

06/LL/14088/08

In the Wigan and Leigh Magistrates' Court

In the matter of:

R

V

Alan Taylor

Defendant's response to the CPS response of 29 April 2009
for the hearing before the District Judge on 15 May 2009

With respect to the CPS's response of 29 April, the Defence comments (by reference to the paragraph numbers from their document with the CPS comments in quotation marks) as follows:

1. "The legislation governing the instant case is the Misuse of Drugs Act 1971".

Agreed, and of course the Human Rights Act 1998 ("HRA") has jurisdiction over Mr Taylor's human rights claims. Paragraphs 1-17 herein detail Taylor's common law claim and paragraphs 18 & 19 refer to the human rights claims.

2. "The legal restrictions in respect of controlled drugs are aimed at preventing drug abuse."

Rather, the legal restrictions in respect of controlled drugs are aimed at the prevention, minimalisation or elimination of the "harmful effects sufficient to constitute a social problem" that may arise via the consumption of "dangerous or otherwise harmful drugs". *All* such drugs are within the remit of the Misuse of Drugs Act 1971 ("the Act"). This object of regulation is read from s1(2) of the Act conjunct the Preamble.

3. "Whilst it is accepted that a large number of "controlled drugs" have a medicinal value, drugs are controlled in the sense that their distribution and use are regulated in such a fashion and for such period of time that any harmful affects related to their use or abuse and prevented, minimised or eliminated."

(i) Controlled drug use is not a crime (except for the use of opium). All 'meaningful use' of controlled drugs is presently curtailed by the prohibition of the enumerated activities with respect to such drugs. There is no regulation of controlled drug use except with respect to their medical and scientific uses, s7(3).

(ii) The Act seeks to regulate, in a rational, objective and evolutive manner, the enumerated activities, s3-6, re controlled drugs as a means to achieve the object of regulation.

(iii) The Act's principles of law are enumerated in paragraph 69 of Taylor's Application for a Stay.

4. "Controlled drugs and their classification for the purposes of the Misuse of Drugs Act 1971 (hereinafter referred to as the Act) are determined by Section 2 of the Act:

(a) The expression "controlled drug" means any substance or product for the time being specified in part i, ii or iii of Schedule 2 to this Act and

(b) The expressions "Class A drug", "Class B drug" and "Class C drug" mean any of the substances and products for the time being specified respectively in part i, part ii and part iii of that Schedule.

(c) And the provisions of Part iv of that Schedule shall have effect with respect to the meaning of expressions used in that Schedule."

Yes, but the relevant law continues through s2(1)-(5) of the Act, see below.

5. “Part iii of the Act classifies Cannabis as a drug within “Class C”, as of the 14th August 2008 (the date of the alleged offence).”

(i) The process of drug control and classification is found in s2(2)-(5) of the Act:

“(2) Her Majesty may by Order in Council make such amendments in Schedule 2 to this Act as may be requisite for the purpose of adding any substance or product to, or removing any substance or product from, any of Parts I to III of that Schedule, including amendments for securing that no substance or product is for the time being specified in a particular one of those Parts or for inserting any substance or product into any of those parts in which no substance or product is for the time being specified.

(3) An Order in Council under this section may amend Part IV of Schedule 2 to this Act, and may do so whether or not it amends any other Part of this Schedule.

(4) An Order in Council under this section may be varied or revoked by a subsequent order in Council thereunder.

(5) No recommendation shall be made to her Majesty in Council to make an Order under this section unless a draft of the Order has been laid before Parliament; and the Secretary of State shall not lay a draft of such an order except after consultation with or on the recommendation of the Advisory Council.”

(ii) The first inequality of treatment of which Taylor complains arises because the Secretary of State (“SSH”) fails to promote the Act’s policy and objects re the “dangerous or otherwise harmful drugs” alcohol and tobacco via s2(5). The first inequality of treatment is:

1) a failure to treat like cases alike, *viz* the unequal application of the Act to those concerned with equally harmful drugs without a rational and objective basis....

6. "Cannabis, Cannabis Resin, Cannabinol and Cannabinol derivatives have been re-classified under the Misuse of Drugs Act 1971 (amendment) Order 2008 from Class C to Class B drugs for the purposes of control under the Misuse of Drugs Act 1971 effective from the 26th January 2009."

Not relevant to the instant case as there is no presumptive retroactivity.

7. "Section 4 of the Act reads in the following terms:-
Section 4(1) Subject to any regulations under Section 7 of this Act for the time being enforced, it shall not be lawful for a person:

(a) to produce a controlled drug, or

(b) to supply or offer to supply a controlled drug to another.

Subject to Section 28 of this Act it is an offence for a person:-

(a) to produce a controlled drug in contravention of(1) above or

(b) to be concerned in the production of such a drug in contravention of that sub section by another."

Agreed

8. "Producing or supplying a controlled drug where the production or supply contravene Section 4(1) of the Act above constitute a drug trafficking offence for the purposes of Section 55 to Section 59 of the Drug Trafficking Act 1994 and is subject to proceedings under the Proceeds of Crime Act 2002."

Agreed

9. "Section 5 of the Act reads as follows:

(1) Subject to any regulations under Section 7 of this Act for the time being enforced, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to Section 28 of this Act to sub-section (4) below it is an offence for a person to have a controlled drug in his possession in contravention of sub-section (1) above.”

Agreed

10. “Section 7 of the Act referred to above deals with the authorisation of activities otherwise unlawful under Sections 3 to 6 in terms that.

(1) The Secretary of State may by regulations

(a) except from Section 3(1)(a) or (b), 4(1)(a) or (b) or 5(1) of this Act such controlled drugs as may be specified in the regulations and

(b) make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which under any of the following provisions of this Act, that is to say Sections 4(1), 5(1) and 6(1), it would otherwise be unlawful for them to do.

(2) Without prejudice to the generality of paragraph (b) of sub-section (1) above, regulations under that sub-section authorising the doing of any such thing as is mentioned in that paragraph may, in particular, provide for the doing of that thing to be lawful.

(a) if it is done under and in accordance with the terms of a licence or other authority issued by the Secretary of State and in compliance with any conditions attached thereto or

(b) if it is done in compliance with such conditions as may be prescribed.

(3) Subject to sub-section (4) below the Secretary of State shall so exercise his power to make regulations under sub-section (1) above as to secure

- (a) that it is not unlawful under Section 4(1) of this Act for a doctor, dentist, veterinary practitioner or veterinary surgeon, acting in his capacity as such, to prescribe, administer, manufacture, compound or supply a controlled drug, or for a pharmacist, or a person lawfully conducting a retail pharmacy business, acting in either case in his capacity as such, to manufacture, compound or supply a controlled drug and
 - (b) that it is not unlawful under Section 5(1) of this Act for a doctor, dentist, veterinary practitioner, veterinary surgeon, pharmacist or person lawfully conducting a retail pharmacy business to have a controlled drug in his possession for the purpose of acting in his capacity as such.
- (4) If in the case of any controlled drug the Secretary of State is of the opinion that it is in the public interest
- (a) for production, supply and possession of that drug to be either wholly unlawful or unlawful except for purposes of research or other specified purposes or
 - (b) for it to be unlawful for a practitioners, pharmacist and persons lawfully conducting retail pharmacy businesses to do in relation to that drug any of the things mentioned in sub-section (3) above, except under a licence or other authority issued by the Secretary of State he may by Order designate that drug to which this sub-section applies and while there is in force an Order under this sub-section designating a controlled drug as one to which this sub-section applies, sub-section (3) above shall not apply as regard to that drug".

Agreed

11. " Section 7 of the Act above demonstrates how the provisions pursuant to Section 3 to Section 6 of the Act have been regulated. None of the aforementioned regulations apply to the matters raised by the defendant in the instant case."

(i) Section 7 does not “show how the provisions pursuant to Section 3 to Section 6 of the Act have been regulated”. This is shown by the Misuse of Drugs Regulations 2001 (S.I. 2001 No. 3998).

(ii) The second inequality of treatment vests in the SSHD’s failure to introduce via s7 or s22 reasonable and proportionate regulations re controlled drug use. See paragraphs 149-156 of Taylor’s Application for a Stay for this particular argument. The second inequality of treatment is:

2) a failure to treat unlike cases differently, viz the failure to treat those who use controlled drugs peacefully as a different class from those who do not.

(iii) In particular, the reasonable differentiations related to the object of regulation advanced in paragraph 153 of Taylor’s Application are less restrictive means that the SSHD could have and should have employed in tackling the mischief that concerns the Act.

(iv) These differentiations are afforded by Government to those who are concerned in the consumption of alcohol and tobacco, but from outside of the Act.

12. “Section 22 of the Act provides power of the Secretary of State to make regulations as follows: -
Section 22. The Secretary of State may by regulations make provisions:-

(a) For excluding in such cases as may be prescribed.

(1) The application of any provision of this Act which creates an offence or

(2) (Not applicable in the instant case).

(b) For applying any of the provisions of Sections 14 to 16 of this Act and Schedule 3 thereto, with such modifications (if any) as may be prescribed. (1) In relation to any proposal by the Secretary of State to give a direction under Section 12(2) of this Act or

(2) For such purposes of regulations under this Act as may be prescribed.

(c) For the application of any of the provisions of this Act or regulations or orders there under, to servants or agents of the Crown, subject to such exceptions, adaptations, and modifications as may be prescribed.”

Agreed, but see Paragraph 13 below.

13. “The Secretary of State has made no regulations applicable to the issue raised by the defendant in the instant case.”

(i) This is exactly the point of Taylor’s argument re the second inequality of treatment. The SSHD has failed to make reasonable and proportionate regulations consistent with the policy and objects of the Act. Instead the SSHD has clung to the “policy of prohibition.”¹

(ii) Re s22 discussed in CPS’s response at Paragraph 12, this goes to the heart of the first inequality of treatment. If the SSHD is committed to excluding persons concerned in *any* of the enumerated activities re alcohol and tobacco from the sections of the Act applied to Taylor and believes that there is a rational and objective basis for so doing, then the proper process is to control alcohol and tobacco under s2 of the Act and then apply s22(a)(i) as required. This would promote the Act’s policy and objects.

(iii) Taylor believes this inequality is the consequence of the SSHD not understanding properly the Act that regulates the SSHD’s decision-making powers. This argument is set out in paragraphs 96-110 of Taylor’s Application for a Stay.

(iv) In short, why are those concerned with alcohol and tobacco afforded the liberty to produce, sell, purchase and consume the admittedly “dangerous or otherwise harmful drugs” alcohol and tobacco without fear of severe criminal sanction/penalty, whilst Taylor is not afforded the equal liberty re the equally or less harmful drug Cannabis?

14. “The defendant’s primary contention is that the instigation of proceedings pursuant to Sections 4 and 5 of the Act is in breach of the Governments executive power amounting to an abuse of process.

Whilst the defendant has provided numerous references to a number of consultation

¹ Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

papers, the defendant has failed to cite any authority demonstrating that the Misuse of Drugs Act 1971 is unlawful.”

(i) No, Taylor contends that the administration of the Act, prior to the CPS’s application of it to Taylor, is in breach of the Government’s executive power. Thus, bringing any prosecution under the Act re these sections abuses this Court’s process.

(ii) Further, any prosecution under the relevant sections of the Act subjects Taylor to the two inequalities of treatment under severe criminal penalty re his chosen comparator, those who produce, supply and possess the dangerous drugs alcohol and tobacco.

(iii) Taylor’s common law claim elucidates that the *administration* of the Act is unlawful, not that the Act is necessarily unlawful *per se*.

(iv) Taylor does not cite any consultation documents at all. Taylor cites Government Command Papers, Home Office statements, Parliamentary Select Committee reports and reports of the statutorily empowered Advisory Council on the Misuse of Drugs. Taylor relies chiefly on Command Paper Cm 6941.

15. “The defendant has cited in support of his application R v Horseferry Road Magistrates’ Court, ex parte Bennett (1994) 1 AC 42 HL, in which the accused had been brought to this country as a result of collaboration between authorities here and abroad and in disregard of extradition procedures. The doctrine was held to apply in such a situation, even though the matters complained of would not prevent a fair trial and even though it would not be unfair to try the accused if he had been returned to this country through lawful extradition procedures.

Lord Griffiths said that the court had the power to interfere with the prosecution because the judiciary accepted a responsibility for the maintenance of the rule of law that embraced a willingness to oversee executive action and to refuse the contumacious behaviour that threatened either basic human rights or the rule of law.

It was the function of the High Court to ensure that executive action was exercised responsibly and as Parliament intended. If, therefore, it came to the attention of the High Court that there had been a serious abuse of power, it should express its disapproval by refusing to act on it.

Lord Bridge said that there is no principle more basic to any proper system of law than the maintenance of the rule of law itself.”

Agreed

16. “The primary point arising from the above extract is that the Court accept a responsibility for the maintenance of the rule of law. In the instant case the Crown seek to enforce “the law” as enacted by the Misuse of Drugs Act 1971, specifically Section 4 and Section 5 of the Act.

- (a) The issue relates to the Act of Parliament itself. The Crown are applying the rule of law as evidenced by the Act.

- (b) There is no serious abuse of power in the instant case.

As a secondary point arising from the aforementioned extract, it was the function of the High Court to ensure that executive action was exercised responsibly and as Parliament intended. Parliament enacted the Misuse of Drugs Act 1971 creating the offences contained within Section 4 and Section 5 of the Act and, as such, the Crown by bringing the instant case are simply applying Parliament’s intentions as enacted.”

- (i) The issue relates to the presumption that Parliament does not legislate in a vacuum. Parliament’s intention was that the Act would be administered in a flexible and evidence-based methodical fashion consistent with the fundamental tenets of the rule of law², and consistent with the Act’s policy and objects.

² *R. v Secretary of State for the Home Department ex p Pierson* [1998] AC 539 at 591

Parliament later intended that the administration and application of law to be compatible with the Human Rights Act 1998.

(ii) Taylor accepts that the CPS seeks to enforce the Act as they found it. However, the Act has been, and is being abused by the executive. The Act has not been administered consistent with the rule of law or consistent with the Act's policy and/or objects. Further, the application of the abused Act to Taylor subjects him to the inequalities of treatment and discrimination.

(iii) Taylor sets out the specific abuses of power in two separate sections of the Application for Stay; generally, in Section V, entitled "Scrutiny of the new evidence elucidates abuses of discretionary power", paragraphs 38-61, and, then specifically tailored to the principles of judicial review in Section VI under the heading of "The Common Law Argument" at paragraphs 96 – 158, in which Taylor lists no less than 13 abuses of power under the subheadings of illegality, irrationality and unfairness, though some of these may overlap. For the CPS to state that no *serious* abuse of power occurs underestimates the importance of the Governmental duty to administer this legislation consistent with policy, with the rules of common law, and indeed human rights law (as detailed below at 18 & 19).

17. "The defendant has provided much analogy between "controlled substances" as defined within the Act as opposed to other substances which may have been deemed to be addictive or harmful, such as alcohol and tobacco. This is irrelevant to considerations in the instant case as Parliament has not deemed alcohol or tobacco to be a controlled drug with the meaning of the Act."

(i) Paragraph 17 goes to the crux of the first inequality of treatment which arises because the SSHD has failed to exercise s2(5) under the Act re alcohol and tobacco as is the SSHD's duty.³ Taylor deals with this point specifically at paragraphs 98 through 110. In sum, the SSHD has failed to give effect via s2(5) to two material and/or jurisdictional facts:

³ Cf. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030

- 1) Alcohol and tobacco are drugs within the Act's remit as the term "drug" is not synonymous with the phrase "controlled drug", s2(1)(a).
- 2) Alcohol and tobacco misuse is "having harmful effects sufficient to constitute a social problem", s1(2); or as the SSHD declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

(ii) Taylor asserts that the SSHD's failure or refusal to give effect to these material or jurisdictional facts via s2(5) occurs because the SSHD applies an overly-rigid and predetermined "policy of prohibition" to the facts re alcohol and tobacco (wrongly assuming that by fulfilling their duty to include them within the Act, that this would signify prohibition, which is viewed to be unacceptable politically), rather than applying a correct understanding of the Act's policy to protect the public from the double-edged sword of the current *relative* over-control and under-control, of different forms of dangerous drug activities.

(iii) This thwarts the Act's policy and sets up the inequalities of treatment.

18. "A secondary argument submitted by the defendant and contained within his skeleton argument is reference to his human rights as protected by the Human Rights Act 1998 and the various articles referred to therein."

Agreed

19. “Again, the defendant has failed to cite any authority in support of the fact that the Act is incompatible with ECHR Law. Although no authority has been cited to show that the Act is incompatible with ECHR Law, it is of course worthy to note that decisions under the Misuse of Drugs Act have been considered within the context of a defendant’s human rights. Specifically, Sections 5(4) of the Act reads as follows:-

In any proceedings for an offence under sub-section in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove

....

this clearly places a reverse burden upon the defendant.

In *R v Lambert* (2002) 2 AC 545 House of Lords, it was held that in so far as Section 28(2) and (3) impose a persuasive burden on the defendant, they are incompatible with the presumption of innocence in Article 6(2) of the ECHR, but it is permissible to invoke Section 3 of the Human Rights Act 1998, as it is possible to read and give effect to those sub-sections in a manner compatible with conventions right by construing them as imposing no more than an evidential burden on the accused, if sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the defence is not made out.

Clearly, therefore, by way of analogy and the fact that ECHR law has ruled upon the compatibility of the reverse burden under Section 5(4) of the Act, the Crown contend that the Act itself, subject to contrary authority being provided, is itself compatible with ECHR.”

(i) The defences detailed in Section 5(4) of the Act have nothing to do with this application. Taylor has not sought to establish that he was not responsible for the four cannabis plants that are the subject of the criminal charges. The burden of proof in this application lies with Taylor to establish a *prima facie* case, and the standard of proof is on the balance of probabilities. Taylor has established a *prima facie* case and it is now for the court to determine.

(ii) The defendant knows of no such rulings, no similar claim for an Article 14 violation in respect of drug property / legal status has ever been brought before the courts.

(iii) The Act unjustifiably discriminates between equally harmful drug property based upon majority preference rather than justifiably discriminating based on the outcome of the use of drug property as the Act suggest in title and text:

“An Act to make...provision for 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”⁴

(iv) And because the Act regulates the behaviour of people not drugs, the Act subjects Taylor to two discriminations:

1) The dangerous drugs alcohol and tobacco are not controlled under the Act whilst the equally or less harmful drugs of Taylor’s choice, are.

2) The Act prohibits, under severe criminal sanction, Taylor’s peaceful exercise of enumerated activities re the drug of his indictment whilst those peacefully concerned with alcohol and tobacco are subject to no such prohibition.

⁴ Misuse of Drugs Act 1971 c38, preamble conjunct s1(2), emphasis added and crucial

(v) Taylor asserts that the first discrimination is arbitrary and the second is excessive; together they seek to deprive him of his liberty and subject his thoughts, his private life and his property to arbitrary regulation contrary to Article 14 of the Human Rights Act 1998.

(vi) In determining whether interference by an act, rule or decision is arbitrary and/or excessive, this court should ask itself three questions:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective”.⁵

(vii) The Strasbourg Court has identified four circumstances in which discrimination occurs:

1) when States, without an objective and reasonable justification, treat differently persons placed in similar situations;⁶ (under- inclusive)

2) when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different;⁷ (over-inclusive)

3) when States, without an objective and reasonable justification, fail to extend to persons placed in similar situations those additional rights, falling within the ambit of another Convention article, which the State has voluntarily decided to provide;⁸ and

⁵ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80

⁶ *Belgian Linguistic Case (No.2)* [1968] 1 EH RR 252 at 10; *The Diane Pretty Case* [2001] UKHL 61 at 32

⁷ *Thlimmenos v Greece* [2001] EHRR 411 at 44; *Secretary of State for Work and Pensions v M* [2006] UKHL 11 at 74

⁸ *Stec v United Kingdom* [2005] 41 EHRR SE 295 at 40;

4) when a general policy or measure has a disproportionate, prejudicial effect on a particular group, even if such an effect was not intended.⁹

- (viii) All four of these are present in Taylor's case.
 - (ix) The Act, as administered, seeks to deprive Taylor of his liberty in an arbitrary and discriminatory manner contrary to Article 14 within the ambit of Article 5 on the grounds of "property" and "legal status" or, alternatively, that the Act deprives his liberty contrary to Article 5(1)(a).
 - (x) The Act, as administered, regulates Taylor's thought processes in an arbitrary and discriminatory manner contrary to Article 14 within the ambit of Article 9 on the grounds of "property" and "legal status" or, alternatively, that the Act deprives his liberty contrary to Article 9.
 - (xi) The Act, as administered, regulates Taylor's private life contrary to Article 14 within the ambit of Article 8 on the grounds of "property" and "legal status" or, alternatively, that the Act deprives his liberty contrary to Article 8.
 - (xii) The Act, as administered, regulates Taylor's peaceful use of his property in an arbitrary and discriminatory manner contrary to Article 14 within the ambit of Protocol 1 Article 1 on the grounds of "property" and "legal status" or, alternatively, that the Act deprives his liberty contrary to Protocol 1 Article 1.
20. "The issue to be determined by the instant Court again has been dealt with by *R v Horseferry Road Magistrates' Court ex parte Bennett* 1994 as referred to above in that the House of Lords confirmed that justices have the power to stay criminal proceedings for abuse of process, but held that such power should be strictly confined to matters directly affecting the fairness of the trial.

The wider supervisory responsibilities for upholding the rule of law is vested in the High Court and, therefore, it is accepted by the Crown and the Court has the discretion to

⁹ *Nachova & Others v Bulgaria* [2006] 42 EHRR 43 at 167; *R v SSE, ex p Seymour-Smith* [2000] 1 WLR 425 at 449

grant an adjournment to facilitate an application to the Divisional Court.

The Crown rely upon the fact that the Magistrates' Court has a discretion.

The Crown further ask the Court to consider the current status of the application to the High Court Queens Bench Division in the matter of Edward Stratton. The Crown's understanding is that the Divisional Court has rejected the applicant's written application for an oral hearing.

If that is the case, then the Crown pray in aid of the Divisional Court's refusal to list the matter for argument on the basis that there is no merit to the points raised.

A Bakker

29th April 2009"

The discretion of the Magistrates' Court ought to be exercised to grant an adjournment to facilitate the defendant's application to the Divisional Court, or an adjournment to await the outcome in the similar case of *Edwin Stratton*. With respect to this matter, **the Crown is mistaken in their stated view that the Divisional Court has rejected Stratton's written application for an oral permissions hearing.** The oral hearing is set for 1st July 2009.

Presented by Alan Taylor, Darryl Bickler (McKenzie Friend to the defendant) and the Drug Equality Alliance - 12 April 2009