In the European Court
of Human Rights

Case No. 42789/11

Edwin Stratton v United Kingdom

Justiciability Annexe

"There are two sides, and maybe good reasons for Stratton's argument of irrational and illogical, but it is by no means easy to accept that this is justiceable."

- Lord Justice Leveson, *Stratton v Waltham Forest Magistrates Court*, July 1st 2009

Is this matter justiciable?

On 1st July 2009, in the matter of *Stratton v Waltham Forest Magistrates Court* at the High Court in London, Lord Justice Leveson said:

> "There are two sides, and maybe good reasons for Stratton's argument of irrational and illogical, but it is by no means easy to accept that this is justiceable."

This pivotal point is disputed by Stratton. It is submitted below, with authorities, that the matter is eminently justiciable:

1. This case raises questions in that sensitive interstitial space between the judiciary, the legislature and the executive.

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

3. Regrettably, Parliament has neither stated an explicit policy nor fixed any determinative criteria in the Act to guide the SSHD in promulgating such Orders;[1] but, as these Orders may deprive liberty, the Orders are subject to either approval or annulment by both Houses of Parliament acting within the limits set by the Act.

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

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

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

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

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

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

> "Can it be inferred that Parliament, by making an affirmative resolution a condition precedent to the exercise of the power, has intended to make the

[1] *Cf.* s811 *US Controlled Substances Act*, 21 U.S.C. 811; and, 4B *NZ Misuse of Drugs Act* 1975

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

8. The Court in *R v SSHD, ex p Javed* [2001] EWCA Civ 789 accepted this principle. *Javed* dealt with the Designated Safe Third Countries (Order 1996) for asylum purposes. The Order in *Javed* "designating" a country as "safe" is comparable to an Order under s2 of the Act "controlling" a drug because it is "dangerous or otherwise harmful".[2] Put into effect, each of these Orders "may imperil life or liberty".[3]

9. Crucially, Stratton does not contest the Orders controlling cannabis; rather he contests the inequality of treatment he suffers because: (1) the SSHD has failed to promote the Act's policy by exercising the s2(5) power re alcohol and tobacco; and (2) the SSHD has failed to proffer regulations via s31(2) re the peaceful production of controlled drugs for amateur use purposes.

10. With both of these failures, Parliament has expressed no opinion; Parliament has neither approved nor disapproved; the SSHD has not provided Parliament with an opportunity; and because of the subjective and/or incoherent reasons given in Cm 6941, having no connection to the Act's policy and/or objects, the SSHD does not appear eager to do so.

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

12. Stratton asserts that the issues must be justiciable as unequal deprivations of liberty resulting from the exercise of flawed executive discretion are at the core of this case. In *R v SSHD ex p Turgut* [2001] 1 All ER 719 at 729, Simon Brown LJ said:

> "the human right involved here – [Liberty] – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it". (*Mutatis mutandis*)

13. Stratton asserts that the relevant and established fact re promoting the Act's policy via s2(5) is the SSHD's declaration in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than illicit drugs". Yet, because the Act does not control alcohol and tobacco, Stratton is subject to unequal deprivation of liberty for his activity re an equally or less risky drug. This is an arbitrary abuse of power.

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

> "the law forbids the exercise of State power in an arbitrary, oppressive or abusive manner. This is, simply, a cardinal principle of the rule of law. The rule of law

[2] *Misuse of Drugs Act* 1971 c38, preamble
[3] *R v SSHD, ex p Bugdaycay* [1987] AC 514 at 537H, "where the result of a flawed decision may imperil life or liberty"

> requires, not only that State power be exercised within the express limits of any relevant statutory jurisdiction, but also fairly and reasonably and in good faith.

15. In *R v Latif* [1996] 1 WLR 104 at 112H, Lord Steyn said:

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R v Horseferry Road Magistrates' Court, ex p Bennet*."

16. And in *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, 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)

17. Hence, this Court must now decide whether the SSHD abused the Act's powers; and if the SSHD has so abused the Act, then Stratton's conviction should be set aside.