

IN THE COURT OF APPEAL
CRIMINAL DIVISION
Royal Courts of Justice
Strand
London WC2A 2LL

BETWEEN:

Regina

Respondent

&

Casey William HARDISON

Appellant

Draft Grounds
APPEAL AGAINST CONVICTION

Treating like cases alike and unlike cases differently is a general axiom of rational behaviour.
– *Matadeen v Pointu* [1999] AC 98 at 109



Prepared By

Casey William HARDISON

8 August 2009



DRAFT GROUNDS OF APPEAL

1. Mr Casey William HARDISON requests Leave to Appeal against Conviction because new documentary evidence shows that his convictions under the Misuse of Drugs Act 1971 c.38 (“the Act”) are “unsafe” within the meaning of s2(1)(a) of the Criminal Appeal Act 1968.
2. In particular, Cm 6941, a Government Command Paper,¹ elucidates 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. The subsequent criminal proceedings against Hardison manifested two inequalities of treatment:
 - 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. These inequalities of treatment constitute unequal deprivations of liberty at common law and discrimination contrary to Article 14 of the Human Rights Act 1998 (“HRA”) within the ambit of Articles 5, 8, 9 ~~et~~ Protocol 1 Article 1 on the grounds of “property”, “drug preference” and/or “legal status”.
4. On page 24 of Cm 6941, the SSHD unconsciously revealed three errors of law supporting the abuse whilst defending the inequality of treatment on subjective and/or incoherent grounds not rationally connected to the Act’s policy and/or objects, contrary to *Padfield*.²
5. Scrutiny of Cm 6941 and the Act shows that the inequality of treatment occurs because: (1) the Parliament neither stated an explicit policy nor fixed any determining criteria³ to guide the SSHD’s decision-making re drug control and classification under s2(5) of the Act; (2) HM Government fettered the SSHD to an overly-rigid and predetermined “policy of prohibition”⁴; (3) the SSHD failed to understand and give effect to the Act’s policy and objects; and (4) the SSHD arbitrarily exercised s2(5) and the incidental discretionary powers.
6. Had Cm 6941 been available to discharge the evidential burden inherent in Hardison’s pre-trial motion⁵ to stay the indictment as an abuse of process, alleging that executive abuse of power threatened his liberty, his trial would not have taken place.
7. Hardison therefore requests that this Court: (1) grant leave to appeal against conviction; (2) anxiously scrutinise the new evidence and argument; (3) confirm the abuse of power; (4) declare his indictment should have been stayed; (5) declare his conviction “unsafe”; (6) quash his conviction; and (7) order his release.

¹ Cm 6941 (2006) *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06* HC 1031 *Drug classification: making a hash of it?*, 13 October 2006

² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030

³ Cf. s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975

⁴ Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

⁵ 13 January 2005 Transcript of Judge’s Reasons for Ruling on Abuse of Process/Human Rights Arguments at p4A-B

The Point of Law at the Crux of Hardison’s Case, see “Point of Law” skeleton argument

8. 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 and the Human Rights Act 1998, is the issue justiciable and is that defendant entitled to this Court’s protection?

Ground 1 – Common Law, pages 13-26 of “Arguments in Support of Grounds”

9. Hardison asserts that the Misuse of Drugs Act 1971 c.38 is a generally applicable Act of Parliament administered unequally by the SSHD because of errors of law, irrationality and unfairness, contrary to the *ultra vires* doctrine and the principles laid down by the House in *Padfield* and *Wednesbury*. The subsequent application of the Act to Hardison has violated his common law right to equality of treatment and deprived him of his liberty, security and property without Due Process.
10. If this Court finds abuse under any of the established judicial review headings, i.e. illegality, irrationality, and unfairness, then: (1) one or both of the inequalities of treatment exist; (2) the SSHD has abused the Act’s discretions; (3) the SSHD has abused the Court’s process; (4) Hardison’s trial should have been stayed; and (5) his conviction is “unsafe” within the meaning of s2(1)(a) of the Criminal Appeal Act 1968.
 - 1) Illegality – the new evidence shows that the inequalities of treatment are caused by: (1) the SSHD’s failure to correctly understand the Act and its regulation of the SSHD’s decision-making powers; and (2) the SSHD’s failure to give effect to the Act, particularly where established and relevant facts make the permissive exercise of the SSHD’s s2(5) discretion a duty.⁶ (Pages 18-19)
 - a) Hardison asserts that the SSHD makes the following three errors of law in exercising the Act’s discretionary powers:
 - 1) The SSHD believes that the Act permanently proscribes the enumerated activities re a controlled drug, bar medical and scientific purposes, i.e. “our policy of prohibition [is] reflected in the terms of the [Act]”.⁷
 - 2) The SSHD claims a power, the SSHD does not possess, to “exempt individuals or classes of individuals from the operation of the law”⁸ by excluding *de facto* the “dangerous or otherwise harmful drugs”⁹ alcohol and tobacco from the Act’s control.
 - 3) The SSHD believes in the “illegality of certain drugs”,¹⁰ i.e. that some drugs or “substances” are “legal” whilst the Act makes other drugs or substances “illegal”.
 - b) These errors of law cause the inequalities of treatment by preventing the SSHD from giving proper effect to the Act’s policy.

⁶ Cf. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034; *E & R v SSHD* [2004] EWCA Civ 49

⁷ Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

⁸ *Pretty v United Kingdom* (2002) 35 EHRR 1 at 77

⁹ *Misuse of Drugs Act 1971 c.38*, Preamble

¹⁰ Cm 6941 (2006) page 18

- 2) Irrationality – examination of Cm 6941 and the Act shows that the SSHD’s adherence to the three errors of law has led to irrational decision-making under the Act and that this is responsible for the inequalities of treatment Hardison experiences. (Pages 20-22)
 - a) Hardison asserts that the SSHD has acted irrationally by:
 - 1) fettering decision-making to United Nations’ drug policy;
 - 2) acting inconsistently with respect to persons similarly situated;
 - 3) considering irrelevant factors and disregarding relevant factors;
 - 4) pursuing an improper purpose; and by
 - 5) abusing a dominant position.
 - 3) Unfairness – examination of Cm 6941 and the Act shows that the SSHD’s adherence to the three errors of law has led to unfairness under the Act. (Pages 23-36)
 - a) Hardison asserts that the SSHD administers the Act unfairly by:
 - 1) failing to administer the Act in an evidenced-based manner;
 - 2) exercising the s2(5) discretion arbitrarily;
 - 3) failing to evolve a proportionate penalty structure;
 - 4) failing to implement reasonable regulations under ss7 ~~e~~ 22; and by
 - 5) showing apparent bias toward persons concerned with alcohol and tobacco.
 11. Hardison demonstrates that, with respect to the drugs he prefers, the Act, as administered by the SSHD, denies him rights equivalent to the rights granted to persons who use, commerce and/or produce alcohol and/or tobacco whereas the SSHD denies the public equal protection under the Act from the harmful effects of alcohol and tobacco misuse.
 12. As this is contrary to the Act’s policy and contrary to the “equality of treatment”¹¹ doctrine, it falls to the judiciary to refuse to countenance the executive’s “partial and unequal”¹² administration of the Act.
 13. In so doing, Hardison requests that this Court respect Lord Scarman’s words in *McLoughlin v O’Brien* [1983] AC 410 at 430:

“By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path”. (Emphasis added)
 14. Principle will lead this Court to conclude that Hardison’s convictions rest unsafely upon executive abuses of discretionary power that have abused the Court’s process.

¹¹ *Matadeen v Pointu* [1999] AC 98 at 109; *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

¹² *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ

Ground 2 – Human Rights Act 1998, pages 27-39 of “Arguments in Support of Grounds”

15. The Misuse of Drugs Act 1971 c.38 (“the Act”) unjustifiably discriminates between equally harmful drugs property based on majority preference rather than justifiably discriminating on the actual or possible outcome of the use of that property as the Act suggests in title and text.
16. And since the Act regulates human action, not drug action, this subjects Hardison to two unjustifiable discriminations:
 - 1) an under-inclusive and arbitrary discrimination, *viz* Hardison and the drugs of his concern are subject to the Act’s controls yet the equally or more harmful drugs alcohol and tobacco and persons concerned with them are not subject to the Act’s controls; and
 - 2) an over-inclusive and disproportionate discrimination, *viz* Hardison’s peaceful action re controlled drugs is regulated in the same manner as persons causing harm.
17. Together these two unjustifiable discriminations deprive Hardison 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.
 - 1) Article 5 “Right to Liberty” (Pages 32 ~~et~~ 33)
 - a) The State, via the Act, deprives Hardison of his physical liberty in a discriminatory and thus arbitrary manner contrary to Article 14 within the ambit of Article 5 on the grounds of “property”, “drug preference” and/or “legal status”.
 - 2) Article 8 “Right to Private Life” (Pages 34 ~~et~~ 35)
 - a) The State, via the Act, regulates Hardison’s private life and autonomy in a discriminatory and thus arbitrary manner contrary to Article 14 within the ambit of Article 8 on the grounds of “property”, “drug preference” and/or “legal status”.
 - b) Alternatively, the State, via the Act regulates Hardison’s private life contrary to Article 8.
 - 3) Article 9 “Freedom of Thought” (Pages 36 ~~et~~ 37)
 - a) The State, via the Act, regulates Hardison’s thoughts contrary to Article 9.
 - b) Alternatively, the State, via the Act, regulates Hardison’s thoughts in a discriminatory manner contrary to Article 14 within the ambit of Article 9 on the grounds of “property”, “drug preference” and/or “legal status”.
 - 4) Article 1 Protocol 1 “Protection of Property” (Pages 38 ~~et~~ 39)
 - a) The State, via the Act, has deprived Hardison of his lawfully acquired possessions and prevented him from peacefully enjoying his possessions in an arbitrary and discriminatory manner contrary to Article 14 within the ambit of Article 1 Protocol 1 on the grounds of “property”, “drug preference” and/or “legal status”.
18. The analogous comparators and the grounds of discrimination in terms of Article 14 are set out on page 29-31 of the “Arguments in Support of Grounds”.

19. In *R v SSHD, ex parte Daly* [2001] UKHL 26 at 28, Lord Steyn issued an essential caveat:

“The differences in approach between the traditional grounds of review and the proportionality approach may ... sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way”.

20. Hardison thus requests this Court’s proper analysis of each of his human-rights claims.

Additional Arguments

21. Additional arguments supporting the proper forensic analysis of Hardison’s claims are set out in the “Arguments in Support of Grounds” in the order he thought best. Accordingly:

- 1) arguments re jurisdiction and review standard are dealt with on page 2;
- 2) arguments re s23 of the Criminal Appeal Act 1968 are dealt with on pages 3 & 4;
- 3) Hardison’s interpretation of the Act is set out on page 5;
- 4) the relevant new evidence, in context, is set out on page 6-8;
- 5) Hardison’s critical analysis of the new evidence is set out on pages 9-12;
- 6) arguments re justiciability are dealt with on pages 40 & 41;
- 7) arguments re the burden of proof are found on page 42; and
- 8) arguments re the public interest at stake are set out on page 43.

Principal Authorities Relied Upon

22. Though not necessarily in this order, Mr Hardison relies on the following principal authorities in making his claims:

- 1) *Connelly v Director of Public Prosecutions* [1964] AC 1254
- 2) *R v Looseley, Attorney General’s Reference* (No 3 of 2000) [2001] UKHL 53
- 3) *R v Horseferry Road Magistrates’ Court, ex p Bennett* [1994] 1 AC 42
- 4) *R v Central Criminal Court, ex p Randle and Pottle* [1992] Cr App R 323, DC
- 5) *Attorney-General’s Reference* (No. 1 of 1990) [1992] QB 630
- 6) *R v Mullen* [1999] 2 Cr App R 143
- 7) *R v Telford Justices, ex p Badhan* [1991] 2 QB 78
- 8) *R v SSHD, ex p Bugdaycay* [1987] AC 514
- 9) *Kruse v Johnson* [1898] 2 QB 91
- 10) *Matadeen v Pointu* [1999] AC 98
- 11) *Railway Express Agency, Inc v New York* (1949) 336 US 106
- 12) *JH Rayner (Mincing Lane) Ltd v DTT* [1990] 2 AC 418 (HL)
- 13) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374
- 14) *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997
- 15) *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223
- 16) *Redereaktiebolaget Amphitrite v The King* [1921] 3 KB 500
- 17) *Magill v Porter* [2001] UKHL 67
- 18) *R (RJM) v Secretary of State for Work & Pensions* [2009] UKHL 63
- 19) *A & Others v United Kingdom* (2009) All ER (D) 203 (Feb)
- 20) *Dudgeon v United Kingdom*, (1982) 4 EHRR 149
- 21) *Steck v United Kingdom* (2005) 41 EHRR SE 295
- 22) *Pretty v United Kingdom* (2002) 35 EHRR 1
- 23) *Chassagnon & Others v France* (1999) 29 EHRR 615
- 24) *R v SSHD, ex p Javed* [2001] EWCA Civ 789
- 25) *A & Others v SSHD* [2004] EWCA Civ 1123

Requested Remedy

23. At this point it may be wise to recall Lord Lowry's wise words in *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 at 77:

"If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No "floodgates" argument applies because the executive can stop the flood at source by refraining from impropriety".

24. Hardison seeks: (1) a stay of the criminal proceedings against him; (2) to have his convictions quashed; (3) to have his release ordered; and (4) a declaration, under s4 of the Human Rights Act 1998, that "the Misuse of Drugs Act 1971, as administered by the State, is incompatible with Convention rights".

25. In the first alternative, as the new evidence demonstrates that Hardison's sentence is both ordinarily and cardinally disproportionate,¹³ this Court should: (1) commute his sentence to time served; and (2) order his immediate release. This may require an Appeal against Sentence based on the new evidence. If the Court proposes this option, leave should be granted forthwith so that Hardison may prepare arguments.

26. In the second alternative, Hardison requests that this Court certify the following point of law as matter of general public importance which ought to be considered by the Supreme Court and grant leave to appeal to the Supreme Court so that it may be considered:

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 and the Human Rights Act 1998, is the issue justiciable and is that defendant entitled to this Court's protection?

27. Please see "Point of Law" skeleton argument re this second alternative.

Prayer

28. Mr Casey William Hardison humbly requests that the Honourable Court: (1) grant Leave to Appeal against Conviction; (2) anxiously scrutinise the new evidence and argument; (3) confirm the abuse of power; and (4) grant the remedies he seeks.

– fiat justitia, ruat calum!

Signed
Casey William HARDISON

Dated

¹³ Von Hirsh, A. & A. Ashworth (2005) Proportionate Sentencing: Exploring the Principles, Oxford: OUP, Chapter 9.