of responsible consumption; and the licensing controls on these substances remain acceptable to the vast majority of people. The way in which Government regulates alcohol and tobacco therefore remains distinct from the method by which drugs subject to the Misuse of Drugs Act 1971 are controlled".
>
> "4. 'The penalty-linked framework [of the Misuse of Drugs Act] has no place in the regulation of alcohol and tobacco' insofar as the means by which these substances are regulated is embedded in historical tradition and tolerance of responsible consumption; and the licensing controls on these substances remain acceptable to the vast majority of people".

The s2(5) Request

67. On 1 July 2010, the Claimant wrote the Defendant, setting out in full the Defendant's remit under s2(5) of the Act and his analysis, as it stood, of her misconstructions of the Act. He then requested that she ask the Council about the feasibility of creating under the Act, via ss7(1)-(2), 22(a)(i) & 31(1)(a), a coherent regulatory structure for alcohol and tobacco allowing for:

    1) Regulating and licensing under s7(1)-(2) their import and export;
    2) Regulating and licensing under s7(1)-(2) their production and supply;
    3) Regulating and licensing under s7(1)-(2) premises for their safe supply and consumption;
    4) Excluding via s22(a)(i) the offence of possession, s5, re alcohol and tobacco for all persons over the age of 18;

The Withdrawal

68. On 5 July 2010, the Defendant sought leave to withdraw her appeal to the First Tier Tribunal re the Information Commissioner's 9 March 2010 Decision Notice. The Tribunal granted the Defendant leave to withdraw.

Statement of Facts

rDCS Unredacted

69. On 9 July 2010, the Home Office posted to the Claimant the full, ~~unredacted~~ rDCS document *Review of the UK's Drugs Classification System – a Public Consultation*. After admitting in paragraph 6.9 that alcohol and tobacco kill 120,000 per annum, the previously redacted paragraphs 6.10-6.11 state:

> "6.10 In view of the harms presented by [alcohol and tobacco] a classification system could recognise these substances in a way which would stop short of imposing comparable controls. The creation of a system to assess the harmfulness of drugs on a more structured and transparent basis, as presented earlier in this paper, could be extended to cover alcohol and tobacco but for comparative and messaging rather than control purposes. Acknowledging the harmfulness of alcohol and tobacco could allow young people to give greater credence to the message that all drugs are harmful and the less overall misuse the better for individuals, their communities and society as a whole". (Emphasis added)
>
> "6.11 This approach would allow for a more logically consistent approach to substance misuse. However most people would not want to see the drugs classification system as a mechanism for regulating legal substances such as alcohol and tobacco. If applied to legal as well as illegal substances, this would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Emphasis added)

70. The "could" in paragraph 6.10 above envisages that the Act can be applied to alcohol and tobacco. As far as the Claimant is aware, this is the first time that the Defendant even remotely suggests that the Act can be applied to persons concerned with alcohol and tobacco. Is it any wonder that the Defendant suppressed these two paragraphs for four years?

The s2(5) Decision

71. On 10 August 2010, the Defendant responded to the request that she ask the Council about the feasibility of creating under the Act, via ss7(1)-(2), 22(a)(i) & 31(1)(a), a coherent regulatory structure for alcohol and tobacco:

> "The Coalition Government has no intention of seeking the classification of alcohol and tobacco under the Misuse of Drugs Act (the 1971 Act) for the purposes of controlling these substances under the Act. […S]ection 2(5) places a duty on the Secretary of State not to lay a draft Order in Council before Parliament … except after consultation with or on the recommendation of the Advisory Council. It does not place a duty upon the Secretary of State to otherwise consult the Council".

The Letter Before Claim

72. On 25 August 2010, the Claimant posted a Letter Before Claim ("LBC") to the Defendant setting out the issues he thought pertinent and the questions of law that might arise in addressing them. He also gave the Defendant an opportunity to reconsider the decision and give 14 days for reply.

The Letter of Response

73. On 24 September 2010, Mr James Chapman, for the Treasury Solicitor, responded for the Defendant. The Letter of Response ("LOR") addressed none of the specific issues set out in the LBC, in particular it did not address the original request, made by the Claimant on 1 July 2010, that the Defendant consult with the Advisory Council on the possibility of controlling alcohol and tobacco under the Act. The LOR did, however, state that "the Courts will not become involved in policy issues of this kind". The short LOR then reiterated the Defendant's "policy":

> "the Government's policy is to regulate controlled drugs – more commonly referred to as "illegal drugs" – through the Misuse of Drugs Act 1971, and the availability of alcohol and tobacco separately. This stance recognises that whilst alcohol and tobacco pose health risks and may have anti-social effects, their use is embedded in society, and responsible use is possible and commonplace."

74. Here we go again; except this time the Claimant is not concerned with the merits of the policy; he wants to know if the policy and the decision taken pursuant to it are lawful?

Not the Merits

75. Thus, in reality and in form, this challenge is to the lawfulness, not the merits of the decision and the policy that predetermined it. It is not about it being morally wrong, which it may be; rather, it is all about it being legally wrong.

I firmly believe that the facts stated in this Statement of Facts are true.

– *fiat lux, fiat justitia, ruat cælum!*

Casey William Hardison
Claimant

Date ……