IN THE HIGH COURT OF JUSTICE CO/12291/2010
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN

THE QUEEN
On the Application of CASEY HARDISON

Claimant

-v-

ADVISORY COUNCIL ON THE MISUSE OF DRUGS

Defendant

DEFENDANT'S SUMMARY GROUNDS OF RESISTANCE

Note: References to C/x are references to the Claimant's bundle. References to D/x are to the Defendant's bundle.

Background

1. The Advisory Council on the Misuse of Drugs (the "Defendant") opposes the claim for judicial review for the reasons set out below. The Court is invited to consider this claim alongside a very similar claim against the Secretary of State for the Home Department (the "SSHD, CO/11538/2010) which is opposed by the SSHD.

2. Casey Hardison (the "Claimant") is serving a twenty-year term of imprisonment following conviction in April 2005for the manufacture of Class A drugs on a commercial scale. The Claimant essentially challenges the decision of the ACMD not to recommend regulation of tobacco and alcohol under the Misuse of Drugs Act 1971 ("MDA 1971") to the Home Department. The issue as to whether tobacco and alcohol should be regulated under the MDA 1971 has been the subject of previous litigation between the Claimant and the SSHD. The Defendant has been in correspondence with the Claimant since September 2006 [C/251].

3. The Defendant invites the Court to dismiss the application for permission, certify the claim as wholly without merit and to make an extended civil restraint order.

Defendant's submissions

General

4. This application is the fourth claim for judicial review brought by the Claimant in relation to this subject matter. At the base of each claim is a challenge to the longstanding policy distinction between the legal frameworks regulating tobacco and alcohol and the regime under the MDA 1971 in respect of controlled drugs. The Defendant's summary grounds and

the orders of the court dismissing the first two of these claims (CO/687/2007 and CO/7548/2007) are attached. The third claim (CO/11538/2010 is referred to above.

5. CO/687/2007 was dismissed by Beatson J as wholly without merit. On seeking leave to appeal that decision, the Rt. Hon. Henry Brooke sitting as a judge of the Court of Appeal agreed that the application was totally without merit and stated [D/12]:

   > "Remedies for this grievance lie in the world of politics, not in the realm of law, as Mr Justice Beatson has so clearly explained. The House of Lords' decision in Findlay [1985] 1 AC 318 provides a very clear statement of the courts' refusal to become involved in policy issues of this kind.

6. CO/7548/2007 was dismissed as totally without merit by McCombe J who observed that the "...claim has *no prospect of success*". McCombe J also invited the Defendant to submit an application for a Civil Restraint Order. IN that case, the claimant sought to challenge the classification of drugs under the MDA 1971 by challenging the procedural fairness of the Home Office's 2007 consultation on the 2006 drugs strategy. The challenge essentially repeated the Claimant's arguments regarding the alleged unfairness inherent in the distinction drawn between the regulation of alcohol and tobacco and the control of illegal substances.

Grounds of Claim

7. In this claim, the Claimant essentially challenges the Defendant's decision not to consider recommending regulating tobacco and alcohol under the Misuse of Drugs Act on 16 August on the basis of four (albeit overlapping) grounds of challenge. He alleges:
   (1) the Defendant has misconstrued their remit and the Act
   (2) the Defendant did not act upon relevant factors to the exclusion of relevant factors
   (3) the decision is arbitrary and unreasonable
   (4) the Defendant is not sufficiently independent of the Home Office.

8. In all cases the claim is misconceived and without any merit and the Court is invited to refuse the application for permission and certify the claim as wholly unfounded.

9. As to ground 1. The Defendant has not misconstrued their remit nor the Act in noting that there is not an equivalent independent expert body to the ACMD which advises on alcohol and tobacco issues (there is not), nor in concluding that the framework of the Misuse of Drugs is not appropriate for the regulation of alcohol and tobacco (which is not a matter for this Court).

10. Essentially, the Defendant is an independent body which advises on drugs which cause harm generally, but the defendant has additional responsibilities in relation to "controlled drugs" which it does not have in relation to drugs generally. Section 2(1) of the MDA 171 establishes the Defendant's remit [D/22]

> "It shall be the duty of the Advisory Council to keep under review the situation in the United Kingdom with respect to <u>drugs</u> which <u>are being</u> or appear to them likely to be <u>misused</u> and of which the misuse is having or appears to them capable of having <u>harmful effects sufficient to constitute a social problem</u>, and to give to any one or more of the Ministers, where either the Council consider it expedient to do so or they are consulted by the Minister or Ministers in question, advice on measures (whether or not involving alteration of the law) which may be taken for preventing the misuse of such drugs or dealing with the problems connected with their misuse, and in particular on measures which in the opinion of the Council ought to be taken..."

This is a wide definition of drugs. The Defendant is clear that its remit under s.1(2) includes alcohol and tobacco. The MDA 1971 also establishes a system of "*controlled drugs*" which are defined by s.2 of the MDA 1971 and are known as Class A, Class B, and Class C drugs and defined in Part I-III of Schedule 2 of the MDA 1971. The SSHD is required by the MDA 1971 to consult the ACMD in circumstances relating to controlled drugs as prescribed by s.2(5), s.7(7) and s.31(3) of the MDA 1971 [D/22-25]. As tobacco and alcohol are not listed in Schedule 2 they are not "controlled drugs". They do not fall under the MDA 1971. The Secretary of State is thus not required to consult the defendant before making regulations (other than under the MDA 1971) in relation to alcohol and tobacco. There is no analogous body such as the Defendant which the Secretary of State is obliged to consult before making regulations under other statutory schemes in relation to tobacco and alcohol. Thus, there is no error of law in the Defendant noting what is the current situation.

11. As to the Defendant's consideration the framework of the Misuse of Drugs is not appropriate for the regulation of alcohol and tobacco and that therefore the Defendant would not recommend to the Secretary of State consideration of controlling tobacco and alcohol through s.2 of the MDA1971. This is clearly a reasonable decision for the Defendant to make and the decision was made in a lawful manner (see below in relation to ground 2 and 3). Moreover, it is not for the Court to determine whether the Misuse of Drugs framework is appropriate for regulating alcohol and tobacco for the reasons set out by Beatson J and the Rt. Hon. Sir Henry Brooke above.

12. As to the alleged "miconstruals" that are alleged to take a form as "policy", it is not possible to identify a ground of challenge in relation to this which is arguable on recognised public law principles. The Defendant is clearly aware that its advisory role can include recommending changes to the law and is not limited to e.g. drug harm and classification.[1]

13. As to grounds 2 and 3, the claim is <u>completely unarguable</u>. The Defendant did not act arbitrarily or unreasonably in its decision or otherwise unlawfully in not acceding to the claimant's request to consider the possibility of recommending to the Secretary of State the control of alcohol and tobacco under s.2 of the MDA 1971 for the following reasons:

---

[1] See the penultimate paragraph of the Defendant's response to the Claimant on 16 August 2010 [C/75] and paragraph 4 of the Defendant's response to the Claimant stated 19 June 2010 [C/82], responding to the Claimant's 13 page letter at [C/151-163]

(1) The decision is not "arbitrary and unreasonable" because the Defendant recognised in its 2006 report, that there are different legal frameworks for the regulation and control of drugs for drugs such as alcohol and tobacco which can be bought and sold legally (subject to regulations and in the case of tobacco and alcohol stringent age-related and licensing regulations), drugs which are covered by the MDA 1971 and drugs which are classed as medicines, some of which are also covered by the MDA. The Defendant recognised that these different frameworks were used, not because of the harm caused by the different drugs being regulated, but because of historical and cultural factors. That is a rational observation which is readily understandable. Recognition of cultural and historical background does not make a decision arbitrary. The Defendant further made clear to the Claimant that it did not believe the MDA 1971 was appropriate as "both alcohol and tobacco are already subject to legislative regulation regarding their manufacture, sale and consumption, including age-related restrictions [C/57] and referred the Claimant to various "recent and significant use of legislative control around these two substances" in its response of the 16 August, including the Licensing Act 2003, amended in May 2007 to introduce a new offence, and the Health Act 2006, and the Health Act 2009 [C74-75] Thus, a decision not to advise the Home Secretary about the feasibility of regulating tobacco and alcohol under the MDA is plainly not an unreasonable decision. Indeed the vast majority of the population would readily recognise why the distinction is drawn, the Defendant's decision is plainly not Wednesbury unreasonable nor it is arbitrary.

(2) The Defendant is said to have ignored that the factors as to what makes alcohol and tobacco a drug falling within the Defendant's remit are now established (even if they were not recognised in 1971) and therefore failed to recommend its regulation under s.2 and s.7 of the MDA 1971. This is wrong. The Defendant is fully aware that tobacco and alcohol fall within its remit under s.1(2) and has expressly stated this to the Claimant on numerous occasions [C/83]. Alcohol and tobacco are not "controlled drugs" under s.2 and the Defendant does not intend to recommend that they become "controlled drugs".

(3) Further, the Defendant is under no public law duty to accede to the Claimant's request. It is for the Defendant to consider as it sees fit. The Defendant has not made an arbitrary or unreasonable decision as alleged (see (1) above). As Sullivan J said in R (Greenpeace) v Secretary of State (2007) EWCH 311 (Admin):

> "I would readily accept the proposition that in the absence of any statutory or well established procedural rules for taking such strategic decisions it may well be very difficult for a claimant to establish procedural impropriety. Similarly, given the judgmental nature of 'high level, strategic' decisions it may be well nigh impossible to mount a 'Wednesbury irrationality' challenge absent bad faith or manifest absurdity: see *R (London Borough of Wandsworth and others) v Secretary of State for Transport* [EWHC] 20 Admin, paragraph 58 (the 'Airports White Paper' case).

14. As to ground 4, in respect of the challenge to the alleged lack of independence between the ACMD and the Home Office and the mandatory order sought directing that the Defendant's sponsorship is moved to the Department of Health, the ground of challenge is completely unarguable, wrong in fact and entirely misconceived in law. It is wrong in fact because the

Defendant's 2006 report "*Pathways to Problems*" indicates that the Defendant gave advice on measures which in the opinion of the Council ought to be taken in relation to tobacco and alcohol and further has critically assessed the progress on these recommendations in its follow-up report "Pathways to Problems, a follow-up report on the implementation of recommendations from Pathways to Problems" in 2009 and continues to keep the situation under review. The Defendant is clearly aware that its advisory role can include recommending changes to the law (see above). There is no lack of independence. In any event, the Defendant fulfils its statutory duty. Further, it is misconceived because even were it to be true that the ACMD was not fulfilling its statutory role (which it is not) it is not a matter for the Court to direct that the Defendant's sponsorship should be moved to the Department of Health.

15. The Defendant notes that the Claimant has sought a protective costs order. That should be refused, applying the principles in *R (Corner House Research) v Secretary of State for Trade and Industry* (2005) EWCA Civ 192. The Claim does not raise public law issues of general importance, nor does the public interest require resolution of these issues. Further, the Claimant has given no information about his means save to note that he "relies on donations from concerned citizens". There is no reason why the public purse should bear the costs of the Claimant's ongoing litigation in this matter and the usual costs rules should be applied.

16. For the reasons given above, the Defendant invites the Court to refuse the application for permission. The Defendant also seeks costs in the sum of £500 for the preparation of this acknowledgement of service.

Application for an Extended Civil Restraint Order

17. In light of the vexatious nature of this Claim and the judicial comments in respect of other applications for judicial review brought by the Claimant, the Defendant invites the court to grant an extended Civil Restraint Order pursuant to CPR 3.11 and CPR Practice Direction 3C paragraph 3.1 as also sought by the Secretary of State for the Home Department in CO/11538/2010 and as supported by the Defendant.

18. In this regard the Court is also referred to the Hon. Mrs. Justice Dobbs DBE's Order dated 13 October 2010 in a claim brought against the Criminal Cases Review Commission in which she advised the initiation of civil restraint proceedings should be considered.

19. An extended civil restraint order is requested because:
    (1) The Claimant has persistently issued claims against the Defendant on the same subject matter which a totally without merit (see the order in respect of cases CO/687/2007 and CO/7548/2007 attached at D/5 and 18)
    (2) The current proceedings are an abuse of process and wholly without merit.

20. For the above reasons, an extended civil restraint order s sought preventing the Claimant from making any further applications involving or relating to or touching upon the subject matter of these proceedings. An application notice seeking the order is attached. The Defendant attaches a near-identical civil restraint order in that application notice to that

sought by the SSHD in CO/11538/2010 save that the Defendant seeks for the civil restraint order sought by the SSHD to also refer to these proceedings and to also name the Defendant Advisory Council on the Misuse of Drugs.

SASHA BLACKMORE
20 DECEMBER 2010