In the Supreme Court of Judicature
Court of Appeal (Civil Division)
On Appeal from the Queen's Bench Division
The Administrative Court
His Honour Mr. Justice Beatson

C4/2007/2160

Royal Courts of Justice
Strand
London WC2A 2LL

In the matter of an Application for Judicial Review CO/687/2007

The Queen on the Application of

CASEY WILLIAM HARDISON

Appellant

– & –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Draft Skeleton Argument in Support of Grounds of Appeal

"The current system for classifying and controlling drugs in the UK has a number of shortcomings and should be reviewed".

Pathways to Problems
The Advisory Council on the Misuse of Drugs
September 14th 2006

Prepared By

Casey William HARDISON

October 8th 2007

Draft Arguments in Support of Grounds of Appeal

Introduction

1. Mr Casey William Hardison appeals His Honour Justice Beatson's August 31st 2007 Order refusing Hardison permission to seek Judicial Review of the SSHD's October 13th 2006 decision, in Cm 6941 at paragraph 12, not to honour his predecessor's January 19th 2006 promise to publish "a consultation paper with suggestions for a review of the drug classification system".

2. Hardison set out his claim against the decision on the grounds of reasonableness and legitimate expectation given the significance of new evidence of illegality and disproportionality in the administration of the Misuse of Drugs Act 1971.

3. HHJ Sullivan, with whom HHJ Beatson agreed, adopted the Defence assertion that Hardison's "claim is in reality, if not in form, a challenge to the merits not the legality of the Government's drug policy". But, this is wrong, as Hardison is not attacking political, economic, or social judgment; instead, Hardison attacks the lawfulness of the SSHD's exercise of discretion which is manifestly bound by the Rule of Law, the Human Rights Act 1998 ("HRA"), the Misuse of Drugs Act 1971 and the public interest. In Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, Lord Diplock said "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."

4. As per s1 of the Misuse of Drugs Act 1971 ("the 1971 Act), it is predominantly for the Advisory Council Misuse of Drugs ("the ACMD) to decide primary facts re drugs and their risks to public welfare upon objective scientific evidence. In this manner, the 1971 Act is not a political or economic statute but a criminal and health statute based on independent scientific advice of risks to the public.

5. In the summer of 2006, between the original promise and the reneging on that promise, Government was made aware by the ACMD and others of primary facts which strongly signify to any reasonable man with an open mind that the 1971 Act and its classification system are being administered arbitrarily and thus illegally in terms of common law equal treatment and by extension HRA Article 14.

6. Mr Hardison asserts that paragraph 1.13 from the September 14th 2006 Advisory Council on the Misuse of Drugs report *'Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*, taken to its logical conclusion, signifies this in a unequivocal manner:

> "1.13 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) (Figure 1.3) and drugs which are classed as medicines, some of which are also covered by the Act. The insights summarised in this chapter indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis". (Emphasis added)

7. At the point the SSHD was made aware by the statutory ACMD, *inter alia*, of the possibility that the drug classification system, the backbone of the Misuse of Drugs Act 1971 which deprives liberty and property, is being operated arbitrarily, based on subjective distinctions of "historical and cultural factors [which] lack a consistent and objective basis", he had but one question to ask:

   > Am I, the Minister responsible, operating the drug classification system under the Misuse of Drugs Act 1971 within the four corners of the law?

8. Instead, he asked himself the wrong question (cynically assumed by Hardison):

   > Is the first Friday of a new Parliament a good time to ditch my predecessor's promised consultation and review of the drug classification system?

9. No, it wasn't, for Hardison was watching with a procedural and substantive legitimate expectation that he would honour his predecessor's lawful promise.

10. And so Hardison asserts it can be shown that the SSHD knew well before October 13th 2006 that the drug classification system was being administered arbitrarily and thus illegally. And that is why it is reasonable to say that the Rt Hon Charles Clarke MP, the former SSHD, did the responsible thing when, on January 19th 2006, he made a clear unambiguous decision or "promise" in the public interest to Parliament in the following terms:

    > "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, Col 983

11. Thus, it beggars belief, to the extent of *Wednesbury* unreasonableness, that when the Rt. Hon Charles Clarke MP resigned his post, as SSHD, and the Rt. Hon Dr. John Reid MP, the new SSHD, was broadsided with two reports from very credible authorities declaring serious shortcomings in the drug classification system, he ignored or depreciated them whilst reneging on the promised review:

    a. On July 31st 2006 – The Fifth report of the 2005-2006 Science and Technology Committee, HC 1031, *'Drug classification: making a hash of it?'*, stated: "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, and to do so without further delay". (Emphasis added)

    b. On September 14th 2006 – The ACMD Prevention Working Group report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, stated: "The current system for classifying and controlling drugs in the UK has a number of shortcomings and should be reviewed".

12. Hardison claims the new SSHD's renege was beyond the range of responses open to a reasonable decision maker. R v MOD *ex p* Smith [1996] QB 517 at p. 554.

13. More, by deciding, in Cm 6941, "not to pursue a review of the classification system at this time" the procedural legitimate expectation to be consulted on the review of the classification system was thwarted, without a word, along with the substantive legitimate expectation of a lawfully administered, evidenced based drug classification system where like cases are treated alike and unlike cases are treated differently. *Cf.* Matadeen v Pointu [1999] AC 98 at para 8

14. That like cases are not being treated alike is elucidated by the SSHD's admission on page 24 of Cm 6941, the same document in which he reneged:

> "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 ..."

15. No explanation is given as to why "historical and cultural precedents" or "legal status" are lawful justifications for treating the two drugs, alcohol and tobacco, that Government has just acknowledged are the most dangerous in terms of deaths and health problems, as a different case from the "dangerous or otherwise harmful drugs" which the Misuse of Drugs Act 1971 makes provision for; nor is any explanation offered for the errors of law exhibited in the above reasoning:

    1) that drugs or "substances" can be "illegal" when it its only the exercise of property rights re controlled drugs that may, not shall, be made illegal under the 1971 Act, i.e, the 1971 Act regulates the actions of people not drugs.

    2) that the application of the 1971 Act's classification system to a drug mandates the extinction of property rights for non-medical and non-scientific purposes; and

    3) that the SSHD has the power to exclude two unquestionably harmful drugs from the scope of the 1971 Act, thereby exempting (*de facto* and *de jure*) certain individuals or classes of individuals from the application of the principles of a neutral law; and

16. These errors show that the SSHD does not "understand correctly the law that regulates his decision-making power" and has not "given effect to it". Yet, paragraph 7 of the Defendant's Summary Grounds rehashes the first and third of these errors of a law and peculiarly HHJ Beatson accepted it in his judgment:

> "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, Judgment paragraph 10)

17. But as Pretty v United Kingdom [2002] 35 EHRR 1 said at 77, "strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law".

18. Hence, the exclusion by the executive of the dangerous or otherwise harmful drugs alcohol and tobacco and by extension the exemption of those persons with interests in them from the quintessentially neutral Misuse of Drugs Act 1971 cannot be legal in terms of common law equal treatment and/or HRA Article 14.

19. But, lest this assertion gets lost in the smoke and mirrors of drug law obfuscation, Hardison repeats for clarity, on a proper understanding of the 1971 Act "prohibition" of any controlled drug is not mandatory nor is Hardison asking this Court to Order the imposition of prohibition on alcohol and tobacco. As the Defendant rightly stated, Summary Grounds at paragraph 5, it is "manifestly absurd" to prohibit the exercise of all property rights in alcohol and tobacco.

20. Yet by this same logic, it is equally "manifestly absurd" to prohibit under severe penalty the exercise of all property rights in controlled drugs, which the ACMD established are no more harmful than, and in many cases significantly safer alternatives to, the harmful drugs alcohol and tobacco. In fact, it's downright "unreasonable" and disproportionate; and therein lays the unequal treatment.

21. So, it is a curious fact that when Secretary of State for the Home Department, the Rt. Hon Charles Clarke MP, announced on January 19th 2006 his unequivocally decision or "promise" to undertake a review of the drug classification system to Parliament, he did so in special reference to "the young":

> "Clarity is the most important thing. One of the biggest criticisms of the current classification system is that it does not illuminate debate and understanding among the young people who are affected by it. That is one of the reasons that I have decided to undertake an examination of this matter." *Hansard*, HC Deb, 19 Jan 2006, Col 992 *et seq.* (Emphasis added)

22. He's right; this young person, Mr Hardison, does not understand why he is being treated so differently to the CEO's of the Alcohol and Tobacco industry.

23. And yes, what Hardison ultimately seeks at the end of the legal rainbow is equal treatment under the Rule of Law and the Human Rights Act 1998 and thus an end to the blatant discrimination rooted in prejudice and misconceptions of the majority and the SSHD's legal misunderstanding of the beautifully crafted and quintessentially neutral Misuse of Drugs Act 1971 and its classification system.

24. So in sum, Hardison's procedural expectation to consultation and substantive legitimate expectation to a return to a lawfully administered evidenced based drug classification system arises from the SSHD's promise to consult on the review of the drug classification system he "decided to undertake" conjunct the Rule of Law, s3 of the HRA 1998 and the implied procedure rule in s1 of the 1971 Act that an independent scientific advisory body would kept it under review.

25. Set out in Appendix A is the factual basis of the SSHD's decision or "promise" to review the drug classification system, Hardison's interpretation of the Misuse of Drugs Act 1971, its legitimate aims and its classification system, Hardison's procedural and substantive legitimate expectation, and a short argument as to why the current administration of the Misuse of Drugs Act 1971 itself illegal, irrational, and unfair. But now, the Grounds of Appeal.

The Grounds for Appeal

26. HHJ Beatson did not address Hardison's Application for Equal Footing (CPR 1.1(2)(a)) listed in s7 of the N461 and mailed to the Court and Defence on March 28th 2007. So, the full papers set out in the January 16th 2007 Essential Documents declaration attached to the N461 were not before the Court. This placed the Court at a disadvantage in applying the overriding objective to the controversy and denied the opportunity to establish the factual basis of the "promise"

    a. Hardison, as an incarcerated self-litigant without adequate research facilities, was unable to find let alone place before the Court the official *Hansard* report of the announcement and subsequent discussion in both Houses of Parliament, and other essential documents, so he was unable to establish for the Court the factual basis of the promise; but, as was said in R v North & East Devon Health Authority, *ex p* Coughlan [2001] QB 213 at paragraph 56:

    > "Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion."

    b. In pursuit of the factual basis of the promise, on March 19th 2007, Hardison sought disclosure via the Treasury Solicitor of "the consultation document" referred to by Home Office Minister Vernon Coaker on June 14th 2006 in oral testimony to the 2005-2006 Science and Technology Committee. Hardison received a reply dated March 23rd 2007 that the document was not in the possession of the Treasury Solicitor and was redirected to Angela Scrutton at the Home Office. So, on March 26th 2007, under the Freedom of Information Act 2000 Hardison requested "the consultation document".

    c. Crucially, on March 28th 2007, along with the application for 'Equal Footing', Hardison informed the Court by letter that he was seeking disclosure of "the consultation document" and, in particular, Hardison asserted: "It is firmly believed that this 'consultation document' adversely affects the Defence".

    d. Then, on July 2nd 2007, after a number of holding replies by the Home Office, Hardison finally received a reply from their Direct Communications Unit, letter reference T12396/7 6439, which stated:

    > "I can confirm that **the Home Office holds information that is relevant to your request**. However, after careful consideration, we have decided that the information you have requested – **in the form of an unapproved draft consultation document** and of Ministerial communications, including advice to Ministers – is exempt from disclosure by virtue of Section 35(1)(a) and (b) of the Freedom of Information Act ("the Act") We consider that the information falls squarely within these exemptions." (Letter enclosed, emphasis added)

    e. As a result of the Court not facilitating equal footing the decision was reached without the full papers, in particular "the consultation document". Thus, Mr Hardison has been denied a "fair crack of the whip". E v SSHD [2004] EWCA Civ 49 at 65-66.

27. HHJ Beatson made an error of law concerning the "clear promise" element of the cause of action and subsequently the scrutiny of any defence to any legitimate expectation created by such a "clear promise".

    a. The SSHD has a duty to ensure that the drug classification system under the Misuse of Drugs Act 1971 functions effectively and lawfully. Thus, on January 19th 2006, "concerned" about "the limitations" of the drug classification system, the then SSHD decided to undertake a review.

    b. *Hansard* shows this decision, using the terms "I will" and "I have decided" can rightly be characterised as a promise made in the public interest, which induced at minimum a procedural expectation to be consulted on the forthcoming review. Government should not resile unless a compelling and overriding public interest justifies breaking the original promise.

    c. The public interest in honouring that promise increased when the July 31st 2006 Fifth report of the 2005-2006 Science and Technology Committee, HC 1031, *'Drug classification: making a hash of it?'*, concluded that: "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, and to do so without further delay", and when the September 14th 2006 report of the statutory Advisory Council on the Misuse of Drugs, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'* declared the Government's risk management distinctions made under the Misuse of Drugs Act 1971 "are based on historical and cultural factors and lack a consistent and objective basis" adding that, "[t]he current system for classifying and controlling drugs in the UK has a number of shortcomings and should be reviewed". These two reports strongly indicate that the Misuse of Drugs Act 1971 and its drug classification system are being administered illegally and disproportionately.

    d. And so, if the SSHD has been made aware by primary fact finders that he is possible administering the drug classification system illegally, he has a public law duty to address them. *Cf.* Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. This the new SSHD has not done though the consultation and review were perfect opportunities to do so.

    e. Thus, the SSHD's October 13th 2006 decision in Cm 6941 to renege on his predecessor's promise was not made in the public interest nor was any such overriding public interest offered in Cm 6941 which justified the SSHD in breaking the promise or ignoring evidence of illegality. Instead, and contrary to the ACMD and Science and Technology committee, the SSHD declared:

        > "The Government believes that the classification system discharges its function fully and effectively and has stood the test of time … Its familiarity and brand recognition amongst stakeholders and the public is not to be dismissed".

    f. Apparently, Government belief and "brand recognition" trumps the findings of primary fact finders and the Rule of Law. There is no defence to this failure to honour the former SSHD's lawful promise or the SSHD's duties. Besides, there is no public interest in not having the consultation and review.

28. HHJ Beatson made an error of law in placing the "promise" in a category which demands the least scrutiny and the most deference from the Court. But, because of Hardison's and the wider public's procedural and substantive legitimate expectations, HHJ Beatson should have placed the "promise" in at least the second Coughlan category, set out in paragraph 57.

    a. HHJ Beatson, without establishing the factual basis of the promise and crucially without the full papers, particularly the official *Hansard* report and Cm 6941, wrongly characterised the January 19th 2006 announcement by the Rt Hon Charles Clarke MP as a general or broad statement of policy. As a result, HHJ Beatson concluded that the "statement is not arguably within the Coughlan guidelines"; (paragraph 7). Yet, in R v North & East Devon Health Authority, *ex p* Coughlan [2001] QB 213 at paragraph 57, this Court said:

> "(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see *Re Findlay* [1985] AC 318; *R v Home Secretary ex parte Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *A-G for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy." (Emphasis in original)

    b. It is clear that the then SSHD promised the publication of "a consultation paper with suggestions for review of the drug classification system". And the Court was made aware that a draft copy of "the consultation paper" exists. Coughlan would suggest that it is uncontentious that HHJ Beatson should have, at minimum, "require[d] the opportunity for consultation to be given unless there is an overriding reason to resile from it".

    c. And, even if the SSHD's statement falls only to the first Coughlan category, Hardison asserts that given the significance of the new evidence of the arbitrary and illegal administration of the drug classification system and thus the 1971 Act, the renege was beyond the range of responses open to a reasonable decision maker. R v MOD *ex p* Smith [1996] QB 517 at 554.

    d. More, the promise induced in Hardison "a legitimate expectation of a benefit which is substantive", *viz* the eventual public recognition that his conviction and severely disproportionate sentence is a product of conspicuous unfairness.

29. HHJ Beatson failed to connect the "clear promise" to Hardison's ultimate and compelling liberty interest, and the liberty interest of all others similarly situated, and thus to his procedural and substantive expectation that the consultation process and review would uncover a majoritarian abuse of power in the unequal administration of the Misuse of Drugs Act 1971.

    a. Hardison asserted from the moment of his arrest that "this Government is guilty of an abuse of power" in their arbitrary, unfair, and unequal administration of the neutral Misuse of Drugs Act 1971 and thus his trial should not take place. And until mid-2006, after his criminal appeal, he had no real evidence to support this and/or to aid in his articulation of it.

    b. Yet, in January 2006, four months before Hardison's appeal, the then SSHD decided he would undertake a review of the drug classification system and that he would consult on it. This induced in Hardison a procedural and substantive legitimate expectation that he would be heard in the consultation and the review itself would uncover the abuse of power, i.e., conspicuous unfairness.

    c. Hardison had no idea that the 2005-2006 Science and Technology Committee was undertaking an examination of the Government's use of evidence in administering the drug classification system or even that the ACMD's Prevention Working Group was to report on their three-year study.

    d. So, when these two groups reported on the fundamental lack of evidence for the distinctions Government makes in administering the 1971 Act, its drug classification system, and the arbitrary exclusion of alcohol and tobacco, he saw hope at the end of the legal rainbow. But, he did not expect that Government would come right out and admit unequal treatment based on majoritarianism, subjectivity and an incorrect understanding of the 1971 Act.

    e. Yet, this is exactly what Government did in the last two paragraphs on page 24 of the renege document, Cm 6941. And surprisingly, paragraph 7 of the March 14th 2007 'Defendant's Summary Grounds for Contesting the Claim' repeats this admission complete with two of the same errors of law.

    f. Legality drives policy not the contrary. Government policy is not legal as it treats like cases differently without an objective and rational justification. And this Court, like all of Her Majesty's Courts, has a responsibility to examine this matter fully and fairly. As Lord Nicholls of Birkenhead affirmed in *R v Looseley, Attorney General's Reference* (No 3 of 2000) [2001] UKHL 53:

        > "Every court has and inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement provisions of the courts and thereby oppress citizens of the state."

    g. Anxious scrutiny by this Court of Cm 6941 page 24 with respect to the *vires* of the Misuse of Drugs Act 1971 would elucidate the abuse of power, connect it to Hardison liberty interest and his legitimate expectations, and show that the SSHD's renege was, as Hardison asserted in s5 of the N461, "at minimum *Wednesbury* unreasonable"; *ex p* Smith at p. 554.

30. HHJ Beatson failed to address the Article 6 'procedural fairness' claim.

a. Because drug classification decisions ultimately result in deprivations of liberty, classification must be a reliable fact of law. And as the scientific evidence evolves along with patterns of drug use and control, so too the classification system must evolve with it. Thus, as the first two parts of safeguarding procedural fairness, proportionality and consistency, over time, the SSHD has a statutory duty, under ss2(5), s7(7) & 31(3) of the 1971 Act, to consult the ACMD for their contemporary scientific opinion as to drug risks to individuals and society before presenting to both Houses of Parliament for resolution any draft Order proposing alterations in drug classification. Judicial review is the remaining safeguard. *Cf.* Council of Civil Service Unions at p. 31.

b. The July 31st 2006 Fifth report of the 2005-06 Science and Technology Committee, HC 1031, *'Drug classification: making a hash of it?'* stated:

> "78. The stated purpose of the classification system is to classify harmfulness so that the penalties for possession and trafficking are proportionate to the harm associated with a particular drug. [...] 80. The penalties associated with classification can have serious consequences for users in terms of sentencing."

c. HC 1031, *'Drug classification: making a hash of it?'*, strongly indicates the current classification of drugs is no longer a reliable fact of law and that the exclusion of the drugs alcohol and tobacco from the classification system is arbitrary.

> 96. A paper authored by experts including Professor Nutt, Chairman of the ACMD Technical Committee, which we have seen in draft form, found no significantly significant correlation between the Class of a drug and its harm score. Astonishingly, despite the fact that Professor Nutt is the lead author, the paper asserted that **"The current classification system has evolved in an unsystematic way from somewhat *arbitrary foundations* with seemingly little scientific basis"**. The paper also found that the boundaries between Classes were entirely arbitrary [...] 106. 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 than LSD and ecstasy (both Class A drugs)."

d. The 'paper authored by experts including Professor Nutt, Chairman of the ACMD Technical Committee', Appendix 14 of HC 1031, states:

> Our findings raise questions about the validity of the current MDAct classification, despite the fact that this is nominally based on an assessment of risks to users and society. This is especially true in relation to psychedelic type drugs. **They also emphasise that the exclusion of alcohol and tobacco from the MDAct is, from a scientific perspective, arbitrary.** [...] Moreover, **our findings reveal no clear distinction between socially accepted and illicit substances** (Emphasis added, Ev 116)

e. So, by failing to honour the promised consultation and review of the drug classification system, the SSHD has placed the Police, the Jury, the Courts, the User, and any defendant at a considerable disadvantage, by having them believe the drugs in question to be more or less harmful than they really are. This results in prejudice, misconception, and disproportionate sentencing.

The Public Interest

31. There is no public interest in not having a consultation on the review of the drug classification system or indeed not having the review itself.

32. The new SSHD has made no attempt to justify, in the public interest, his decision not to honour his predecessor's commitment to review the drug classification system other than stating in Cm 6941 that "Government believes that the classification system discharges its function fully and effectively and has stood the test of time". Yet, this does not even begin to address the questionable legality of their unwavering policy "to exempt individuals or classes of individuals from the operation of the law": Pretty v United Kingdom [2002] 35 EHRR 1 at para 77.

33. But lest we forget, the real problem presented by basing a drug policy on historical and cultural assumptions, factors, and/or precedents rather than the Rule of Law is the deleterious affect of diverting the implementation of the 1971 Act from the actual risks drugs present to individuals and society; ultimately, this upsets the balance between public welfare and individual autonomy with serious unintended consequences. This is irrational, unintelligent and contradicts Government's stated commitment in their *Principles of Managing Risk to the Public*:

> "Government will base all decisions about risks on what best serves the public interest. Action taken to tackle risks to the public will be proportionate to the level of protection needed and targeted to the risk."[1]

34. Hardison believes it was in this spirit that the SSHD promised, with reference to young people's interests, a consultation on the review of the classification system.

35. In fact, Chapter 5 of the 1997 UN World Drug Report, entitled 'The Regulation-Legalization Debate', had pre-emptively warned Government:

> "The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use of some dependence creating drugs is legal and of others is illegal. The cultural and historical justifications offered for this separation may not be credible to the principle targets of today's anti-drug messages – the young".[2] (Emphasis added)

36. Reflecting this reality, Government's Updated Drug Strategy 2002 stated:

> "it is vital that the Government's message to young people is open, honest and credible. Drug laws must accurately reflect the relative harms of different drugs if they are to persuade young people in particular of the dangers of misusing drugs".[3]

37. So, how on earth are our young people going to consider Government's message on drugs credible when they exclude from the 1971 Act and the 'Drug Strategy' the two drugs, alcohol and tobacco, which they acknowledging are the two most harmful drugs in terms of deaths and illness and which the United Kingdom National Curriculum[4] requires *all* children to be taught are harmful drugs?

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[1] HM Treasury/Cabinet Office (2003) *Principles of Managing Risks to the Public*
[2] UNODC (1997) UN World Drug Report 1997, p 198, www.unodc.org/adhoc/world_drug_report_1997/CH5/
[3] www.drugs.gov.uk/ReportsandPublications/NationalStrategy/1038840638/Updated_Drug_Strategy_2002.pdf
[4] DfES (2004) *Drugs: guidance for Schools*, www.wiredforhealth.gov.uk/PDF/drugs_guidance_4.pdf at 1.3

An apology and a request for anxious scrutiny

38. As Lord Steyn so poignantly said in R (Daly) v Home Secretary [2001] 2 AC 532 at paragraph 28, "In law context is every thing." Thus, it must be acknowledged that Hardison, in his emotional attachment to his substantive expectation, overstated the Human Rights aspect of his claim.

39. Hardison had laid out as best he could that aspect of his argument as a mnemonic to himself, to highlight the increased public interest in both the promised consultation and the review, and to illustrate the absurdity of the SSHD reneging on them both. By the time Hardison made his prayer for relief, he lost sight of the fact that he set out his s5 N461 claim against the decision on the grounds of reasonableness and legitimate expectation given the significance of new evidence of illegality and disproportionality in the execution of the Misuse of Drugs Act 1971. He accepts that it was inappropriate for him to have done so.

40. Accordingly, Hardison apologises to this Court, the previous Court, and the Defendant for having obfuscated the claim with his emotions. And it is thus necessary to withdraw all requests for relief bar the original request for relief stated in s6 of the N461 and restated at paragraph 213(a) of his Statement of Case.

> "213. Thus, it is requested that this Court:
>
> a) Grant a Quashing Order for the decision of October 13th 2006 in paragraph 12 of page 5 of Cm 6941 and remit the matter to the SSHD under CPR 54.19(2)(b) directing him to reconsider his decision and reach a new decision consistent with the Human Rights Act 1998 and the *Power to Promote Regulatory Principles* in Section 2 of the Legislative and Regulatory Reform Act 2006."

41. Nevertheless, both this case and the new decision, in a more than reasonably incidental manner, touch on the common law principle of equal treatment and arbitrariness in the administration of a neutral law, which deprives physical liberty and the exercise of property rights, and by extension Article 14 conjunct the ambits of Protocol 1 Article 1, Article 8 and Article 6. Hence, Hardison submits that this case and the controversies which lie just beneath its surface are of such an entrenched nature that strict or anxious scrutiny review is required.

42. Previously anxious scrutiny has been reserved for some grounds such as sex, race, religion but more recently sexual orientation; these are what the US Supreme Court describe as particularly "suspect class[es]", i.e., those classes which are:

> ...saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[5]

43. This Court should extend this standard of review to this present case as those like Mr Hardison have been subjected to a "history of purposeful unequal treatment" without a rational and objective basis. Consequently, anxious scrutiny of at least the level of R v MOD *ex p* Smith [1996] QB 517 at p. 554 is requested.

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[5] *San Antonio School District v Rodriguez* (1973) 411 U.S. 1, 29 'the traditional indicia of suspectness'

Prayer for Relief

44. That Mr Justice Beatson did not avoid errors of law and fact has rendered his Order refusing permission for Judicial Review wrong and unjust within the meaning of CPR 52.11(3)(a) and (b). As such, Mr Hardison requests permission to Appeal the Order of HHJ Beatson be granted and that the Order be reversed.

45. In addition, Mr Hardison makes the following requests:

    1) that this Court grant Mr Hardison permission to submit additional relevant evidence, in particular, *Hansard* transcripts of both Houses and the Reply of the Advisory Council on the Misuse of Drugs to the Fifth Report of the Science and Technology Committee, establishing that the SSHD's promise was a "clear promise";

    2) that this Court Orders the disclosure of the "the consultation document which is in draft form in the department" and any other relevant information which the Home Office admits exists in letter T12396/7 6439. This firmly indicates that the wheels were in motion towards honouring the SSHD's promise and is clearly adverse to the Defence case.

– *vitam impendre vero, fiat lux!*

Signed .....
Casey William HARDISON

Dated .....