

In the Wigan and Leigh Magistrates' Court

06/LL/14088/08

In the matter of:

R

V

Alan Taylor

Defendant's skeleton 'abuse of process' argument for a stay of these proceedings

The Courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

– *Connelly v. Director of Public Prosecutions* [1964] AC 1254 at 1354

Preliminaries

This application concerns Alan Carl TAYLOR (a litigant in person), who faces charges concerning the production and possession of four cannabis plants at his home. An outline abuse of process application was served at the first hearing on 24th March 2009 at this court. Subsequently, the substantive document (dated 3 April 2009) was served upon this court and the CPS.

There are three enclosed documents that comprise the point of law / abuse of process argument for consideration by this court.

- (i) Skeleton argument as reproduced below;
- (ii) Submissions re ‘justiciability’ of the issue / point of law;
- (iii) The updated human rights section to supplement the previously submitted substantive document of 3 April 2009.

Reference materials and the core documentation are also enclosed in CD format.

The District Judge determined on 10 July that this court must hear this application in line with a decision of the High Court in the case of *Stratton* (Case No: CO 10629/2008). The Judge’s Order in that case stated that the Magistrates’ Court is competent to so determine this issue (although this point is disputed by Taylor who believes his matter to be one for either the High Court or the Supreme Court). In any event, Taylor no longer considers his case to be “on all fours” with the case that the High Court thought that *Stratton* was making. Taylor has advanced his legal argument (especially the human rights claims) since that time. It is recommended that the application for a stay dated 3 April 2009 is made available, the new draft human rights substantive section and the ‘justiciability’ argument are considered to add flesh to the bones to the skeleton argument.

Taylor was pressed into entering a plea on 10 July as he was instructed that the abuse argument could not be heard if he failed to do so. The defence notes that despite being without legal representation, Taylor was committed for trial without a reading of the submitted papers and with only ten minutes to consider the committal papers. The District Judge remarked that she could not understand why Taylor was pleading ‘not guilty’ given his apparent acceptance of the fact that he did cultivate the cannabis plants, and his expressed wish not to call any of the prosecution witnesses to give evidence. Taylor’s defence is the Abuse of Process detailed below, and if this court is satisfied that *any* such abuse has occurred (on the balance of probabilities), then the criminal proceedings must be stayed.

The Skeleton Argument

1. Cm 6941, a Government Command Paper,¹ elucidates abuse of power by the Secretary of State for the Home Department (“SSHHD”) in the administration of the Act grounded in errors of law, irrationality and unfairness. The subsequent intended criminal proceedings against Taylor manifest 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.
2. These inequalities of treatment threaten 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”.
3. On page 24 of Cm 6941, the SSHHD 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
4. 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 SSHHD’s decision-making re drug control and classification under s2(5) of the Act; (2) HM Government fettered the SSHHD to an overly-rigid and predetermined “policy of prohibition”⁴; (3) the SSHHD failed to understand and give effect to the Act’s policy and objects; and (4) the SSHHD arbitrarily exercised s2(5) and the incidental discretionary powers.
5. This state of affairs raises a point of law for the courts to determine; 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

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

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

6. Taylor 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 Taylor would violate his common law right to equality of treatment and now threatens to deprive him of his property and liberty without Due Process.
7. 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 is abusing the Court's process;
 - (4) Taylor's trial should be stayed.
11. **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.⁵
 - a) Taylor 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]".⁶
 - 2) The SSHD claims a power, the SSHD does not possess, to "exempt individuals or classes of individuals from the operation of the law"⁷ by excluding *de facto* the "dangerous or otherwise harmful drugs"⁸ alcohol and tobacco from the Act's control.

⁵ Cf. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034; *E & R v SSHD* [2004] EWCA Civ 49

⁶ Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

⁷ *Pretty v United Kingdom* (2002) 35 EHRR 1 at 77

⁸ *Misuse of Drugs Act* 1971 c.38, Preamble

- 3) The SSHD believes in the “illegality of certain drugs”,⁹ 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.
- 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 Taylor experiences.
 - a) Taylor 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.
 - a) Taylor 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 ~~&~~ 22; and by
 - 5) showing apparent bias toward persons concerned with alcohol and tobacco.

⁹ Cm 6941 (2006) page 18

8. Taylor demonstrates that, with respect to the drug 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.
9. As this is contrary to the Act's policy and contrary to the "equality of treatment"¹⁰ doctrine, it falls to the judiciary to refuse to countenance the executive's "partial and unequal"¹¹ administration of the Act.
10. In so doing, Taylor requests that this Court respect Lord Scarman's words in *McLoughlin v O'Brian* [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)

11. Principle will lead this Court to conclude that Taylor's prosecution has arisen unsafely because of executive abuses of discretionary power that have abused the Court's process.

Ground 2 – Human Rights Act 1998,

12. 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.
13. And since the Act regulates human action, not drug action, this subjects Taylor to two unjustifiable discriminations:
 - 1) an under-inclusive and arbitrary discrimination, *viz* Taylor and the drug 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* Taylor's peaceful action re controlled drugs is regulated in the same manner as persons causing harm.

¹⁰ *Matadeen v Pointu* [1999] AC 98 at 109; *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

¹¹ *Kruze v Johnson* [1898] 2 QB 91 at 99, per Lord Russell C]

14. Together these two unjustifiable discriminations seek to deprive Taylor 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”**

a) The State, via the Act, seek to deprive Taylor 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”**

a) The State, via the Act, regulates Taylor’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 Taylor’s private life contrary to Article 8.

3) **Article 9 “Freedom of Thought”**

a) The State, via the Act, regulates Taylor’s thoughts contrary to Article 9.

b) Alternatively, the State, via the Act, regulates Taylor’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”**

a) The State, via the Act, has deprived Taylor 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”.

15. The analogous comparators and the grounds of discrimination in terms of Article 14 are set out in the human rights supplementary document.

16. 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”.

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

Principal Authorities Relied Upon

18. Though not necessarily in this order, Taylor relies on the following principal authorities in making his claims (see CD Rom):

- 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) *Chassagnou & 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

19. 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".

20. Taylor seeks: (1) a stay of the criminal proceedings against him; (2) to have his property returned.

The Point of Law at Issue

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?

21. The principal executive discretion at issue in the inequality of treatment is found in s2(5) of the Act. Section 2 reads:

"2. Controlled drugs and their classification for purposes of this Act.

(1) In this 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; and the provisions of Part IV of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule.

(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 approved by a resolution of each House of Parliament; and the Secretary of State shall not lay a draft of such an Order before Parliament except after consultation with or on the recommendation of the Advisory Council.” (Emphasis added)

22. Crucially, s2(5) is constructed in terms of what the Secretary of State “shall not” do rather than what the Secretary of State “may” or “shall” do. Further, there is no reference to the scope of the Secretary of State’s (“SSHHD”) discretion and/or the manner of its exercise.¹²

23. Two questions re the SSHHD’s s2(5) discretion are thus relevant:

- 1) What material and relevant facts makes it the SSHHD’s duty to “lay a draft Order”, under s2(5), “recommend[ing] to Her Majesty in Council to make an Order under [s2(2)]”?
- 2) Similarly, when “may” the SSHHD “lay a draft Order” under s2(5), “recommend[ing] to Her Majesty in Council to make an Order under [s2(2)]”?

Application to Taylor’s Case

24. At heart, Taylor claims that the SSHHD’s *de facto* exemption of alcohol and tobacco from the Act’s controls denies equal protection to persons affected by alcohol and tobacco misuse and denies equal rights to persons, like Taylor, who produced a controlled drug for peaceful, amateur use.

25. Taylor does not contest the control of the drug of his indictment under the Act; rather he contests the SSHHD’s failure to seek equal “control” of the equally or more harmful psychoactive drugs alcohol and tobacco. The SSHHD’s failure to act re the s2(5) discretion effectively exempts persons

¹² Cf. s811 US *Controlled Substances Act* 1970, 21 USC 811; and, s4B NZ *Misuse of Drugs Act* 1975

concerned with alcohol and tobacco from the Act's criminal measures, thus creating the first inequality 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.
26. The second inequality occurs via ss7(1)-(2), 7(4), 22(a)(i) ~~vs~~ 31(1)(a). These executive discretions re regulations are equally unfettered, so the point of law applies here too; however, for ease argument, the second inequality of treatment is omitted here.

Material and Relevant Facts re the Point of Law and the First Inequality of Treatment

27. Parliament has expressed no opinion on the control of alcohol or tobacco under the Act; though, s1(2) of the Act implies that a drug is liable to control under s2(2) if the drug is:

“being or appear[s] ... likely to be misused and [this] misuse is having or appears ... capable of having harmful effects sufficient to constitute a social problem”.

28. The SSHD has not laid a draft Order under s2(5) allowing Parliament to recommend that Her Majesty in Council make an Order under s2(2) re alcohol or tobacco. However, on 13 October 2006 in Cm 6941 at page 24, the SSHD declared “alcohol and tobacco account for more health problems and deaths than [controlled] drugs”.
29. The Advisory Council has not recommended that the SSHD lay a draft Order under s2(5) allowing Parliament to recommend that Her Majesty in Council make an Order under s2(2) re alcohol or tobacco. Yet, on 14 September 2006 in *Pathways to Problems* at page 14, the Advisory Council declared “for the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate”.

Resultant Questions Relevant to Taylor's Application

30. Is the matter justiciable? See separate enclosure.

- 1) 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”.

31. Do the material and relevant facts enumerated at paragraphs 30-32 above confer a duty on the SSHD to lay a draft Order under s2(5), thus allowing Parliament to recommend that Her Majesty in Council make an Order under s2(2) re alcohol or tobacco?

1) In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030, Lord Reid said:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court”.

32. Has the SSHD’s failure to lay a draft Order under s2(5) re alcohol and/or tobacco denied Parliament the opportunity to recommend that Her Majesty in Council make an Order under s2(2), thwarted the Act’s policy and caused Taylor to suffer the first inequality of treatment in terms of common law and the Human Rights Act 1998?

1) In *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112, Justice Jackson said:

“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected”.

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

18 August 2009