In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/7548/2007

Royal Courts of Justice
Strand
London WC2A 2LL

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

REPLY TO DEFENCE

"If policy on drugs is in future to be pragmatic not moralistic, driven by ethics not dogma, then the current prohibitionist stance will have to be swept away as both unworkable and immoral, to be replaced with an evidenced based unified system (specifically including tobacco and alcohol) aimed at the minimisation of harms to society. [...] This logical, rational and consistent approach will inevitably lead to the legalisation and regulation of all harmful drugs".

Richard Brunstom QPM, B.Sc., M.Sc.
Chief Constable North Wales Police
Drugs Policy: a radical look ahead?
October 9th 2007

Prepared By

First love!

Casey William HARDISON

Casey William Hardison

October 13th 2007

REPLY TO DEFENCE

Introduction

1) On September 18th 2007, Counsel for the SSHD filed the 'Defendant's Summary Grounds for Contesting the Claim'. Counsel's brief proceeds on the basis that Mr Hardison's challenge is "vexatious", "hopeless", "misconceived" and "utterly without merit". And that ultimately Hardison's instant challenge is to Governmental and Parliamentary drug policy and not the public law errors in the Drug Strategy Consultation document ("the DSCP"). It is disappointing that Counsel for the Defence has misunderstood and misrepresented Hardison's Claim; thus, Hardison turns once more and briefly to the facts and the law, beginning with the public law grounds upon which his case is stated.

2) The 14 Grounds or **Issues** set forth in Hardison's 'Statement of Case' in paragraphs 19-32 fall under three public law headings:

   a) A general failure by the Defendant to provide sufficient information and reasons in the DSCP for intelligent consideration and intelligent response to its proposals and response form questions: **Issues 1-6;**

   b) A failure to undertake consultation at a time when DSCP proposals are still in a formative stage: **Issues 7-8;**

   c) A failure to honour the legitimate expectations created within the consultation paper itself: **Issues 9-14.**

3) These **14 Issues** boil down to failures by the Defendant's to:

   a) follow Government's own *Code of Practice on Consultation 2004* even whilst the DSCP goes so far as to state that it does; and to

   b) follow the guidelines on consultation set out in R v North & East Devon Health Authority, *ex parte* Coughlan [2001] QB 213 at 108; and to

   c) get acquainted with the law and relevant evidence as set out in Secretary of State for Education v Tameside MBC [1977] AC 1014 at 1065; and to

   d) consult on relevant evidence and its possible consequences as stated in Coughlan at 115; and to

   e) give effect to the principle of fairness confirmed in R (Edwards and others) v Environment Agency and others [2006] EWCA Civ 877at 103; and to

   f) give effect to the duty to give reasons for any proposed deprivations of liberty as said in Wooder v Dr Feggetter *et al.* [2002] EWCA Civ 554 at 24.

4) It is relevant that Counsel for the Defendant did not directly address in the 'Summary Grounds for Contesting the Claim' any of the public law Grounds put forth by Hardison in the N461 or his 'Statement of Case'.

5) What follows is a paragraph by paragraph analysis of the 'Defendant's Summary Grounds for Contesting the Claim'. Defence text is in Ariel **Bold.**

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1. The Secretary of State opposes this claim for judicial review, for the reasons set out below.

2. The Claimant is serving a twenty year term on imprisonment after being convicted of manufacturing Class A drugs on a commercial scale. This case is the latest in a series of vexatious legal challenges brought before the Courts by the Claimant, all of which effectively raise the same or similar arguments based upon the Claimant's assertion that the criminalisation of his drug related activities is unfair. These arguments are legally hopeless and can sound only in public policy debate.

6) This claim is about the public law errors in the Drug Strategy Consultation Paper as stated in the N461 and the Statement of Case.

7) Whilst only incidental to the claim, Hardison has asserted from the outset that *his investigation, arrest and trial* result from conspicuous unfairness amounting to an Abuse of Power in the illegal implementation by the Government of a neutral Act of Parliament; hence, he endeavours to work through the British legal system to articulate this and, unsurprisingly, this thread runs through all legal arguments reasonably incidental to the administration of the Act.

8) Many, if not all, public law errors in the DSCP boil down to Government's desire, however unconsciously, to obscure the fact that the drugs used by the majority, alcohol and tobacco, are more dangerous in terms of deaths or health problems than the currently declared illicit drugs.

3. Not Repeated

9) Paragraph 3 is irrelevant to the errors of public law embodied in the Drug Strategy Consultation Document; but as it was raised by Defence Counsel, Hardison was unable to place before the Criminal Appeal Court on May 25th 2006 recent new evidence which supports Hardison's position that an Abuse of Power in the illegal administration of the Misuse of Drugs Act 1971 exists.

10) This new evidence comes from high authorities: a October 13th 2006 Command Paper presented to Parliament by the Government, **Cm 6941** replying to the July 31st 2006 Fifth report of the 2005-2006 Science and Technology Committee, HC 1031, *'Drug classification: making a hash of it?'*, and a September 14th 2006 report of the statutorily empowered Advisory Council on the Misuse of Drugs ("the ACMD") *'Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*.

11) The two reports elucidate how Government's risk management distinctions vis-à-vis "dangerous or otherwise harmful drugs" are based disproportionately on arbitrary "historical and cultural factors [which] lack a consistent and objective basis" and **Cm 6941** contains a direct admission of this on page 24, as does the 'Defendant's Summary Grounds' at paragraph 8, dealt with below.

12) Sadly, this new evidence is ignored in the DSCP and consultees are denied an opportunity to deal with it head on. *Cf.* Coughlan at 115; Edwards 103.

4. Most recently, in case CO/687/2007, the Claimant sought judicial review in respect of an alleged failure by the Secretary of State to consider the re-classification of illegal substances. The claim involved effectively the same bases of argument as the present claim. The relief sought by the Claimant in that case extended as far as an order requiring the Secretary of State to impose prohibition of alcohol and tobacco in the United Kingdom (in the Claimant's reasoning, this would place the drugs which he traded on an equal footing with alcohol and tobacco).

13) Gerard Clarke was the SSHD's counsel in CO/687/2007, which was about the October 13th 2006 decision, in Cm **6941**, by the SSHD not to honour his predecessor's January 19th 2006 promise to "publish a consultation paper with suggestions for review of the drug classification system" in light of new relevant evidence which suggests that Government's administration of the drug classification system is illegal, discriminatory, and based on irrelevant historical and cultural factors which lack a consistent and objective basis. Thus, Hardison continues to allege, on appeal C4/2007/2160, that the SSHD's October 2006 decision is unreasonable and thwarts legitimate expectations.

14) The purpose of laying out the common law and human rights arguments inside the context of the new evidence, not available prior to Hardison's Criminal Appeal May 25th 2006, was to highlight *the significant public interest* in honouring the SSHD's January 19th 2006 promise.

15) At no point did Hardison request "an order requiring the Secretary of State to impose prohibition of alcohol and tobacco in the United Kingdom".

   a. Hardison did request an Order mandating the SSHD to "equitably add" the "dangerous and otherwise harmful drugs" alcohol and tobacco to Schedule 2 of the Misuse of Drugs Act 1971. This Act does not mandate the regulatory option of prohibition, and to think it does is an error of law.

   b. Hardison respects that when/if alcohol and tobacco are 'equitably add[ed]' to the list of drugs controlled under the Act, regulation is a matter for the ACMD, the SSHD and, ultimately, subject to resolution by both Houses of Parliament, as crucially the SSHD's discretion *in terms of altering* regulations under ss7, 22 & 31 of the 1971 Act remains unfettered.

   c. In this manner, Parliament has crafted a beautifully evolutive and dynamic legal framework with inherent regulatory flexibility suitable to all eventualities, classes of persons and drugs, including alcohol and tobacco.

16) Further, during oral argument, Beatson J assured Mr Clarke that Hardison was not seeking prohibition of any drug. And as Mr Clarke rightly stated, CO/687/2007 Summary Grounds at paragraph 5, it is "manifestly absurd" to prohibit the exercise of all property rights in alcohol and tobacco. Hardison counters that it is equally "manifestly absurd" to prohibit under severe penalty the exercise of all property rights in controlled drugs, which the ACMD have 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.

5. Sullivan J dismissed that claim on the papers, concluding that the case was completely without merit. On 31st August 2007, Beatson J, after an oral hearing on the Claimant's renewed application for permission, gave a detailed judgment dismissing the claim, and agreeing with Sullivan J's evaluation thereof.

17) This matter is the subject of an appeal: C4/2007/2160.

6. The current challenge is utterly without merit, by reference to clear principles of public law. The Secretary of State is not required to formulate public consultation on a matter of public policy such as Drug Strategy in order to accommodate the personal platform of the claimant.

18) Yes; "the Secretary of State is not required too formulate public consultation on a matter of public policy such as Drug Strategy in order to accommodate the personal platform of the claimant", but the SSHD is required by law to conduct consultation properly. As Lord Woolf said in Coughlan at 108:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R *v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168." (Emphasis added)

19) More, it is an accepted principle of administrative law that a public body undertaking consultation must do so fairly. In R (Edwards and others) v Environment Agency and others [2006] EWCA Civ 877 at paragraph 103 Auld LJ, with whom Rix and Maurice Kay LJJ agreed, said this:

> "103. [I]f … a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it." (Emphasis added)

20) Consultees should be given a fair opportunity to deal with the new evidence.

7. The Claim is, as with the Claimant's other claims and his unavailing defence to the criminal charges against him, a challenge to Parliamentary and Governmental policy decisions as to the classification of drugs under the Misuse of Drugs Act 1971.

21) Hardison's claim is not a challenge to either Parliamentary or Governmental drug policy. **To assert so is to misrepresent the claim.** It is a challenge to the woefully inadequate consultation ~~process and its failure~~ to account for and provide an fair opportunity to be heard on relevant new evidence which suggests that Government's 'separate but equal' administration of drug law is contrary to the text and spirit of the MDA 1971 and the HRA 1998, and fails to comply with the common law principle of "treating like cases alike and unlike cases differently", *Cf.* Matadeen v Pointu [1999] AC 98 para 8, and the Rule of Law principle that "laws be equal in operation", Railway Express Agency, Inc v New York (1949) 336 U.S. 206 at 113.

REPLY TO DEFENCE

8. The Government's policy is and has been 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.

22) Whilst only incidental to the claim, Paragraph 8 deserves a clause by clause deconstruction and anxious scrutiny by the Court:

a. The first clause, "**Government's policy is and has been to regulate drugs which are classified as illegal**", embodies two errors of law.

   i. The Misuse of Drugs Act 1971 does not regulate drugs rather the Act regulates people's exercise of property rights with respect to "dangerous or otherwise harmful drugs" [...] "which are being or appear ... likely to be misused and *of which the misuse is having or appears ... capable of having* harmful effects sufficient to constitute a social problem", s1(2).

   ii. No drug is classified as or is illegal under the Misuse of Drugs Act 1971 but a drug can be specified as a "controlled drug" in Schedule 2 of the Act.

b. The second clause, "**Government's policy is ... to regulate the use of alcohol and tobacco separately**", is a failure to treat like cases alike. 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".

c. The third clause, "**This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects**", places these two harmful drugs within the competence of the 1971 Act.

d. The fourth clause, "**This policy ... recognises also that consumption of *alcohol and tobacco is historically embedded in society***", is not a rational justification for treating unequally people who use and commerce equally harmful drugs, especially when physical liberty is at stake.

   i. The ACMD stated September 14th 2006 in *Pathways to Problems*, that: "At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol ..., drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines. The insights summarised in this chapter indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis. (Paragraph 1.13, emphasis added)

e. The fifth clause, "**This policy ... recognises ... that responsible use of *alcohol and tobacco is both possible and commonplace***", distinguishes use from misuse yet does not afford this distinction in law to the approximately 10% of UK population who peacefully exercise proper rights in controlled drugs, albeit the 1971 Misuse of Drugs Act supports it.

9. The Claimant's lengthy claim boils down to a disagreement with this policy. He maintains his legally misconceived line that his is the victim of some form of "discrimination" because the drugs in which he was trading are classified as illegal whereas other substances are regulated but not so classified.

23) Again, Hardison's claim is a challenge to the woefully inadequate consultation process <u>and</u> its failure to account for and provide a fair opportunity to be heard on relevant new evidence which undermines its key assumptions.

24) And again, <u>no</u> drug is classified as illegal. Only some exercises of property rights by some individuals re drugs specified as "controlled drug[s]" is currently illegal. The 1971 Act does, however, provide for regulations to be made "for doing things … it would otherwise be unlawful for them to do", s7(1)(b), if reason shows such regulations are better suited to achieve the Act's legitimate aim of reducing harm to the public from the irresponsible exercise of property rights with respect to "dangerous or otherwise harmful drugs".

25) Whether Mr Hardison, or any other person similarly situated, is a victim of Governments illegal and unfair administration of a neutral law or not has nothing to do with the Defendant's failure to carry out a proper consultation.

10. There is no question of procedural unfairness to the Claimant. He is free, if he so chooses, to make representations the Secretary of State as to what should be the appropriate strategy for dealing with all substances capable of causing harm. The Secretary of State is consulting with an open mind on Drugs Strategy, but cannot be compelled to adopt any particular policy view on the inclusion or exclusion of substances such as alcohol and tobacco within or from the same legal category as controlled drugs.

26) Absolutely, the SSHD "cannot be compelled to adopt any particular policy view on the inclusion or exclusion of [drugs] such as alcohol and tobacco within or from the same legal category as controlled drugs". Nonetheless, it is unfair and irrational to expect consultees to engage in a half-measures 'drug strategy' consultation which excludes the two most "dangerous or otherwise harmful drugs", alcohol and tobacco, <u>and</u> does <u>not</u> set out in sufficient detail:

   a. what the proposals are, who may be affected, and the assumptions made about those who are likely to be affected by the proposed policy; and does <u>not</u> encourage respondents to challenge these assumptions; and

   b. does <u>not</u> explain why some regulatory options are ruled out; and, if there are things which cannot be changed … due to prior Ministerial commitments, the DSCP does <u>not</u> make this clear; or

   c. why alternative regulations are <u>not</u> being considered along with the unintended consequences of the proposals or why respondents are <u>not</u> being asked to highlight these in their response; or

   d. why best practice, such as Government's own *Principles of Good Regulation* and the *Code of Practice on Consultation 2004*, is <u>not</u> being followed.

REPLY TO DEFENCE

11. The Court is invited to conclude that this claim is completely without legal substance and to dismiss it.

27) This Court is invited to hear past Defence Counsel's obfuscations and grasp the nettle. Hardison only wants a "fair crack of the whip" and a right to be heard in an effective and proper drug strategy consultation as part of a lawfully administered, rationally assessed and evidence based drug strategy where like cases are treated alike and unlike cases are treated differently.

12. The Court is also invited to consider imposing restrictions on the Claimant's ability to bring further legal challenges raising in effect the same arguments as those in this claim, or giving directions for the future management of such claims. Continued reiteration of these vexatious proceedings imposes an undesirable drain on limited public resources.

28) Ineffective consultation is a drain on limited public resources as is the SSHD's Counsel's failure to deal with the issues in dispute head on.

29) Nevertheless, it does appear that Counsel for the Defence disputes the following legal facts, retooled as questions of law, which Hardison asserts in this claim against the DSCP. The first three arise from the 'Defendant's Summary Grounds' paragraph 8, whilst the last two are most relevant to this claim. It would be most helpful to have this Court's ruling on them:

a. Are alcohol and tobacco "dangerous or otherwise harmful drugs" within the competence of the Misuse of Drugs Act 1971?

b. Does Government have the power to exclude the two drugs, alcohol and tobacco – which they acknowledge in Cm 6941 at page 24 "account for more health problems and deaths than illegal drugs" – from the operation of the neutral Misuse of Drugs Act 1971, which is designed "to make provision for dangerous or otherwise harmful drugs"?

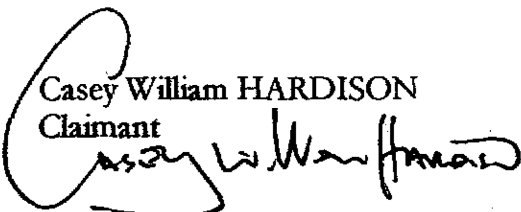
c. Is it a legitimate aim of the Misuse of Drugs Act 1971 to treat unequally – via the DSCP's second proposed aim – without a rational and objective justification those who exercise property rights in equally harmful drugs?

d. Is it irrational, unfair and "clearly and radically wrong" for alcohol and tobacco and their known anti-social, health and mortality risks and effects to be excluded from the DSCP and consultation process?

30) For the reason set out above, and those set out in the Statement of Case, Hardison requests permission for Judicial Review.

– The claimant firmly believes the facts stated in this Reply to Defence are true.

Casey William HARDISON
Claimant



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