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Legal Argument

1. The Misuse of Drugs Act 1971 ("the Act") gives the SSHD discretion to make Orders re the control, s2(5), and designation, s7(4), of dangerous or otherwise harmful drugs and for regulating enumerated activities, ss7(1)-(3), 10 & 31(1)(a), or exempting offences, s22(a)(i), re "controlled drugs".

2. Regrettably, Parliament has neither stated an explicit policy nor fixed any determinative criteria in the Act to guide the SSHD in promulgating such Orders; but, as they may deprive liberty, these Orders are subject to either approval or annulment by both Houses of Parliament acting within the limits set by the Act.

3. Accordingly, the well-known principle established by their Lordships' House in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 applies, the SSHD's discretions are only to be exercised in furtherance of the Act's policy and objects, which are determined by construction of the Act, and this is a matter of law for the superior Court.

4. In *R (Kebilene & Ors) v Director of Public Prosecutions* [1999] EWHC Admin 278 at 59, Lord Bingham of Cornhill said:

   > "where statute confers a discretionary power but does not set out on its face the considerations to which the decision-maker must have regard in relation to its exercise, the choice of factors which he will take into account is left to the decision-maker subject to *Wednesbury* and *Padfield*". (Emphasis added)

5. Crucially, in *Notts CC v SS for the Environment* [1986] AC 240 at 250, Lord Scarman said:

   > "The courts can properly rule that a minister has acted unlawfully if he has erred in law as to the limits of his power even when his action has the approval of the House of Commons, itself acting not legislatively but within the limits set by a statute".

6. And in the unreported *R v SS for the Environment, ex p the GLC and ILEA* at 31, Mustill LJ reminded us to tackle the justiciability question by asking this question:

"Can it be inferred that Parliament, by making an affirmative resolution a condition precedent to the exercise of the power, has intended to make the House of Commons the sole judge of whether the decision expressed in the draft Order is too unreasonable to be allowed to stand? After careful consideration, we have come to the conclusion that the answer, in theory, is No. In our judgment, the right of veto, created by section 4(5) is a safeguard addition to and not a substitution for the power to judicial review. **The debate in the House on affirmative resolution and the investigation by the Court of a *Wednesbury* complaint are of a quite different character and are directed towards different ends; the two are complementary**", my emphasis.

7. This principle was accepted by the Court in *R v SSHD, ex p Javed* [2001] EWCA Civ 789, which dealt with the Designated Safe Third Countries (Order 1996) for asylum purposes; interestingly, this Designation Order is comparable to a s2 Order under the Act "controlling" a drug because: (1) it is dangerous or otherwise harmful; (2) it is "being misused or appear[s] … likely to be misused"; and (3) that "misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem".

   In this case at para.33 (Quoting Wade's 8th Edition on Administrative Law), Lord Phillips MR said:

   "…It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the Courts, for there is a fundamental difference between a sovereign and a subordinate law-making power. Even where, as is often the case, a regulation is required to be approved of by a resolution of both houses of Parliament, it still falls on the subordinate side of the line, so that the court may determine its validity…."

8. Crucially, the appellant does not contest the Orders controlling the drugs of his indictment; rather he contests the inequality of treatment he suffers because: (1) the SSHD has failed to promote the Act's policy by exercising the s2(5) power re alcohol and tobacco control; and (2) the SSHD has failed to proffer regulations via s31(2) re the peaceful non-medical and non-scientific production, commerce and use of controlled drugs.

9. With both of these failures, Parliament has expressed no opinion; Parliament has neither approved nor disapproved; the SSHD has not provided Parliament with an opportunity; and because of the subjective and/or incoherent reasons given in Cm 6941, having no connection to

the Act's policy and/or objects, the SSHD does not appear eager to do so.

10. Accordingly, the only control on the SSHD's arbitrary actions and errors of law is the *ultra vires* doctrine and the abuse of process jurisdiction administered fearlessly by the Courts.

11. The SSHD declared in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than illicit drugs". The appellant submits that this is the relevant and established fact re promoting the Act's policy via s2(5). Yet by not seeking alcohol and tobacco control equally under the Act, the appellant is subject to unequal treatment for his activities re equally or less harmful drugs. This is an arbitrary abuse of power.

12. In *A & Ors v SSHD* [2004] EWCA Civ 1123 at 248 Lord Justice Laws reminded us that:

    "the law forbids the exercise of State power in an arbitrary, oppressive or abusive manner. This is, simply, a cardinal principle of the rule of law. The rule of law requires, not only that State power be exercised within the express limits of any relevant statutory jurisdiction, but also fairly and reasonably and in good faith.