

1 July 2010

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The Rt Hon Theresa May MP
Home Secretary
2 Marsham St
LONDON SW1P 4DF

Re: T19870/9 – Misuse of Drugs Act 1971 c38 & GCHQ [1985] AC 374

Dear Madam,

Thank you for your letter, via Richard Mullins, of 4 May 2010. Unfortunately, it did not address the substantive issue I raised in my 1 November 2009 letter re the underlying problem with your administration of the Misuse of Drugs Act 1971 c38: the continued irrational exclusion of alcohol and tobacco from the Act's control.

Rather than address this issue; you simply stated:

“the remainder of your letter substantially reflects leave to appeal against conviction considerations and to that extent, they are primarily a matter for the court, not the Home Office, to address”

The matter is not the subject of any appeal. No court is seized of the matter. And I want your views on why you think it is proper for you to not consider the control of alcohol and tobacco under s2 of the Misuse of Drugs Act 1971, as per your duty to protect the public as conferred on you under s2(5).

The Act's control and classification mechanism in s2 states:

“2. Controlled drugs and their classification for purposes of this Act.

(1) In this Act – (a) the expression “controlled drug” means any substance or product for the time being specified in Part I, II, or III of Schedule 2 to this Act; and (b) the expressions “Class A drug”, “Class B drug” and “Class C drug” mean any of the substances and products for the time being specified respectively in Part I, Part II and Part III of that Schedule; and the provisions of Part IV of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule.

(2) Her Majesty may by Order in Council make such amendments in Schedule 2 to this Act as may be requisite for the purpose of adding any substance or product to, or removing any substance or product from, any of Parts I to III of that Schedule, including amendments for securing that no substance or product is for the time being specified in a particular one of those Parts or for inserting any substance or product into any of those Parts in which no substance or product is for the time being specified.

(3) An Order in Council under this section may amend Part IV of Schedule 2 to this Act, and may do so whether or not it amends any other Part of this Schedule.

(4) An Order in Council under this section may be varied or revoked by a subsequent Order in Council thereunder.

(5) No recommendation shall be made to Her Majesty in Council to make an Order under this section unless a draft of the Order has been laid before Parliament and approved by a resolution of each House of Parliament; and 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.” (Emphasis mine)

As the Act neither states an explicit policy nor fixes any determining criteria to guide when you, the Secretary of State, shall instigate the control process under s2(5), the s2(5) discretion is governed by the administrative law principle laid down by the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court”.

Section 1(2) of the Act, re the remit of Advisory Council on the Misuse of Drugs, implies that a drug or substance is liable to control under the Act if: (1) it is “being or appear[s] ... likely to be misused”; and (2) “[this] misuse is having or appears ... capable of having harmful effects sufficient to constitute a social problem”.

The above two criteria are the relevant and sufficient facts that must be made out in order to justify the control of a drug or substance, and thus regulate the actions of persons concerned with them, in the public interest.

It is this simple: if a drug or substance is being or may be self-administered and that self-administration results or may result in any spilt blood or treasure or weigh on the public purse in any way, it is “sufficient to constitute a social problem”, s1(2) and it should be controlled under the Act.

In ‘Review of the UK’s Drugs Classification System – a Public Consultation’ you stated:

“alcohol and tobacco account for more health problems and deaths than illicit drugs.”

In Cm 6941 (2006) you again stated:

“alcohol and tobacco account for more health problems and deaths than illicit drugs”

And in your defence to *R(Hardison) v SSHD* [2007] EWHC 2133 (Admin) you stated:

“alcohol and tobacco do pose health risks and can have anti-social effects”.

You have admitted the necessary jurisdictional facts for you to begin the process of seeking the control of alcohol and tobacco under s2(5) of the Act by first requesting advice and recommendations from the Advisory Council on the Misuse of Drugs. For clarity, I reiterate the two jurisdictional facts:

- 1) Alcohol and tobacco are harmful drugs within the Act's scope as the term "drug", s1(2), is not synonymous with the phrase "controlled drug", s2(1)(a).
- 2) Alcohol and tobacco misuse is "having harmful effects sufficient to constitute a social problem", s(1)2.

Your current refusal to consider the control of alcohol and tobacco under the generally applicable and neutral Act is unacceptable and creates two inequalities of treatment under criminal law:

- 1) a failure to treat like cases alike, *viz* the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis; and
- 2) a failure to treat unlike cases differently, *viz* the failure to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm.

These inequalities of treatment constitute unequal deprivations of liberty at common law. On page 24 of Cm 6941, you unconsciously revealed three errors of law whilst defending the inequality of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects.

These three errors of law are:

- 1) You, the SSHD, believe that the Act permanently proscribes the enumerated activities, ss3-9, re a controlled drug, bar medical and scientific purposes, i.e. "our policy of prohibition [is] reflected in the terms of the [Act]".¹
- 2) You, the SSHD, claim a power, the SSHD does not possess, to exempt individuals or classes of individuals from the operation of the law by excluding alcohol and tobacco from the Act's control.
- 3) You, the SSHD, believe in the "illegality of certain drugs",² i.e. that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal".

In the *GCHQ* case, [1985] AC 374 at 401, Lord Diplock formulated a classic statement on illegality as a ground of judicial review:

"By 'illegality' ... I mean the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable".

¹ Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

² Cm 6941 (2006) page 18

The three errors of law above elucidate your failure to correctly understand the Act regulating your decision making power.

In your letter to me of 21 May 2010, T6866/10, you attempt to justify, in your words:

“the absence of applying control of alcohol and tobacco under the Misuse of Drugs Act”

You gave completely illogical rationale for this “absence” and then you stated that current provisions re alcohol and tobacco, i.e. licensing controls:

“do not need to be replicated in the Misuse of Drugs Act 1971”

This is not good enough.

I hereby formally request that you, the Secretary of State, identified as the responsible Secretary under the Misuse of Drugs Act 1971, exercise your powers, in good faith, to ask the Advisory Council for their opinion on bringing alcohol and tobacco under the Act’s control.

I specifically request that you 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) the import and export of alcohol and tobacco;
- 2) Regulating and licensing under s7(1)-(2) the production and supply of alcohol and tobacco;
- 3) Regulating and licensing under s7(1)-(2) premises for the safe supply and consumption of alcohol and tobacco;
- 4) Excluding the operation of s5 re alcohol and tobacco under s22(a)(i) for all persons over the age of 18;

I eagerly await your response.

– *fiat lux!*

Casey William Hardison – POWd (Civ)