Criminal Cases Review Commission **00687/2009**
Alpha Tower
Suffolk Street Queensway
Birmingham B1 1TT

In the Matter of:

Regina

Respondent

&

Casey William HARDISON

Appellant

Errors in the Commission's Legal Analysis

"The Rule of Law abhors arbitrariness"
– Lord Johan Steyn
Democracy through Law
September 2002

Prepared By

Casey William HARDISON

5 May 2010

CCRC 00687/2009

Regina Respondent

&

Casey William HARDISON Appellant

Errors in the Commission's Legal Analysis

Mr Hardison, a self-litigating US citizen, has read the Commission's Provisional Statement of Reasons ("PSR") of March 2010 re his CCRC application, numbered 00687/2009. Set out below are errors in the Commission's legal analysis of Hardison's application plus additional fresh evidence.

1. This case concerns the Rule of Law. At issue is whether Hardison's trial should have taken place; hence Hardison's statement, repeated by the Commission in the PSR, at para 41, that the grounds he relies upon are not related to guilt or innocence.

2. In *R v Mullen* [1999] 2 Cr App R 143, CA, LJ Rose said:

> "for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe … "unsafe" bears a broad meaning and one which is apt to embrace abuse of process". (Emphasis mine)

3. The Commission's relevant duties and powers are stated in the Criminal Appeal Act 1995:

> "9. – (1) Where a person has been convicted of an offence on indictment in England and Wales, the Commission – (a) may at any time refer the conviction to the Court of Appeal … 13. – (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless – (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made, (b) the Commission so consider – (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, … and (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused. (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it. (Emphasis added)

4. Cm 6941 and allied new evidence facilitate new arguments based on: (1) the Common Law and (2) the Human Rights Act 1998 demonstrating that Hardison's trial should not have taken place because – prior to Operation Pathfinder and Hardison's actions – the Secretary of State for the Home Department ("SSHD") arbitrarily exercised the discretionary powers under s2(5) of the Misuse of Drugs Act 1971. Consequently, the ensuing criminal proceedings against Hardison manifested severe and unequal deprivation of liberty.

5. If after proper forensic examination of Hardison's submissions the Commission finds that, as a matter of law, Hardison's trial should not have taken place then the Commission must refer his conviction to the Court of Appeal for quashing along with his sentence.

I. The first error of legal analysis

6. The Commission's "analysis and reasons" in the PSR identify the starting points of the Common Law and Human Rights strands of Hardison's submission at paragraphs 45(a) & 45(b) respectively but then mistakenly conflates them in paragraph 47 & 48 without considering Hardison's Common Law argument with respect to the new evidence.

7. In law, Common Law and Human Rights arguments are distinct branches of the *ultra vires* doctrine. Under the Common Law, Hardison asserts that the SSHD has acted *ultra vires* the Misuse of Drugs Act 1971 ("the Act"). Under the Human Rights Act 1998 ("HRA 1998"), Hardison asserts that the State, via their administration of the Act, has acted *ultra vires* the HRA. The Commission must consider each argument separately.

8. As the Common Law argument has not been before any Court, the Commission is wrong to assert at paragraph 47:

> "whilst the document is new evidence that has not previously been raised in the proceedings, the argument that this document is being used to support is not new".

9. Hardison recognises that Human Rights based arguments can not make his convictions unsafe; however, his Common Law arguments can and do.

II. Jurisdiction

10. Hardison made all previous submissions to the Courts under the Human Rights Act 1998. These submissions originate with the defence statement Hardison served under s5(5) of the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"); but, the Court would not hear Hardison's request for a stay until 5 January 2005, before the swearing of Jury and after HHJ Niblett had declared "the trial is starting today".[1]

    a. The judicial declaration led Hardison, a self-litigant, to believe that the Abuse of Process/Human Rights hearing had been a preparatory hearing within the meaning of ss29-31 of CPIA 1996 and thus a matter of trial on indictment.

    b. As Hardison could not judicially review a matter of trial on indictment, his only route to stay the prosecution was via an interlocutory appeal against HHJ Niblett's ruling in what Hardison had wrongly thought was a preparatory hearing.

    c. This request lead the Prosecution to discover that if the abuse hearing was not a preparatory hearing ordered under s30 CPIA 1996; though the Judge admitted it should have been:[2] (1) then the trial could not have started by judicial declaration; and (2) the custody time limits had expired entitling Hardison to bail.

    d. Seeking to avoid expired custody time limits and thus Hardison's automatic entitlement to bail, HHJ Niblett ruled that his Trial-start declaration and abuse ruling stood. Thus: (1) the matter of the abuse was closed; and (2) any appeal against the abuse must wait until after trial. The jury was duly sworn the following day.

    e. On 27 April 2005, the Queen's Bench declared, "the Learned Judge could not start Trial by direction": *See* QBD Consent Order CO/356/2005.

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[1] *See* 18 January 2005 Ruling re Custody Time Limits at page 2 line 23. *Cf.* s22(11) Prosecution of Offences Act 1985
[2] *Ibid* at page 10 line 5-11

11. In *R v Horseferry Road Magistrates' Court*, *ex p Bennett* [1994] 1 AC 42, the House of Lords held that the proper process for arguing a stay on the basis of an abuse of power by the executive is to seek a stay of the prosecution from the Divisional Court before the trial has started: at 62-64 *as per* Lord Griffiths; Archbold 2010 §4-50 *et seq*.

12. Thus it is wrong in law for the Commission to seek to bring Hardison's Common Law arguments for stay of the criminal proceedings due to prior abuses of the Act by the executive back under the jurisdiction of the Trial judge, HHJ Niblett: *see* PSR at para 56.

13. Any Jurisdiction to stay the criminal proceedings, and to quash Hardison's convictions, now lay with Court of Appeal.

14. More, in *ex p Bennett* at 76, Lord Lowry said:

> "… the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused". (Emphasis added)

15. So, the Commission must ask: (1) whether the new evidence, particularly Cm 6941, shows the SSHD's arbitrary abuse of the Act's discretionary powers; (2) whether this abuse has subjected Hardison to severe unequal treatment contrary to the Rule of Law; and (3) whether this abuse and subsequent unequal treatment is capable of making Hardison's Trial a trial that should not have taken place.

16. If the Commission answers these questions affirmatively then, *as per Mullen*, Hardison's conviction is "unsafe" within the meaning of the Criminal Appeal Act 1968.

III. Getting at the answer

17. Hardison's Common Law claims are, if correct in law, sufficient to stay the prosecution.

18. In his 8 August 2009 Arguments in Support of Grounds, Hardison painstakingly analyses the 1971 Act, page 5, 14-17, conjunct the new evidence, pages 9-12. He then shows how this analysis goes to the heart of his Common Law arguments found at pages 18-26.

19. Hardison unfurled these arguments under the traditional judicial review headings: illegality, irrationality and unfairness. He broke these down into three errors of law causing five irrational actions and five unfair administrations re the Act.

20. Beyond mere assertion in PSR paragraph 47, the Commission has not considered these Common Law claims.

21. Similarly, the Commission failed to consider the new evidence, chiefly page 24 of Cm 6941, or ask whether this evidence support Hardison's Common Law claims.

22. The Commission should now ask the relevant question: does page 24 of Command Paper Cm 6941 elucidate abuse of power by the Secretary of State for the Home Department ("SSHD") in the administration of the Act grounded in errors of law, irrationality and unfairness whilst concomitantly illustrating the two inequalities of treatment Hardison experiences?

IV. Only six sentences

23. Six sentences on page 24 Cm 6941 are crucial to determine whether the SSHD has abused the Act's powers; and, even though Hardison forensically analysed these six sentences in his Arguments in Support of Grounds and ordered his submissions to the Commission around them, the Commission refused to speak their name.

24. The six sentences of Cm 6941, *mutatis mutandis* and with emphasis, are repeated here:

    1) "Government fully [believes] that the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating … substances such as alcohol and tobacco". (Is the Act suitable or not? Is this an error of law?)

    2) "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis". (Does the SSHD really mean the distinction between alcohol/tobacco and 'controlled drugs'? Is this an error of law?)

    3) "It is … based in large part on historical and cultural precedents". (Is this acceptable?)

    4) "A classification system that applies to [alcohol, tobacco and 'controlled drugs'] would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Is the SSHD confusing 'control' with 'prohibition' here, otherwise, why would it be unacceptable? Is this an error of law? Is responsibly controlled drug use possible?)

    5) "[Alcohol and tobacco] are therefore regulated through other means". (Is this rational?)

    6) "the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs". (Then why are they not controlled drugs?)

25. These six sentences from the SSHD contain three errors of law:

    1) They show that the SSHD believes that the Act permanently proscribes the enumerated activities re a controlled drug, bar medical and scientific purposes.

    2) In them the SSHD claims a power, the SSHD does not possess, to exempt individuals or classes of individuals from the operation of the law by excluding *de facto* alcohol and tobacco from the Act's control.

    3) They show that the SSHD believes in the "illegality of certain drugs",[3] i.e. that some drugs or "substances" are "legal" whilst the Act makes others "illegal".

26. These three errors of law underpin the SSHD's abuses of the s2(5) discretion and so manifest the two inequalities of treatment of which Hardison suffers:

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

    2) a failure to treat unlike cases differently, *viz* the failure to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm.

[3] Cm 6941 (2006) page 18

27. Accordingly, Hardison requests that the Commission conduct a proper forensic analysis of the Misuse of Drugs Act 1971 conjunct these six sentences from Cm 6941.

28. A proper forensic analysis will show that the SSHD's abuse of the Act's discretions, and the inequalities of treatment, flow from the SSHD's failure to "understand the law that regulates [the SSHD's] decision-making power" and "give effect to it": *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401, *as per* Lord Diplock.

29. If the SSHD is responsible for the unequal deprivations of liberty of which Hardison complains – because the SSHD failed to understand and give proper effect to the s2(5) discretion, amongst others – was it fair to apply the Act to him?

V. A new admission re Alcohol and Tobacco – the Home Office sobers up

30. Most recently, it has come to Hardison's attention that the SSHD "consider[s] alcohol and tobacco to be implicit in the ACMD's terms of reference" in s1(2) of the Act "as these are substances that can be misused".[4] This new admission is in a document jointly published by the Home Office and the Advisory Council on the Misuse of Drugs ("ACMD").

31. This sensibly recognises that Parliament has always thought the Act a suitable mechanism for regulating the production and commerce of alcohol and tobacco. Alas, though the Bill drafters knew it,[5] until now no Secretary of State has been willing to countenance it.

32. Logic follows that the SSHD's belief, expressed twice in Cm 6941, that "the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating … substances such as alcohol and tobacco", is wrong.

33. This false belief is the crux of the three errors of law the SSHD makes in administering the Act. This false belief makes possible the inequality of treatment Hardison suffers.

34. This new admission conjunct sentence 6 from page 24 of Cm 6941 should have the SSHD scrambling to control alcohol and tobacco under the Act. Please consider the following:

    a. Mephedrone – a substance subject to a recent, intense campaign to it 'ban it' under the Act. The ACMD declared that it was "likely to be harmful to users" with "harms commensurate with the amphetamines".[6] The declaration was sufficient enough for the SSHD to seek its control under s2(5) of the Act. It is now a controlled drug.

    b. Alcohol and tobacco – suddenly within the Act's remit and according to the SSHD in Cm 6941 – the two drugs that "account for more health problems and deaths than illicit drugs" (including the drugs of Hardison's indictment) are not controlled drugs notwithstanding that since Hardison's arrest tobacco alone is responsible for more than half a million deaths.[7]

    c. Persons who peacefully possess, commerce or produce "controlled drugs" are subject to the Act's deprivations of liberty whilst persons who produce and commerce alcohol and tobacco are not. This is arbitrary use of executive power under s2(5) of the Act.

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[4] ACMD/Home Office (2010) "Pathways to Problems: A follow-up report on the implementation of recommendations from *Pathways to Problems*", at para 4.2
[5] *Hansard*, HC Deb, Misuse of Drugs Bill 1970, 25 March 1970, Vol. 798, Col. 1486
[6] ACMD (2010) Consideration of the Cathinones, 26 March 2010, p25
[7] Cm 41(1998) *Smoking Kills,* paragraph 1.1, "smoking kills more than 13 people an hour"

VI. The Point of Law

35. The Commission declared, without demonstrating, that:

> "The point of law posed by Mr Hardison in his application … is simply a restructured version of the five points previously put before the Court of Appeal".

36. Hardison finds this frankly incomprehensible as nowhere in his 8 August 2006 application to have the Court of Appeal certified points of law for consideration by the House of Lords can the concept be found that the abuse starts with the Secretary of State in the administration of the Act under which the prosecution was sought.

37. The five points of law from Hardison's 8 August 2006 application read:

1) Can 'inferences' drawn from the UN drug Conventions – which are not explicitly enabled by an Act of Parliament and which themselves explicitly allow non-compliance on human rights grounds – demonstrate a 'pressing social need' justifying interference with Hardison's Convention rights?

2) Was Mr Justice Keith right to place the instant case within the *ambit* of Article 8?

3) Is the Act neutral in principle and therefore of general applicability?

4) Is there an objective and reasonable justification for this disparity of treatment and denial of equal rights and protection?

5) Is Mr Hardison's sentence of 20 years imprisonment proportionate to the gravity of the acts committed? And, if not, should the sentence be varied?

38. The point of law posed by Hardison in his application, without the HRA claim, reads:

> Where abuse of power is evident in the exercise of, or failure to exercise, a statutory discretion by the Secretary of State and that exercise of discretion requires approval by either a positive or negative resolution of both Houses of Parliament and the application of that abused statute to a criminal defendant has subjected that defendant to severe inequality of treatment in terms of common law […], is the issue justiciable and is that defendant entitled to this Court's protection?

39. This point of law is not comparable to the previous five. It bears no resemblance.

40. More, in his judgment dated 17 October 2006, re the five Points of Law, Lord Justice Hooper stated:

> "I cannot give you the points of law because they were just scattered across 25 pages".[8]

41. As these five points were set under bold headings on page 2 paragraph 7 of Hardison's application, the above statement suggests wilful obfuscation of his claim.

42. Accordingly, the Commission has not considered properly the Point of Law posed by Hardison in his CCRC application. He again requests that the Commission use its power to refer the Point of Law to the proper Court for consideration.

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[8] Court of Appeal Certiorari Judgment, Hardison v R, 17 October 2006, lines 12-13

VII. The Human Rights Act 1998 arguments – A new approach

43. Whilst Hardison's use of Human Rights based arguments is not new, the identification that the abuse starts with the State's administration of subordinate legislation, in particular the arbitrary nature of the SSHD's exercise of the s2(5) discretion without an explicit policy or any fixed determining criteria is entirely new.

44. Accordingly, Hardison's Human Rights arguments as articulated in the 8 August 2009 Grounds of Appeal and Arguments in Support of Appeal are new arguments that have not been before any court.

45. But, as the Commission rightly points out, PSR at paragraphs 64 & 65, Hardison's Human Rights based arguments cannot reach the "safety" of his convictions.

46. It may be that the Commission should disregard them in their entirety except for informing the sentencing appeal. Even so, when the Commission refers Hardison's Common Law argument to the Court of Appeal, he will request that the Court forensically examine them.

47. For the record, Hardison reasserts that page 24 of Cm 6941 declares the subject matter is "substances that alter mental functioning". This goes to the heart of his original Article 9 submission. Hardison, having a great affinity for cognising in the mindstates facilitated by psychedelic-type drugs, should be free to "alter [his] mental functioning". Yet, the State, via the Act, abrogates his *Cognitive Liberty*, i.e. Freedom of Thought, in an arbitrary and discriminatory manner on the irrational basis of "historical and cultural precedents".[9]

VIII. Sentence

48. The Court of Appeal has not considered Hardison's sentence in light of his new Common Law inequality of treatment argument. This Common Law argument demonstrates that, due to the SSHD's arbitrary and unequal administration of the Act's discretions, Hardison's sentence is disproportionate to the harm risked by his activities.

49. The Commission failed to grasp that this inequality of treatment created by the SSHD's arbitrary and abusive administration of the Act makes it "manifestly absurd" that Hardison received a twenty-year sentence for undertaking identical property activities as those of an alcohol brewer and/or tobacco grower whilst they receive a Queen's Award for Industry or a Knighthood: *see* PSR at paragraph 88-89.

50. More, Hardison stands by his submission re *R v Kennedy*.[10] *Kennedy* asks who is responsible when person A prepares a controlled drug and then supplies this drug to an informed and consenting adult, person B, and person B comes to harm from self-administration.

51. *Kennedy* suggests that person A is not culpable for any harm suffered by person B because of B's actions. Yet, in sentencing, Hardison was held responsible for harm that may have resulted to persons B by use of his drugs while alcohol and tobacco conglomerates are not held responsible for harm that may result to persons B by use of their drugs.

[9] Cm 6941 (2006) page 24
[10] *R v Kennedy (No. 2)* [2008] 1 AC 269, HL

52. Hence, the Commission should recommend, at minimum, to the Court of Appeal that Hardison's sentence is manifestly excessive and arbitrary for it is not commensurate with the true gravity of his actions when compared with alcohol and tobacco conglomerates.

IX. Investigations, Disclosure and New Evidence

53. As the Commission has not considered Hardison's Common Law arguments conjunct Cm 6941 and the allied evidence it can not say whether a s17 investigation by the Commission seeking disclosure of Government documents re the administration of the Act, particularly the arbitrary exclusion of alcohol and tobacco, would bear fruit affecting the safety of his conviction.

54. Hardison notified the Commission on 23 March 2010 that a Decision Notice (DN), dated 9 March 2010, had been issued from the Information Commissioner's Office ordering disclosure to Hardison within 35 days of "the information in the draft consultation document" proposing a review of the drug classification system and held by the Home Office.

55. Hardison believes that the SSHD knew before Operation Pathfinder that the Act's classification system was administered arbitrarily. Evidence produced by the Advisory Council on the Misuse of Drugs, subsequently published on 31 July 2006 in Appendix 14 to the Fifth Report of the House of Commons Science and Technology Committee Session 2005-06 HC 1031 *Drug classification: making a hash of it?*, declared that:

> "The current classification system has evolved in an unsystematic way from somewhat arbitrary foundations with seemingly little scientific basis. […] Our findings raise questions about the validity of the current Misuse of Drugs Act classification, despite the fact that it is nominally based on an assessment of risk to users and society. The discrepancies between our findings and current classifications are especially striking in relation to psychedelic type drugs. Our results also emphasise that the exclusion of alcohol and tobacco from the Misuse of Drugs Act is, from a scientific perspective, arbitrary. We saw no clear distinction between socially acceptable and illicit substances. The fact that the two most widely used legal drugs lie in the upper half of the ranking of harm is surely important information that should be taken into account in public debate on illegal drug use. Discussions based on a formal assessment of harm rather than on prejudice and assumptions might help society to engage in a more rational debate about the relative risks and harms of drugs". (Emphasis added)

56. This reflects the results of research reported on by the Police Foundation in their year 2000 "Report of the Independent inquiry into the Misuse of Drugs Act 1971, *Drugs and the Law*" and subsequently published in *The Lancet* 369: 1047-1053.

57. Hardison believes that this and other relevant evidence informed the SSHD's decision to order a review of the classification system and that the consultation document acknowledges this. This makes the consultation document new evidence going to the crux of Hardison's Common Law argument.

58. Though the DN ordered the release of the consultation document, the Home Office has now appealed the DN to the First-tier Tribunal, EA/2010/0075, effectively keeping it from the public domain.

59. Hardison reiterates his request that the Commission conducts all necessary investigations in relation to his case including exercising its powers under s17 of the Criminal Appeal Act 1995 to seek disclosure of the consultation document and other Government documents re the administration of the Act, particularly documents relating to the acknowledged exclusion of alcohol and tobacco from control under the Act.

X. Conclusion

60. Rooted in the deeply emotive issue correctly identified by the SSHD in Cm 6941, drugs that "alter mental functioning", Hardison's case unavoidably raises questions as to the balance between the judiciary, the legislature and the executive in matters of common law.

61. Having recognised that the use of such drugs results in a variable likelihood of risks and benefits to the public and individuals alike, and that these require conscious balancing, Parliament embodied beautifully neutral principles of general applicability in the Act.

62. Yet, as administered by the executive, Hardison's shows that, re the drugs he prefers, the Act denies him rights equivalent to the rights granted to persons who use, commerce and/or produce alcohol and/or tobacco whereas the executive denies the public equal protection under the Act from the harmful effects of alcohol and tobacco misuse.

63. This abuse of power is arbitrary, contrary to the Act's policy and objects, and contrary to the Common Law equality-of-treatment doctrine.

64. It now falls to the Commission, in the fulfilment of their statutory duty,[11] to see with the Court's eyes and refuse to countenance the executive's "partial and unequal"[12] administration of the Act and the unequal treatment to which it has subjected Hardison.

65. Hardison recognises that the Commission rarely deals with cases that are about the conduct of the executive pre-investigation, arrest and trial, rather than guilt or innocence.

66. Hardison also recognises that due to entrenched attitudes, familiarity and prejudice it may be difficult for the Commission to ingest the consequences of his arguments.

67. But so too it was in *Sommersett's Case* (1772) 20 St. Tr. 1 in which the 'negro' became a free man entitled to the fullest protection of law and in which it was said:

> "He who is subject to English law is entitled to its protection".

68. The principle here is identical; it is the antithesis to the exertion of arbitrary power, it is the keystone of democracy, it is what all the bloodshed has been about, it is:

> *Equal treatment under Law*

69. This principle requires that the Commission refer Hardison's Conviction and Sentence to the Court of Appeal. Hardison is subject to English law, he is entitled to its protection.

– *fiat lux!*

Signed …….
Casey William HARDISON – POWd (Civ)

Dated …….

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[11] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034; when "may" becomes "shall"
[12] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ; see also *Plessy v Ferguson* (1896)163 US 537 at 552; *Brown v Board of Education* (1954) 347 US 483 at 495, "separate but equal"