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

**CO/687/2007**

**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**

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# REPLY TO DEFENCE

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"It is a curious but significant fact that no government in the past hundred years has dared to commission a wide-ranging inquiry into drugs and drug policy."

*Drugs – Facing Facts*
RSA Commission on Illegal Drugs
Community and Public Policy
March 2007

**Prepared By**

**Casey William HARDISON**

**26th March 2007**

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On March 14th 2007 the SSHD filed the 'Defendant's Summary Grounds for Contesting the Claim'. Set out below are Mr. Hardison's paragraph by paragraph replies to the defence submissions filed by Counsel on behalf of the SSHD.

**Paragraph 2 – The Secretary of State contends that it is not possible to distil from the lengthy grounds of claim submitted by the Claimant any distinct ground of challenge to any decision of the Secretary of State which is properly arguable on recognised public law principles.**

1. At least 3 public law principles can be distilled from the N461. These were repeated in the first 12 paragraphs of the Draft Statement of Claim. They are re-distilled here.

   a. **Irrationality/Unreasonableness**: the October 13th 2006 decision by the SSHD in Cm 6941 not to "review the drug classification system" is irrational and unreasonable, and thus an unfair abuse of power, due to failure to take into account required relevant factors and taking into account irrelevant factors. This ultimately results in arbitrariness and inconsistency with disproportionate impact.

      i. Relevant factors not taken into account include:

         a) The original relevant 'concerns' which influenced the SSHD's initial decision to review the drug classification system on January 19th 2006.
         b) New evidence establishing the material fact that some drugs currently classified as the most harmful, particularly the psychedelic type drugs of Class A, are significantly less harmful than alcohol and tobacco – two harmful drugs not classified by the Act. Yet, in Cm 6941, Government maintained "that alcohol and tobacco account for more health problems and deaths than illegal drugs" *and* that "Class A drugs are the most harmful"; these statements are mutually exclusive.
         c) New evidence that the distinction between legal and illegal drugs lacks a consistent and objective basis and is thus arbitrary.
         d) The legitimate expectation created in 1971 by the SSHD that periodic reviews of the Act and its regulations would occur in light of new objective evidence as a matter of procedural fairness.
         e) New evidence signifying the drug classification system's non-compliance with the HRA 1998.

      ii. Irrelevant factors taken into account include:

         a) 'Historical and 'cultural' factors, unacceptability to "persons who use [drugs] responsibly" and "political vision". This leads to bias and/or fettered discretion.
         b) The assumption that 'responsible use' justifiably distinguishes uncontrolled drugs from controlled drugs.

   b. **Legitimate expectation**: the SSHD, "concerned with the limitations of the current system", promised on January 19th 2006, in the House of Commons, that he would "in the next few weeks publish a consultation paper with suggestions for a review of the drug classification system". This created a legitimate expectation that remains unfulfilled due to the subsequent decision in Cm 6941.

   c. **Lawfulness**: both the SSHD's positive obligation under s3 of the Human Rights Act 1998 and negative obligation under s6 of the 1998 Act, with respect to the Misuse of Drugs Act 1971 and related legislation, remain unfulfilled.

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**Paragraph 3 – The claim appears substantially to be a challenge to Parliamentary and Governmental policy decision as to the classification of drugs under the Misuse of Drugs Act 1971.**

2. Hardison's Claim is about the October 13th 2006 decision by the SSHD not to review drug classification in light of new relevant evidence which questions its compliance with the Misuse of Drugs Act 1971 and the Human Rights Act 1998.

**Paragraph 4 – (not repeated)**

3. It is crucial to note that whilst referring to the case of *R (Greenpeace) v Secretary of State* [2007] EWHC 311 (Admin), para 54, Counsel for the Defendant made no assertion that the decision under challenge was not justiciable.

**Paragraph 5 – Insofar as the claim contends that the Court should effectively impose Prohibition in the United Kingdom by compelling the Secretary of State to list alcohol and tobacco as controlled drugs under the 1971 Act, the challenge is manifestly absurd.**

4. At no point did Hardison assert that this Court "should effectively impose Prohibition in the United Kingdom by compelling the Secretary of State to list alcohol and tobacco as controlled drugs".

5. Hardison recognises and respects that when/if alcohol and tobacco are 'equitably add[ed]' to the list of drugs controlled under the Act, equitable treatment will be a matter for the ACMD and, ultimately, the SSHD to decide as, crucially, his discretion in terms of altering MD regulations under ss7, 22 & 31 remains unfettered.

6. It is relevant to recall that the SSHD is granted vast 'room for manoeuvre' under s31 of the 1971 Act in that he "may make different provision in relation to different controlled drugs, different classes of persons, different provisions of this Act or other different cases or circumstances". Accordingly, controlled drugs can be treated unequally under the Act if there are relevant and sufficient differences which objectively justify different treatment; this is a general axiom of rational behaviour.

7. It is the conflation by the SSHD and Counsel, illustrated here, of 'equitable' treatment with equal prohibition which appears to suggest that Government believes that current MDA regulations, *viz*, prohibition of property rights vis-à-vis controlled drugs, cannot be reviewed *and/or* changed. This is an Error of Law resulting in discretion concerning the duty to review regulations being fettered to existing regulations and the Government's "political vision".

**Paragraph 6 – Furthermore, insofar as this claim seeks to challenge a decision of 19th October 2006, the claim was not made promptly and there are no proper grounds for extending the time for making the claim.**

8. The decision was published on the 13th of October 2006. The Claim was filed on January 16th 2007. Admittedly this is one business day over the 3 month time limit.

9. Hardison stated in the N461 Claim form that this was due to his status as an incarcerated self-litigant with sporadic access to a computer, lack of print and fax facility, and the necessity to have volunteers search and mail legal jurisprudence. This is a proper ground for extending the time limit and is within the *ambit* of ECHR Article 6(3)(b) as Hardison is clearly not on equal footing.

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**Paragraph 7 – 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.**

10. New evidence has come before the SSHD which demonstrates that Government policy, as described by Counsel here and by the SSHD in Cm 6941, the unequal treatment under the Act of those concerned with equally harmful drugs, is contrary to the Act's intention to place under control drugs – "the misuse of which is capable of having harmful effects sufficient to constitute a social problem".

**Paragraph 8 – The "decision" complained of does not infringe any legitimate expectation. The Secretary of State indicated that he would continue to review the classification of drugs as the evidence evolves over time. This he continues to do. For a legitimate expectation case to succeed there must be some unfairness or abuse of power in the departure from a previously adopted position. There is no such unfairness or abuse of power in the present case.**

11. The "decision" not to review, in Cm 6941, departed from the position, adopted January 19th 2006 – which held that a review was needed in the public interest. In the face of a preponderance of relevant new evidence which greatly heightened the public interest in the promised review, the SSHD reneged.

12. This is an abuse of power considering the significance of the new evidence which the SSHD failed to take into account, including the refusal to accept vital established facts about alcohol and tobacco which would trigger his powers under the Act, and his near-total reliance on irrelevant factors which elucidate bias and unfairness.

**Paragraph 9 – As to the human rights claim, the 1971 Act is not directed at the regulation of property rights. It is a penal statute which regulates certain types of behaviour. Its impact on the alleged "property rights" of those who possess drugs which are subject to the Act is incidental and, even if such impact does engage Article 1 Protocol 1 ECHR, the Act clearly serves the public interest and is a proportionate means of pursuing a legitimate aim.**

13. The Misuse of Drugs Act 1971 is clearly directed at drugs property *and* associated activities: importation and exportation, s3; production, manufacture, extraction, preparation, supply, s4; possession, possession with intent to supply, s5. Drug consumption (with the exception of opium, s9) is not an offence under the Act.

14. Blanket prohibition of property rights, irrespective of the harmfulness of a drug, cannot be reasonably incidental to the Act's legitimate aim of reducing risks to the public from harmful drug consumption.

15. If such restriction on property rights are proportionate and in the public interest then Government is failing to protect the public by allowing the exercise of property rights in relation to the equally or more harmful drugs alcohol and tobacco.

16. Hardison's Article 1, Protocol 1 claim is not freestanding but conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of 'property' and 'other status'.

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**Paragraph 10 – Article 6 is not engaged or infringed. Prosecutions under the 1971 Act follow due process in accordance with that article.**

17. Article 6 is engaged by the continuing failure of the SSHD to exercise the duty to review MDA regulations – contrary to the intentions of the Parliament which designed the Misuse of Drugs Act 1971 to evolve with new evidence – a procedural safeguard to ensure proportionality, consistency and effectiveness.

**Paragraph 11 – To the extent that Article 8 is engaged at all, any interference with private life is a proportionate means of pursuing a legitimate aim.**

18. If such restrictions on Article 8 rights vis-à-vis Schedule 2 drugs are proportionate and in the public interest then Government is failing to protect the public from the equally or more harmful drugs alcohol and tobacco by respecting people's Article 8 rights in relation to them.

19. Hardison's Article 8 claim is not freestanding but conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of Drug Orientation and Property.

**Paragraph 12 – Article 9 is not engaged or infringed. The control of drugs has no impact on the ability of any individual to exercise freedom of thought, conscience or religion.**

20. Article 9 is engaged and infringed due to the nature of the property controlled under the Act; in SSHD's own words, "substances that alter mental functioning".

21. Quintessentially, Government respects the right of consumers of the harmful drugs alcohol and tobacco to 'alter' their 'mental functioning' but denies this right to consumers of 'controlled' drugs, many of which are significantly less harmful, particularly the psychedelic type drugs of which Mr. Hardison has interests.

22. Hardison's Article 9 claim is freestanding *and* conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of Drug Orientation, Property.

**Paragraph 13 – Article 14 is not engaged or infringed. The status of drug manufacturer, drug dealer or drug user is not a protected status under Article 14.**

23. Hardison's claim that current MDA regulations contravene Article 14 is not based on the grounds 'other status': referring to drug manufacturer, drug dealer or drug user.

24. This is a misrepresentation of Hardison's Claim which specified the grounds of 'property' and 'other status', referring to "drug-orientation" or "drug preference".

**Paragraph 14 – (not repeated)**

25. Hardison is not serving a 20 year prison sentence for manufacture of Ecstasy but for manufacture of LSD, 2C-B, and DMT, possession of 5-MeO-DMT and exportation of MDMA.

26. Counsel's conflation in paragraph 5 is repeated here. Mr. Hardison's has never 'professed' a wish for *property activities* vis-à-vis alcohol and tobacco to be made unlawful. He has only professed a wish for equitable treatment under the Act.

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**Paragraph 15 – The Court is asked to dismiss this claim.**

27. Ultimately, if the threats presented by alcohol and tobacco *misuse* can be addressed without infringing Convention rights, it is not shown why similar measures cannot adequately address the threats presented by the *misuse* of controlled drugs.

28. Accordingly, Mr. Hardison implores this Court to grant permission for the Judicial Review to proceed to the full hearing this matter deserves.

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

Casey William HARDISON – POWd (Civ)
Claimant

March 26th 2007