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

BETWEEN:

Regina

Respondent

&

Casey William HARDISON

Appellant

Draft Application for Leave to
APPEAL AGAINST CONVICTION

Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

– *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 113

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

Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law.

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

Prepared By

Casey William HARDISON

20 July 2009

Regina

Respondent

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Appellant

APPEAL AGAINST CONVICTION

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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 those concerned with equally harmful drugs without a rational and objective basis; and

   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.

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 *&* 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 criteria[3] to guide the SSHD's decision-making re drug control and classification under s2(5) of the Act; (2) HM Government's overly-rigid and predetermined "policy of prohibition"[4] fettered the SSHD; (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 motion[5] 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) anxiously scrutinise the new evidence and argument; (2) confirm the abuse of power; (3) declare his indictment should have been stayed; (4) declare his conviction "unsafe"; (5) quash his conviction; and (6) order his release.

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[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

I. The Facts of the Case

8. Mr Casey Hardison, a US citizen, was arrested on 11 February 2004 and charged with various offences relating to the manufacture, supply and possession of Class A controlled drugs contrary to the provisions of the Misuse of Drugs Act 1971.

9. On 5 January 2005, at Lewes Crown Court, before His Honour Judge Niblett, Hardison moved to stay the indictment as an abuse of process – alleging that an executive abuse of power threatened his human rights under Articles 3, 6, 8, 9, 10 & 14 of the Human Rights Act 1998 ("HRA"). This application necessitated several days of oral argument and ended with an adverse ruling on 13 January 2005.

10. On 18 January 2005, the jury was sworn and trial began. On 18 March 2005, the jury convicted Hardison on six of the eight counts on the indictment. Hardison conducted his own advocacy throughout.

11. On 22 April 2005, assisted by Counsel, Mr Rudi Fortson, Hardison was sentenced to 20 years imprisonment and recommended for deportation and asset recovery.

12. On 25 May 2006, the Court of Appeal heard an Application for Leave to Appeal against Conviction, prepared by Hardison, and an Appeal against Sentence, prepared by Counsel. The Court dismissed both the Application and the Appeal.

13. On 17 October 2006, the Court of Appeal declined to certify 5 points of law for the House of Lords re the Appeal against Sentence.

II. Jurisdiction and Review Standard

14. The Court can grant Leave to Appeal against Conviction either within its "inherent power" or "within the ambit" of legislation governing appeals: *R v Pinfold* [1988] 2 WLR 635 at 466.

15. As Lord Morris said in *Connelly v DPP* [1964] AC 1254 at 1301:

> "There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers … to suppress any abuses of its process and to defeat any attempted thwarting of its process".

16. Lord Nicholls of Birkenhead affirmed this in *R v Looseley*, *Attorney General's Reference* (No 3 of 2000) [2001] UKHL 53 at 1:

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement provisions of the courts and thereby oppress citizens of the state".

17. As Hardison's remedy lay with this Court, he requests that this Court: (1) grant Leave to Appeal against Conviction; (2) receive the new evidence and arguments under s23 of the Criminal Appeal Act 1968; and (3) apply the "anxious scrutiny"[6] review standard to it.

18. For justiciability arguments, see section *IX* page 40.

[6] *R v SSHD, ex p Bugdaycay* [1987] AC 514 at 537H, "where the result of a flawed decision may imperil life or liberty"

III. The power to receive new evidence

19. Section 23 of the Criminal Appeal Act 1968 provides:

> (1) For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice -
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;
>
> (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings;
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

20. Hardison requests this Court receive the new evidence under s23(1)(c) as it was <u>not</u> available to be adduced in previous proceedings.

a. Is the new evidence believable?

21. Yes, the new evidence is found in public documents printed by the Stationary Office or under Crown Copyright.[7] The principle documents are:

1) HM Government (2006) Cm 6941 *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?*

2) Advisory Council on the Misuse of Drugs (2006) *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy.*

3) House of Commons (2006) The Fifth report from the House of Commons Science and Technology Committee Session 2005-2006 HC 1031 *Drug classification: making a hash of it?*

4) Home Office (2007) *Response to the Better Regulation Executive re Misuse of Drugs Act Proposal*, 27 September 2007, www.betterregualtion.gov.uk

[7] *Cf. Sturla v Freccia* (1880) 5 AC Law Reports 623 at 643

b. Does the new evidence afford a ground for allowing an appeal?

22. Yes, the new evidence shows Hardison's convictions are unsafely grounded in executive abuse of power that provides "a morally unacceptable foundation for the exercise of jurisdiction"[8] over him. This has abused the Court's process.

23. Accordingly, the new evidence shows that his motion[9] to stay the indictment as an abuse of process should have been granted and his trial should not have taken place.

c. Is the new evidence admissible?

24. Yes, the new evidence would have been admissible in support of Hardison's motion to stay the indictment as an abuse of process because executive abuse of power had preceded his investigation and indictment.

1) The proper way to challenge an indictment based on abuse is to seek a stay of that indictment or of the relevant counts: *R v Central Criminal Court, ex p Randle and Pottle* [1992] Cr App R 323, DC.

2) If an application for a stay is unsuccessful and there is a conviction then the grounds for requesting that stay may be relied upon on appeal in alleging that the conviction is unsafe within the meaning of s2(1)(a) of the Criminal Appeal Act 1968: *Attorney-General's Reference* (No. 1 of 1990) [1992] QB 630.

3) When His Honour Judge Niblett refused Hardison's motion for a stay, he did not change his plea to guilty but relied upon overturning the decision on appeal.

4) On the former Application for Leave to Appeal against Conviction, Hardison again failed to discharge the evidential burden inherent in his motion to stay and the Court denied him Leave. On the balance of probabilities, the new evidence discharges this burden: *R v Telford Justices, ex p Badhan* [1991] 2 QB 78.

25. In *Mullen* [1999] 2 Cr App R 143, CA, Lord Justice 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".

26. This Court should therefore: (1) apply anxious scrutiny to the new evidence and argument; (2) confirm the abuse of power; (3) declare Hardison's indictment should have been stayed; (4) declare his conviction "unsafe"; (5) quash his conviction; and (6) order his release.

d. Is there a reasonable explanation for failure to adduce the new evidence at trial?

27. Yes, the evidence did not exist. HC 1031 was published 31 July 2006; *Pathways to Problems* was published 14 September 2006; Cm 6941 was published 13 October 2006; and, the *Response to the Better Regulation Executive* was published on 27 September 2007.

28. Accordingly, Hardison was unable to adduce the new evidence in support of either his motion to stay the indictment as an abuse of process or his former Application for Leave to Appeal against Conviction.

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[8] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 at 76

[9] 13 January 2005 Transcript of Judge's Reasons for Ruling on Abuse of Process/Human Rights Arguments at p4A-B

IV. The Misuse of Drugs Act 1971 c.38 – First Principles

29. Drugs are substances self-administered to alter one's thinking, feeling or behaviour.

30. The Misuse of Drugs Act 1971 c.38 ("the Act") is an Act to make "provision with respect to dangerous or otherwise harmful drugs". (Preamble)

31. The term "misuse", as used in the Act, means misuse by self-administration, s37(2).

32. The term "drug", as used in the Act, is not synonymous with the phrase "controlled drug", s2(1); thus, "drug" means any drug irrespective of its chemical structure, delivery method, legal status and/or purpose of use.

33. The Act does not specify explicit criteria determinative of drug control and classification, s2(2); but, s1(2) implies that a drug is liable to control under s2(2) of the Act 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". (*NB* emphasise added)

34. The self-administration of controlled drugs is lawful under the Act, bar opium, s9.

35. The Act aims to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem", s1(2), that may arise via the self-administration of dangerous or otherwise harmful drugs.

36. The Act targets these "harmful effects" indirectly by imposing "restrictions" ss3-6, "prohibitions" ss8-9, and/or "regulations" ss7, 10 & 22, on the exercise of enumerated activities re controlled drugs, e.g. import, export, production, supply, possession, etc.

37. Accordingly, the Act regulates human action with respect to controlled drugs.

38. Section 1 of the Act creates the Advisory Council on the Misuse of Drugs ("ACMD"), a non-departmental public body, and charges them with: (1) keeping the drugs "situation" and relevant law "under review"; (2) giving ministers advice on exercising the Act's powers; and (3) giving ministers advice on any measure or measures, "whether or not involving alteration of the law", thought necessary to achieve the Act's purpose.

39. The SSHD may not recommend the control of a drug under s2(2) of the Act except after consultation with or on the recommendation of the ACMD, s2(5).

40. The SSHD may not make any regulations under the Act except after consultation with the ACMD, s31(3).

41. The Act proscribes the enumerated activities re controlled drugs by default, however, the SSHD may – by regulations – authorise their exercise for any purpose, s7, or exclude the application of any provision of the Act which creates an offence, s22(a)(i).

42. The Act explicitly authorises the SSHD to make different regulations in relation to different controlled drugs, different classes of persons, different provisions of the Act or other different cases or circumstances, s31(1)(a).

43. The Act's discretionary powers are not fettered to any regulatory regime; however, any regulatory regime created under the Act's discretionary powers is fettered to both the Human Rights Act 1998 and the Rule of Law.

V. Brief Excerpts from the New Evidence – an Historic Artificial Divide

44. The following précis of the new evidence is presented in chronological order; but it is first situated in context. The new evidence in full is available in Appendix A.

a. International Background

45. In 1994, in the Opening Statement to the 37th Session of the Commission on Narcotic Drugs, the Executive Director of the UN International Drug Control Program said:

> "[It is] increasingly difficult to justify the continued distinction among substances solely according to their legal status and social acceptability. Insofar as nicotine-addiction, alcoholism, and the abuse of solvents and inhalants may represent greater threats to health than the abuse of some substances presently under international control, pragmatism would lead to the conclusion that pursuing disparate strategies to minimise their impact is ultimately artificial, irrational and un-economical". (Emphasis added)

46. In 1997, under the heading "The Regulation-Legalization Debate", the United Nations World Drug Report articulated the contradiction inherent in "cultural and historical justifications" re dangerous drugs legislation:

> "The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use of some dependence creating drugs is legal and of others is illegal. The cultural and historical justifications offered for this separation may not be credible to the principle targets of today's anti-drug messages – the young". (Chapter 5, page 198, emphasis added)

b. Domestic Background

47. On 22 May 2002, in concluding a wide-ranging inquiry into HM Government's drug policy, the Third Report from the House of Commons Home Affairs Committee Session 2001-2002 HC-318 *The Government's Drug Policy: is it working?* declared:

> "Legal drugs, such as tobacco and alcohol, are responsible for far greater damage both to individual health and to the social fabric in general than illegal ones".

The 2002 Home Affairs Committee report HC-318 continued:

> "Substance misuse is a continuum perhaps artificially divided into legal and illegal activity". (Introduction, paragraphs 8 & 9, emphasis added)

48. On 19 January 2006, the Secretary of State for the Home Department promised a public consultation suggesting a review of the Act's drug classification system:

> "The more I have considered these matters, the more concerned I have become about the limitations of our current system. Decisions on classification often address different or conflicting purposes and too often send strong but confused signals to users and others about the harms and consequences of using a particular drug and there is often disagreement over the meaning of different classifications. […] I will in the next few weeks publish a consultation paper with suggestions for a review of the drug classification system, on the basis of which I will make proposals in due course. […] one needs to proceed on the basis of evidence […] I want to emphasise to the House the importance of evidence and research on this subject". (*Hansard*, HC Deb, 19 Jan 2006, Col 983, emphasis added)

c. The Principle New Evidence

49. On 31 July 2006, after rigorously investigating the production and use of scientific advice and evidence in making drug control and classification decisions under s2 of the Act, 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:

> "With respect to the ABC classification system, we have identified significant anomalies in the classification of individual drugs and a regrettable lack of consistency in the rationale used to make classification decisions. […] We have found no convincing evidence for the deterrent effect, which is widely seen as underpinning the Government's classification policy. […W]e have concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm. […] In light of the serious failings of the ABC classification system that we have identified, we urge the Home Secretary to honour his predecessor's commitment to review the current system". (Summary, emphasis added)

The 2006 Science and Technology Committee report HC 1031 finished with this:

> "We conclude that, in respect of this case study, the Government has largely failed to meet its commitment to evidence based policy making". (Paragraph 108, emphasis added)

50. On 14 September 2006, the Advisory Council on the Misuse of Drugs ("ACMD") published a commanding report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, in which the ACMD declared unequivocally that the artificial divide in drugs policy lacks rationality:

> "We believe that policy-makers and the public need to be better informed of the essential similarity in the way in which psychoactive drugs work: acting on specific parts of the brain to produce pleasurable and sought-after effects but with the potential to establish long-lasting changes in the brain, manifested as dependence and other damaging physical and behavioural side-effects. At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines, some of which are also covered by the Act. The insights summarised [here] indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis". (Paragraph 1.13, p22, emphasis added)

A few pages earlier the ACMD had admitted "neglect[ing]" their duty under the Act by discriminating between "harmful psychoactive drugs" on the ground of "legal status":

> "The scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs. Both cause serious health and social problems and there is growing evidence of very strong links between the use of tobacco, alcohol and other drugs. For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate". (Introduction, p14, emphasis added)

Consistent with this, the ACMD's first recommendation in *Pathways to Problems* reads:

> "As their actions are similar and their harmfulness to individuals and society is no less than that of other psychoactive drugs, tobacco and alcohol should be explicitly included within the terms of reference of the Advisory Council on the Misuse of Drugs".

51. Less than a month later, on 13 October 2006, in **Cm 6941**, *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?*, the SSHD unconsciously revealed three errors of law supporting the abuse whilst attempting to defend the inequality of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects:

> "Government [believes] the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. However, it should not be imputed that Government takes the harms caused by these drugs any less seriously. […] The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances 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 […]. Legal substances are therefore regulated through other means. […] However, the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs". (Para 7 & p24, emphasis added)

52. Then, on 22 March 2007, while defending against Hardison's claim for a judicial review, CO/687/2007, of the SSHD's decision in paragraph 12 of Cm 6941 "not to pursue a review of the classification system at this time", the SSHD admitted the inequality of treatment again whilst attempting to justify it on subjective and/or incoherent grounds:

> "The Government's policy is to regulate drugs which are classified as illegal through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace". (Emphasis added)

53. Two days later, on 24 March 2007, a paper by Professor David Nutt, the current ACMD Chairman, and Professor Colin Blakemore, the former Chief Executive of the Medical Research Council, appeared in *The Lancet* entitled *Development of a rational scale to assess the harm of drugs of potential misuse*. This paper described the first scientific ranking of the relative harmfulness of the most commonly used drugs and fatally undermining Government's subjective rational for their arbitrary administration of the Act's classification system.

> "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". (*The Lancet* 369: 1047-1053, emphasis added)

54. Finally, on 27 September 2007, the Home Office reiterated verbatim the SSHD's statement of 22 March 2007 re Government's policy of "regulat[ing] the use of alcohol and tobacco separately" in their *Response to the Better Regulation Executive re Misuse of Drugs Act Proposal.*

VI. Critical Analysis of the New Evidence elucidates Abuse of Discretionary Power

55. Hardison's critical analysis of the new evidence will show that the SSHD has abused the Act's powers on the grounds of illegality, irrationality and unfairness and that the subsequent application of the Act to individuals like him manifests unequal treatment under criminal penalty. The analysis starts with reconstructing the principle new evidence:

    1) The 31 July 2006 Fifth Report of the Science and Technology Committee *Drug classification: making a hash of it?* found "a regrettable lack of consistency in the rationale used to make classification decisions". Thus, re drug classification and control, they said, "Government has largely failed to meet its commitment to evidence based policy making". The Committee concluded, "[T]he current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm".

    2) The 14 September 2006 ACMD report *Pathways to Problems* stated unequivocally that due to "historical and cultural factors [that] lack a consistent and objective basis", the risk management distinctions the SSHD makes whilst administering the Act fail to target the actual risks "harmful psychoactive drugs" present to public welfare and individual autonomy. The ACMD said this had led to "neglect" for the Act's policy and objects and that the ACMD share responsibility as the principal advisors to the SSHD re dangerous or otherwise harmful drugs. Thus, they called for an integrated approach and said that alcohol and tobacco should be "explicitly included" in their remit.

    3) The 13 October 2006 *Government reply* to *Drug classification: making a hash of it?*, **Cm 6941**, admits that the Act is administered unequally without a rational and objective basis fairly related to the Act's policy and/or objects. This admission is "scarcely veiled"[10] within the SSHD's three incoherent and/or subjective attempts to justify excluding alcohol and tobacco from the Act:

        a) "[T]he Misuse of Drugs Act is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". (Emphasis added)

        b) "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is … based in large part on historical and cultural precedents". (Emphasis added)

        c) "A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use [alcohol and tobacco] responsibly and would conflict with the existence of a deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (*Mutatis mutandis,* emphasis added)

56. Hardison's critical analysis of these three justifications follows. This analysis elucidates three errors of law supporting the abuse of power and shows that the subsequent application of the Act to him manifested two inequalities of treatment under criminal penalty:

    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; and

    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.

57. Mr Hardison's common law and human rights submissions rest on this analysis.

[10] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1061

a. The First Justification

58. The first justification the SSHD gives in Cm 6941 for the first inequality of treatment admits an abuse of power. In effect, the SSHD says, "[The Act] is not a suitable mechanism for regulating … alcohol and tobacco". This is manifestly absurd and shows *inter alia* that the SSHD has failed to give effect to two established and relevant facts:

    1) Alcohol and tobacco are harmful drugs within the Act's scope as the term "drug", s1(2), 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", s(1)2; or as Government declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

59. These two facts appear to underpin the ACMD admission in *Pathways to Problems*:

    > "For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate". (p14, emphasis added)

60. The SSHD's failure to act on these two facts conjunct the claim that the Act "is not a suitable mechanism for regulating legal substances" unveils two errors of law:

    1) The SSHD believes that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes, i.e. "our policy of prohibition [is] reflected in the terms of the Misuse of Drugs Act 1971".[11]

    2) The SSHD claims a power, the SSHD does not possess, to "exempt individuals or classes of individuals from the operation of the law"[12] by excluding *de facto* the "dangerous or otherwise harmful drugs" alcohol and tobacco from the Act's control.

61. Re the first error of law, the SSHD's belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. This belief shows that the SSHD has failed to understand and give effect to:

    1) The SSHD's power to authorise the exercise of any of the enumerated activities re any controlled drug by any class of person for any purpose, i.e. "for doing things … it would otherwise be unlawful for them to do", s7(1)(b) & 31(1)(a); and

    2) The SSHD's power for "excluding in such cases as may be prescribed … the application of any provision in [the] Act which creates an offence", s22(a)(i).

62. Re the second error of law, the SSHD's assumed power to exclude alcohol and tobacco from the Act's remit, the Act has jurisdiction to regulate the exercise of the enumerated activities re alcohol and/or tobacco. So, the SSHD's failure to give effect to the two established and relevant facts re alcohol and tobacco thwarts the Act's policy:

    > "to make … provision with respect to 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".[13]

63. These two errors show the SSHD's failure to understand the Act's beautifully evolutive and dynamic framework and its suitability to all dangerous drugs, persons and circumstances.

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[11] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[12] *Pretty v United Kingdom* [2002] 35 EHRR 1 at para 77
[13] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added

b. The Second Justification

64. The second justification the SSHD gives in Cm 6941 for the first inequality of treatment exposes a third error of law while declaring that the inequality is "based in large part on historical and cultural precedents". It reads:

> "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is … based in large part on historical and cultural precedents". (Emphasis added)

65. The third error of law is the SSHD's belief in the "illegality of certain drugs",[14] i.e. the belief that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal". A decision maker holding this belief does not understand the Act correctly.

66. A drug is either "controlled" under the Act, s2(1)(a), or it is not. If a drug is controlled under the Act, only the unauthorised exercise of the enumerated activities re that drug is made unlawful. This error of law is found in all three of the SSHD's justifications.

67. Without this error the second justification reads:

> "The distinction between […] substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is … based in large part on historical and cultural precedents". (Emphasis added)

68. Re the "historical and cultural precedents" at the heart of the "distinction", this and other related phrases found in Cm 6941 are not rational and objective grounds relevant to the Act's policy and/or objects; rather, they are suspect "indicia"[15] of unjustifiable majoritarian discrimination equally applicable to homophobia, sexism and racism.

69. And whilst "historical precedent" may have an objective basis, "cultural preference"[16] can only mean the subjective preference of the majority as the SSHD has not consulted affected minorities and so unfairly treats as irrelevant their cultural drug preferences. Understanding this, the ACMD declared in *Pathways to Problems* that these "historical and cultural" factors re drugs and drug policy "lack a consistent and objective basis".[17]

70. Similarly, a decade ago, the 1997 United Nations World Drug Report recognized the contradiction inherent in "cultural and historical justifications" re harmful drugs:

> "The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use of some dependence creating drugs is legal and of others is illegal. The cultural and historical justifications offered for this separation may not be credible to the principle targets of today's anti-drug messages – the young".[18] (Emphasis added)

71. Truly, the SSHD's allegiance to "historical and cultural precedents" lacks credibility because it diverts the Act's measures from the "harmful effects sufficient to constitute a social problem" that arise via alcohol and tobacco misuse. This thwarts the Act's policy by denying equal protection to the public from the harmful effects caused by alcohol and tobacco misuse whilst denying equal liberty to those concerned in the peaceful exercise of enumerated activities re controlled drugs. Ultimately, this is irrational and unfair.

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[14] Cm 6941 (2006) page 18
[15] *San Antonio School District v Rodriguez* (1973) 411 US 1, 29 'the traditional indicia of suspectness'
[16] Cm 6941 (2006) page 15; *Cf. Hansard* HC Deb 16 July 1970 Vol. 803 Col. 1801
[17] ACMD (2006) *Pathways to Problems*, paragraph 1.13
[18] UNODC (1997) UN World Drug Report 1997, p198, www.unodc.org/adhoc/world_drug_report_1997/CH5/

c. The Third Justification

72. The first clause of the third justification the SSHD gives in Cm 6941 for the first inequality of treatment exposes the second inequality of treatment. It claims:

> "A classification system that applies to [alcohol and tobacco] as well as [controlled substances] would be unacceptable to the vast majority of people who use [alcohol and tobacco] responsibly". (*Mutatis mutandis,* emphasis added)

73. This justification shows the SSHD fears the political cost of applying the "policy of prohibition"[19] to alcohol and tobacco and has thus "shut his eyes" to evidence:

    1) that the peaceful use of controlled drugs is both possible and commonplace; and

    2) that the permanent proscription of the enumerated activities re controlled drugs, bar medical and scientific purposes, is equally "unacceptable" to the millions who use controlled drugs peacefully.

74. On this, the Third Report from the House of Commons Home Affairs Committee Session 2001-2002 HC-318 *The Government's Drug Policy: is it working?* stated:

> "Around four million people use [controlled drugs] each year. Most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their habit". (Para 20, emphasis added)

75. The second clause of the SSHD's third justification for the first inequality of treatment embodies the first error of law, the belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. Essentially, this clause declares that the SSHD's "policy of prohibition":

> "conflict[s] with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Emphasis added)

76. This illuminates a deep, unsettled legal controversy whereby the State facilitates access to certain drug mediated mindstates whilst concomitantly obstructing access to other drug mediated mindstates. This violates freedom of thought, aka *Cognitive Liberty*.

77. Overall, the SSHD's third justification for the first inequality of treatment suggests three general duties re the use of "[drugs] that alter mental functioning":

    1) a duty to respect an individual's "free and informed choice"[20] in the peaceful use of "[drugs] that alter mental functioning" ; and

    2) a duty to differentiate the peaceful use of "[drugs] that alter mental functioning" from the use of "[drugs] that alter mental functioning" … "having harmful effects sufficient to constitute a social problem", s1(2), i.e. use *versus* misuse; and

    3) a duty to subject the commerce and production of all "[drugs] that alter mental functioning" to reasonable, necessary and proportionate regulations.

78. Nevertheless, Government executes these duties only re alcohol and tobacco, the mind-altering drugs used by the "vast majority". As a result, the SSHD fails to distinguish under the Act those who peacefully use controlled drugs as a different "class", s31(1)(a), from those who do not. This is the second inequality of treatment.

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[19] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[20] Cm 41(1998) *Smoking Kills – A White Paper on Tobacco*, para 1.26, "their right to smoke"

VII. The Common Law Argument

79. Mr Casey William 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. 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.

80. Hardison experiences two inequalities of treatment:

    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; and

    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.

81. Hardison characterises this unequal treatment as a majoritarian abuse of executive power. Hardison is entitled to this Court's protection.

    a. Due Process, the Rule of Law and Equality of Treatment

82. Courts uphold the Rule of Law through the doctrine of Due Process, which respectfully "contemplates a civil society under equal and just laws"[21] that necessarily determine the scope of Government power and the manner of its exercise. By fearlessly administering Due Process, this Court protects individuals against the "oppressions and usurpations" of Government power in executing law's rules.

83. At the heart of Due Process, equality of treatment means that the "laws of the land should apply equally to all, save to the extent that objective differences justify differentiation".[22] In *Matadeen v Pointu* [1999] AC 98 at 109, Lord Hoffmann referred to "equality of treatment" as "one of the building blocks of democracy" stating that:

    "…treating like cases alike and unlike cases differently is a general axiom of rational behaviour".

84. In his well-known judgment, *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112, Supreme Court Justice Jackson described the equality-of-treatment doctrine and how to apply it to protect the few against majoritarian abuses of power:

    "Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. […T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing 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. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation".

85. This salutary doctrine encapsulates both the problem and the remedy in this case; for this reason alone, Hardison develops his argument through its lens.

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[21] Lord Steyn (2002) *Democracy Through Law*, Robin Cooke Lecture, Victoria University of Wellington, September 2002
[22] Lord Bingham of Cornhill KG (2006) *The Rule of Law*, Sir David Williams Lecture, House of Lords, November 2006

b. The Principles of Law

86. Recognising that the exercise of the enumerated activities re "dangerous or otherwise harmful drugs" may result in a variable likelihood of risks and benefits to public welfare and individual autonomy and that these must be consciously balanced, Parliamentarians embodied four principles of law in the Misuse of Drugs Act 1971:

    1) A determination, read from the Act's preamble, s1(2) and the offences stated in the Act, to employ education, health and police power measures to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via the self-administration of "dangerous or otherwise harmful drugs".

    2) A determination, read from ss1, 2(5), 7(7) & 31(3) of the Act, to employ an independent advisory body to help the Secretary of State exercise the Act's discretionary powers in a rational and objective manner, particularly when making contingent subordinate legislation and interstitial administrative rules and when considering regulatory options.

    3) A determination, read from s1(3), to employ an independent advisory body to consider any matter relating to drug dependence or the misuse of drugs that may be referred to them by any Minister and to advise them as required or requested.

    4) A determination, read from ss1(2)(a)-(e), to enable persons affected by drugs misuse to obtain advice and secure health services; to promote stakeholder co-operation in dealing with the social problems connected with drugs misuse; to educate the public in the dangers of misusing drugs, and to give publicity to those dangers; and to promote research into any matter which is relevant to prevent drugs misuse or deal with any connected social problem.

87. Crucially, this first principle of law is neutral and generally applicable, coherent with s31(1)(a) of the Act, and based on outcome, irrespective of the drug, the agent's status, class, or intent, or the circumstances in which the drug-related activities occur.

88. The second principle of law facilitates Due Process and seeks to ensure that the Act's police power measures are proportionate to available objective evidence of the potential risk each drug presents when used and are suitably targeted to achieve the Act's objective.

89. The third and fourth principles facilitate a coherent social conversation for minimising harm through the intelligent use of education, health and ministerial services.

c. The Object of Regulation

90. The Act concerns itself with public health and safety; however, the Act does not concern itself with absolute safety. Rather the Act seeks to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via the self-administration of "dangerous or otherwise harmful drugs".[23]

91. The Act targets these "harmful effects" indirectly through "restrictions" ss3-6, "prohibitions" ss8-9 and/or "regulations" ss7, 10 & 22, on the exercise of enumerated activities re controlled drugs whilst generating a harm minimisation conversation at all levels of society via education, research and the provision of specific health services.

92. Accordingly, the Act does not regulate drugs; rather, the Act regulates human beings.

[23] s1(2) conjunct Preamble

d. Reasonable Differentiations Fairly Related to the Object of Regulation

93. With the exception of opium smoking, s9, drug use is not an offence under the Act or at common-law. And whilst the difference between the activities enumerated in the Act and personal drug use might seem insignificant, the legal line is drawn here.

94. Crucially, s37(2) of the Misuse of Drugs Act 1971 states:

> "References in this Act to misusing a drug are references to misusing it by taking it; and the reference in the foregoing provision to the taking of a drug is a reference to the taking of it by a human being by way of any form of self-administration, whether or not involving assistance by another". (Emphasis added)

95. Therefore, in ensuring consistency with the Act's object of preventing, minimising or eliminating the "harmful effects sufficient to constitute a social problem" that may arise via "the taking of a drug" differentiations should distinguish drug use from drug misuse.

96. With respect to drug use, i.e. "self-administration", the Act's principles of law afford three "reasonable differentiation[s] fairly related to the object of regulation":

    1) A primary differentiation between drug use that is reasonably safe to the agent and does not result in harm to others and drug use that is reasonably safe to the agent and results in harm to others;

    2) A secondary differentiation between drug use that is reasonably risky to the agent and does not result in harm to others and drug use that is reasonably risky to the agent and results in harm to others;

    3) A tertiary differentiation between drug use harmful only to the agent following competent informed choice and drug use harmful only to the agent not following competent informed choice.

97. These "reasonable differentiation[s]", based on the outcome of drug use, are neutral with respect to the drug, the agent's intent, and the setting in which drug use occurs, and consistent with s31(1)(a) of the Act. Only in this way are autonomous individuals separable from the public interest and education and health measures separable from the need for police power.

e. Officials Picking and Choosing Only a Few to Whom They Will Apply Legislation

98. Four antecedent conditions, in two complementary pairs, cause the two inequalities of treatment Hardison experiences:

    1) The drugs of Hardison's concern are controlled under the Act; so, the Act's police power measures are applied to him;

    2) The SSHD refuses to seek the control of alcohol and tobacco under the Act; so, the Act's police power measures do not apply to the people concerned with them.

    3) The SSHD does not afford the three "reasonable differentiation[s]" available under the Act re drug use to people concerned with controlled drugs.

    4) Because the SSHD refuses to seek the control of alcohol and tobacco under the Act, the three "reasonable differentiation[s]" are automatically afforded to people who use them.

99. There is no rational and objective basis for these inequalities of treatment.

f. So as to Avoid Political Retribution

100. The equality-of-treatment question appeared in the early moments of debate on the Misuse of Drugs Bill 1970 but it remained unanswered until recently. One excellent question was set forth by the then Home Secretary during the Bill's Second Reading:

> "One young man said to me, 'You like whisky. I like pot. Why can you have whisky while I cannot smoke pot? They are both mildly addictive, but they both do little harm when taken in small quantities. They both do great harm when taken in large quantities. Why is one prohibited and the other allowed?'".[24]

101. All of a sudden and with reckless precision, the SSHD finally declared the political answer: 'applying "our policy of prohibition" to alcohol and tobacco "would be unacceptable to the vast majority of those who use [alcohol and tobacco] responsibly"'.[25]

g. Arbitrary and Unreasonable Government

102. The four antecedent conditions, expressed in paragraph 98, are rooted in five critical factors:

1) The Parliament has neither stated an explicit policy nor fixed any determining criteria[26] to guide the SSHD's decision-making re drug control and classification under s2(5) of the Act; however, the ACMD exists to advise the SSHD on these matters.

2) The SSHD has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]"[27] and therefore that the Act permits only the medical and/or scientific use of controlled drugs.

3) Until most recently, the ACMD held a longstanding erroneous belief that the Act permits only the medical and/or scientific use of controlled drugs.[28]

4) A significant portion of the electorate use alcohol and/or tobacco.

5) Proscribing the enumerated activities re alcohol and/or tobacco would deny all meaningful use of alcohol and tobacco whilst costing votes and tax revenue.

103. Re the first factor, whilst the ACMD can urge the SSHD to exercise the s2(5) power, the SSHD is not required to follow the ACMD's recommendations or advice. This leaves the matter of exercising the s2(5) power to the SSHD without standard or rule to be dealt with as the SSHD thinks fit, i.e. fettered only by *Wednesbury*,[29] *Padfield* and the *ultra vires* doctrine.

104. This lack of explicit standard or rule re the SSHD's decision-making under the Act allows the denial of Due Process to take root via the first pair of antecedent conditions articulated in paragraph 98. The remaining four critical factors offer a plausible explanation for the denial of Due Process under the first critical factor and the second pair of antecedent conditions; nevertheless, Parliament presumably did not intend to authorise abuses.

105. Accordingly, the decisions manifesting the inequalities of treatment under the Act must be anxiously scrutinised for their legality, rationality and fairness; but first, a few preliminaries.

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[24] *Hansard* HC Deb 16 July 1970 vol 803 col 1754
[25] 27 September 2007 Home Office (2007) *Response to Better Regulation Executive* conjunct Cm 6941 (2006) page 24
[26] *Cf.* s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975
[27] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[28] *See* Freedom of Information Act 2000 replies from ACMD dated 14 August 2007 at para 2; 13 November 2007 at para 1; and 5 March 2008 at para 1
[29] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

h. Human dignity and Judicial deference to Government Treaty & Policy

106. In *R (Carson) v SS for Work and Pensions* [2005] UKHL 37 at 49, Lord Walker of Gestingthorpe stated that inequality of treatment or:

> "discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law".

107. Consequently, the requirement that "the law, or administrative action under the law, should treat everyone equally unless there [is] a sufficient objective justification for not doing so"[30] is a fundamental right because it is the foremost way to avoid disregard for human dignity.

108. Hence, the Courts have said that legislation is not capable of abrogating fundamental rights unless the statute explicitly declares so in unambiguous wording. In *R v SSHD, ex p Simms* [1999] UKHL 33, Lord Hoffman stated:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. […] But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. […] In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".

109. And since the sections of the Act at issue in this case are neutral, generally applicable and do not indicate inequality of treatment is intended, this Court must assume Parliament did not intend for the SSHD to override Hardison's basic right to equality of treatment via abuses of the Act's discretionary powers.

110. Further, because Parliament has not incorporated the UN Conventions directly, the Act and its discretionary powers remain unfettered to the UN drug control regime. Even so, previous Courts have dismissed rights-based challenges to the Act by relying on "inferences"[31] drawn from HM Government's subscription to the UN drugs Conventions.

111. But, as Lord Templeman said in *JH Rayner (Mincing Lane) Ltd v DTT* [1990] 2 AC 418 (HL) at 476 & 500, this is the wrong approach:

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a Treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a Treaty … or to invent laws or misconstrue legislation in order to enforce a Treaty … So far as individuals are concerned … it is outside the purview of the court … because, as a source of rights and obligations, it is irrelevant". (Emphasis added)

112. For clarity, Hardison challenges the *ultra vires* administration of the Act and the inequality of treatment created by the subsequent application of that abused Act to him, not the Act's policy and/or objects; accordingly, judicial deference to Government's treaty obligations and/or the SSHD's fundamentally unequal "policy of prohibition"[32] would be inexcusable.

113. Hardison therefore seeks a ruling on whether the SSHD has abused the Act's powers, and if so, a declaration by this Court that his conviction is unsafe and his release ordered.

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[30] *Matadeen v Pointu* [1999] AC 98 at para 7 (Emphasis added)
[31] *Cf. R v Taylor* [2001] EWCA Crim 2263 at 14 & 31; *R v Hardison* [2006] EWCA Crim 1502 at 9 & 10
[32] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

A. Illegality

114. 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.[33]

115. In the *GCHQ* case , *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401, Lord Diplock formulated a classic statement on illegality as a ground of judicial review:

> "By 'illegality' … I mean the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable".

116. In his critical analysis of Cm 6941 conjunct the Act, Hardison identified three errors of law; each is a failure by the SSHD to understand the Act correctly and each contribute in their own way to the SSHD's failure to give effect to the Act's policy:

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]".[34]

2) The SSHD claims a power, the SSHD does not possess, to "exempt individuals or classes of individuals from the operation of the law"[35] by excluding *de facto* the "dangerous or otherwise harmful drugs" alcohol and tobacco from the Act's control.

3) The SSHD believes in the "illegality of certain drugs",[36] i.e. that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal".

i. The First Error of Law

117. The SSHD's first error of law exists in the belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. Hence, the SSHD wrongly declared in the Home Office *Response to the Better Regulation Executive* that:

> "[The Act] focuses on prohibiting illicit and harmful drugs".[37]

118. This shows that the SSHD has failed to understand and give effect to:

1) The SSHD's power to authorise the exercise of any of the enumerated activities re any controlled drug by any class of person for any purpose, i.e. "for doing things … it would otherwise be unlawful for them to do", s7(1)(b) & 31(1)(a); and

2) The SSHD's power for "excluding in such cases as may be prescribed … the application of any provision in [the] Act which creates an offence", s22(a)(i).

119. These two powers contradict the SSHD's "policy of prohibition" and show that the Act's does not intend to "limit exclusively to medical and scientific purposes the production, manufacture, export, and import, distribution of, trade in, use and possession of drugs".[38]

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[33] *Cf. E & R v SSHD* [2004] EWCA Civ 49; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034
[34] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[35] *Pretty v United Kingdom* [2002] 35 EHRR 1 at para 77
[36] Cm 6941 (2006) page 18
[37] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[38] Article 4(c) of the 1961 UN *Single Convention on Narcotic Drugs*

ii. The Second Error of Law

120. The SSHD's second error of law concerns the assumed power to exclude alcohol, tobacco and those concerned with them from the Act's remit. But implicit in the Act's policy is the jurisdiction to regulate the exercise of the enumerated activities re alcohol and/or tobacco:

> "An Act to make… provision with respect to 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".[39]

121. The second error of law thus elucidates the SSHD's failure or refusal to give effect via s2(5) to two established and relevant facts:

1) Alcohol and tobacco are drugs within the Act's remit as the term "drug", s1(2), 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", s(1)2; or as the SSHD declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

122. Combined with the first error of law, the SSHD's belief that the "policy of prohibition [is] reflected in the terms of the [Act]",[40] the SSHD's failure or refusal to control and classify alcohol and tobacco is understandable; it would mean "prohibition"; and knowing this is "unacceptable to the vast majority", the SSHD excludes alcohol, tobacco and those concerned with them from the Act's remit whilst branding the Act "not a suitable mechanism for regulating legal substances".[41] However, this reveals a third error of law.

iii. The Third Error of Law

123. All three of the SSHD's justifications in Cm 6941 for the inequalities of treatment contain the third error of law, the SSHD's belief in the "illegality of certain drugs";[42] i.e. that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal".

124. A drug is either "controlled" under the Act, s2(1)(a), or it is not. If the Act "controls" a drug, only the unauthorised exercise of enumerated activities re that drug is unlawful.

125. This means that the Act regulates humans not drugs; and, therefore it was nonsensical for the SSHD to justify the exclusion of alcohol and tobacco from the Act because the Act "is not a suitable mechanism for regulating legal substances such as alcohol and tobacco".[43]

126. Nevertheless, if the SSHD is committed to excluding persons concerned in the exercise of any of the enumerated activities re alcohol and tobacco from the sections of the Act applied to Hardison and the SSHD believes that there is a rational and objective basis for doing so, Due Process and *Padfield* mandate the application of s2 to alcohol and tobacco and then the application of s22(a)(i) as required. Section 22(a)(i) states:

> "22. Further powers to make regulations. The Secretary of State may by regulations make provision … (a) for excluding in such cases as may be prescribed … (i) the application of any provision of this Act which creates an offence".

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[39] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added
[40] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[41] Cm 6941 (2006) page 24
[42] Cm 6941 (2006) page 18
[43] Cm 6941 (2006) page 24

B. Irrationality

127. Hardison's critical examination of Cm 6941 conjunct the Act shows that the SSHD's belief in the three errors of law has lead to irrational decision-making under the Act and that these irrational decisions are responsible for the inequalities of treatment he experiences.

128. In the *GCHQ* case, Lord Diplock stated that irrationality "applies to a decision which is so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[44]

129. Accordingly, Hardison asserts that the SSHD has acted irrationally by:

    1) fettering decision-making to UN drug policy;

    2) acting inconsistently with respect to people similarly situated;

    3) considering irrelevant factors and disregarding relevant factors;

    4) pursuing an improper purpose; and

    5) abusing a dominant position.

i. Fettered Discretion – A Policy of Prohibition

130. Rather than promote the Act's policy and objects, as required by *Padfield*, Government has fettered the SSHD to the UN drug control regime by treaties based in large part on the historical precedents and cultural preferences of the 1950s industrialised west.

131. But, in *Redereaktiebolaget Amphitrite v The King* [1921] 3 KB 500 at 503, it was said:

> "…it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State". (Emphasis added)

132. Yet, in Cm 6941, the SSHD relied on the UN Conventions to justify the overly-rigid and predetermined "policy of prohibition":

> "Government is not free to legislate entirely as it pleases. It must do so within the parameters set by the [UN drug] Conventions". (p5, emphasis added)

133. The SSHD's 27 September 2007 *Response to the Better Regulation Executive* echoes this obligatory language :

> "The 1971 Act transposes our obligations under the UN Drugs Conventions into domestic law". (Emphasis added)

134. These two sentences indicate that HM Government has fettered the SSHD's "freedom of action" under the Act to the unincorporated UN Conventions, effectively surrendering the Act's policy to an unaccountable international body.

135. Accordingly, the SSHD's "policy of prohibition" is irrational, gives rise to the inequalities of treatment, thwarts the Act's policy and objects and cannot be lawful.[45]

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[44] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410

[45] *Cf. Ellis v Dubowski* [1921] 3 KB 621; R *v SSHD, ex p Venables* [1998] AC 407

ii. Administrative Consistency – Manifest Absurdity

136. Excluding alcohol and tobacco denies equal protection to those affected by alcohol and tobacco misuse and denies equal rights to those, like Hardison, who exercise the enumerated activities re controlled drugs. This is manifestly absurd and administratively inconsistent.

137. No sensible person would exclude the two drugs, alcohol and tobacco, that the SSHD declared "account for more health problems and deaths than [controlled drugs]"[46] from the scope of an Act designed to "make provision for dangerous or otherwise harmful drugs".

138. Not only is it inconsistent with the Act's policy, this exclusion of alcohol and tobacco by the SSHD is "so outrageous in its defiance of logic"[47] because it conflicts with the general principle at the heart of this case: like cases should be treated alike.[48]

139. Thus, in blatant denial of logic embodying the third error of law, the SSHD made a most inconsistent statement:

> "[T]he classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. However, it should not be imputed that Government takes the harms caused by these drugs any less seriously".[49] (Emphasis added)

140. Hardison asserts that the SSHD obviously takes the harms caused by alcohol and tobacco misuse significantly less seriously as those producing alcohol and tobacco are not subject to twenty years imprisonment, whilst, for producing "controlled drugs", Hardison is.

iii. Relevant/Irrelevant Considerations – Unacceptability and Cultural Preference

141. The SSHD's third justification in Cm 6941 for the first inequality of treatment, i.e. failing to give equal effect to s2(5) re alcohol and tobacco, is *Wednesbury* irrational:

> "A classification system that applies to [alcohol and tobacco] as well as [controlled substances] would be unacceptable to the vast majority of people who use [alcohol and tobacco] responsibly and would conflict with the existence of a deeply embedded historical tradition and tolerance of consumption of [some] substances that alter mental functioning". (*Mutatis mutandis,* emphasis added)

142. In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, Lord Greene said that:

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters". (Emphasis added)

143. Accordingly, Hardison submits that "unacceptab[ility]", "responsible use", "historical tradition", "political vision, historical precedence, cultural preference",[50] etc., are not germane to the SSHD's exercise of the s2(5) power re alcohol and tobacco.

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[46] Cm 6941 (2006) page 24
[47] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410
[48] *Matadeen v Pointu* [1999] AC 98 at 109
[49] Cm 6941 (2006) page 4, paragraph 7
[50] Cm 6941 (2006) pages 15 & 24

iv. Improper Purpose/Motive – Electoral Success

144. Hardison asserts that in appealing to the "acceptability" of the "vast majority who use [alcohol and tobacco] responsibly" by not seeking to control these drugs under s2 of the Act, i.e. not applying the "policy of prohibition" to alcohol and tobacco, the SSHD creates the first inequality of treatment whilst acting for a purely political motive.

145. This improper motive was summed up precisely in *Railway Express Agency v New York*:

> "[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".[51]

146. Consequently, the Courts hold that a power granted to a decision-maker for one purpose must not be exercised for a different purpose, here, electoral success.

147. The Act grants the SSHD the s2(5) power so that the exercise of certain enumerated activities re 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", can be brought under the Act's control.[52] If these implicit criteria found in s1(2) are satisfied, the SSHD has a duty to control the drug.[53]

148. So, in refusing to exercise the s2(5) power re alcohol and tobacco because the SSHD believes that "[the Act] focuses on prohibiting illicit and harmful drugs",[54] not only has the SSHD created the inequality of treatment, the SSHD has acted for an improper purpose.

v. Abuse of Discretion – Abuse of a Dominant Position

149. The SSHD's total inactivity re alcohol and tobacco, creates the inequality of treatment, and amounts to an abuse of the s2(5) discretion.[55] This abuse occurs because:

1) Parliament has neither stated an explicit policy nor fixed any determining criteria[56] to guide the SSHD re drug control and classification under s2(5) of the Act.

2) The SSHD has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]" and therefore that the Act permits only the medical and/or scientific use of controlled drugs.

3) The ACMD held a longstanding erroneous belief that the Act permits only the medical and/or scientific use of controlled drugs.

4) A significant portion of the electorate use alcohol and/or tobacco.

5) Proscribing the enumerated activities re alcohol and/or tobacco would deny all meaningful use of alcohol and tobacco whilst costing votes and tax revenue.

150. On these easily ascertainable facts, the SSHD's "partial and unequal"[57] exercise of the s2(5) power is a majoritarian abuse of executive discretionary power. This is inherently unfair.

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[51] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112
[52] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added
[53] *R v Tithe Commissioners* (1849) 14 QB 459 at 474; *Julius v Lord Bishop of Oxford* (1880) LR 5 App Cas 214
[54] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[55] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997
[56] *Cf.* s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975
[57] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ

C. Unfairness

151. A severe substantive law like the Misuse of Drugs Act 1971 is acceptable if administered fairly and impartially. Accordingly, "the rule of law enforces minimum standards of fairness, both substantive and procedural".[58]

152. Here, however, Cm 6941 shows that the SSHD administers the Act unfairly by:

    1) failing to administer the Act in an evidenced-based manner;

    2) exercising s2(5) 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 alcohol and tobacco.

153. This unfairness creates and maintains the inequalities of treatment Hardison experiences.

i. Failing to Administer the Act in an Evidenced-based Manner

154. Successive SSHDs and the ACMD have dashed the expectation created in 1970 of:

> "drugs … divide[d] according to their accepted dangers and harmfulness in the light of current knowledge … provid[ing] for changes to be made in the classification in the light of new scientific knowledge".[59] (Emphasis added)

155. Section 1 conjunct Schedule 1 of the Act created the Advisory Council on the Misuse of Drugs ("ACMD") composed of experts from drugs related disciplines, and charged them with: (1) keeping the drugs "situation" and relevant law "under review"; (2) giving the SSHD advice on exercising the Act's powers; and (3) giving the SSHD advice on any measure or measures, "whether or not involving alteration of the law", thought necessary to achieve the Act's purpose.

156. Parliament then made the ACMD's advice or consultation a prerequisite to every exercise of the SSHD's discretion under the Act re drug control, classification, and/or regulation, ss2(5), 7(7) & 31(3). This powerfully indicates that Parliament intended the Act's administration to evolve "in the light of new scientific knowledge", particularly where decisions may imperil life or liberty.

157. Nevertheless, the ACMD has only made recommendations consistent with the "policy of prohibition", which the SSHD generally accepts. This closed feedback loop has shut both the SSHD's and the ACMD's eyes to the Act's true policy and objects.

158. This has resulted in: (1) the arbitrary exclusion of alcohol and tobacco from the Act; (2) the failure to evolve a penalty structure proportionate to the risk of harm each controlled drug presents when misused; (3) the failure to consider less restrictive regulatory options; and (4) the two inequalities of treatment Hardison experiences.

159. Accordingly, the SSHD's failure to ensure that decisions under the Act are evidence-based and consistent with the Act's policy and objects has resulted in severe substantive consequences for Hardison. This abuse of power cannot be fair.

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[58] *R v SSHD, ex p Pierson* [1998] AC 539 at 591

[59] *Hansard*, HC Deb, Misuse of Drugs Bill 1970, 25 March 1970, Vol. 798, Col. 1453

ii. The Arbitrary Exercise of s2(5)

160. By excluding alcohol and tobacco from the Act on the grounds of "historical and cultural precedents",[60] the SSHD has arbitrarily exercised s2(5) with the intention of "escap[ing] the political retribution that might be visited upon [Government] if larger numbers were affected".[61] This created the <u>first</u> inequality of treatment:

    1) the 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.

161. This inequality of treatment affords those who commerce <u>and/or</u> produce alcohol <u>and/or</u> tobacco the liberty to do so whilst denying Hardison equal liberty to produce <u>and/or</u> commerce in the equally or less harmful drugs of his indictment. So whilst Hardison serves his 20-year sentence of imprisonment, it is possible for those who successfully produce <u>and</u> commerce alcohol and tobacco to receive "a peerage or a Queen's award for industry".[62]

162. But, because alcohol and tobacco are drugs within the Act's remit <u>and</u> alcohol and tobacco misuse is "having harmful effects sufficient to constitute a social problem", s(1)2, the SSHD's refusal to instigate the control of alcohol and tobacco via s2(5) is illogical <u>and</u> immoral. It denies equal protection to the public from the harmful effects caused by alcohol and tobacco <u>misuse</u> whilst denying equal liberty to those concerned in the peaceful exercise of the enumerated activities re controlled drugs.

163. In *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681 at 695 Simon Brown LJ stated that:

> "'Unfairness amounting to an abuse of power' … is unlawful because … it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power".

164. The conspicuous unfairness at issue here is easy to see <u>and</u> "leaps up from the page".[63]

iii. Failing to evolve a proportionate penalty structure

165. The Act differentiates "controlled drugs" listed in Schedule 2 into three classes indicating risk of harm when used. These classes determine the maximum penalties set out in Schedule 4 for the offences enumerated in the Act, s25. As these constitute deprivations of liberty, it is crucial that each drug is classified on the basis of empirical evidence, i.e., penalties must be <u>proportionate</u> to the objective risk of harm involved in a drug's "misuse", s37(2).

166. Crucially, whilst Parliament charged the ACMD with scientifically evaluating the risk of harm inherent in a controlled drug's misuse, the political responsibility for ensuring that the penalty fits the risk of harm falls squarely on the SSHD.

167. Yet, in pursuing the "policy of prohibition", the SSHD has failed to ensure that penalties are proportionate to the risk of harm inherent in a controlled drug's misuse.

168. As such, the SSHD classified the drugs of Hardison's indictment as having the highest risk of harm even when the evidence base indicates that the risk of harm is equal to or less than the risk of harm from alcohol <u>and/or</u> tobacco misuse.[64] This is arbitrary <u>and</u> unfair.

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[60] Cm 6941 (2006) page 24
[61] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112
[62] *Hansard*, HC Deb, 9 November 2001, Vol. ???, Col. ??? Jon O. Jones MP
[63] *R v SSHD, ex p Rashid* [2005] EWCA Civ 744 at 23
[64] Nutt *et al* (2007) Development of a rational scale to assess the harm of drugs of potential misuse,*The Lancet* **369**: 1047-1053

iv. The Failure to Implement Reasonable and Proportionate Regulations

169. The SSHD's failure to implement reasonable and proportionate regulations, within the limits of ss7(1)-(2), 22 & 31(1)(a), creates the second inequality of treatment:

    2) the 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.

170. This inequality of treatment means that those who use controlled drugs peacefully, like Hardison, are not afforded them same respect as the SSHD and Government afford the "vast majority who use [alcohol and tobacco] responsibly".[65]

171. Thus, through the "policy of prohibition",[66] the SSHD denies the peaceful use of controlled drugs, irrespective of the risk of harm, bar medical and scientific use, whilst Government facilitates the peaceful, non-medical and non-scientific (mis)use of alcohol and tobacco.

172. This is substantively unfair and contrary to the Act's policy, which is concerned neither with absolute safety nor with preventing controlled drug use, as drug use is not an offence, but rather with preventing, minimising or eliminating the "harmful effects sufficient to constitute a social problem" that may arise via the use of "dangerous or otherwise harmful drugs".[67]

173. Accordingly, with respect to drug use, ss7(1)-(2), 22 & 31(1)(a) of the Act afford the following three "reasonable differentiation[s proportionately] related"[68] to the harmful effects that may arise via use of controlled drugs:

    1) A primary differentiation between drug use that is reasonably safe to the agent and does not result in harm to others and drug use that is reasonably safe to the agent and results in harm to others;

    2) A secondary differentiation between drug use that is reasonably risky to the agent and does not result in harm to others and drug use that is reasonably risky to the agent and results in harm to others;

    3) A tertiary differentiation between drug use harmful only to the agent following competent informed choice and drug use harmful only to the agent not following competent informed choice.

174. These "reasonable differentiation[s]", based on the outcome of drug use, ask whether the drug use is having "harmful effects" and then whether those "harmful effects" are "sufficient to constitute a social problem". Only in this manner is use separable from misuse. Only in this manner is the autonomous individual separable from the public interest and education and health measures separable from the need for police power.

175. Hardison asserts that the SSHD would be entirely justified in implementing these "reasonable differentiations" via regulations under ss7(1)-(2) & 22 of the Act. This would allow for the control of alcohol and tobacco under the Act, without the "unacceptab[ility]" of the "policy of prohibition", whilst allowing the lawfully regulated production and commerce of controlled drugs for peaceful use to gradually emerge from the evidence base.

176. Consequently, the SSHD has not sought the least restrictive means of targeting the "harmful effects sufficient to constitute a social problem". This is disproportionate.

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[65] Cm 6941 (2006) page 24
[66] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[67] s1(2) conjunct Preamble
[68] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

v. The SSHD's Apparent Bias toward Alcohol and Tobacco

177. Whilst the SSHD is entitled to have regard to "broader considerations of a public character",[69] in not applying the Act to alcohol and tobacco and those concerned with them because, as expressed in Cm 6941, it "would be unacceptable to the vast majority who use [alcohol and tobacco] responsibly", the SSHD appears biased in three ways:

    1) Politically – The SSHD acts favourably towards the "cultural preference"[70] of the "vast majority" as the SSHD's political power depends on it and biased against a "tiny minority"[71] whose preferences do not affect the SSHD's political power.

    2) Economically – Government receives many billions in annual tax revenue from alcohol and tobacco commerce. This revenue would be lost if the SSHD applied the "policy of prohibition" to alcohol and tobacco.

    3) Associatively – the SSHD is associated with the "vast majority" who consume the drugs alcohol and tobacco as the various SSHDs administering the Act have also consumed the drugs alcohol and tobacco.

178. Any fair-minded observer would conclude that there is a real possibility that the SSHDs administering the Act have been, and are now, biased.[72] This is fundamentally unequal.

D. The Court's Role in Matters of Common Law is to Concentrate on Principles

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

180. 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.

181. Yet, as administered by the executive, Hardison shows that, re the drugs he prefers, the Act denies him rights equivalent to the rights granted to those 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. This is contrary to the Act's policy and contrary to the equality-of-treatment principle.

182. It therefore falls to the judiciary to refuse to countenance the executive's "partial and unequal"[73] administration of the Act. And in so doing, Hardison requests that this Court heeds 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)

183. 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.

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[69] *R v SSHD, ex p Doody* [1994] 1 AC 531 at 559
[70] Cm 6941 (2006) page 15
[71] Bagehot (2009) 'The tiny minority", *The Economist*, 21 March 2009, Vol. 390 No. 8623, page 40
[72] *Magill v Porter* [2001] UKHL 67
[73] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ

VIII. The Human Rights Argument

A. The General Claim – An Overview

184. 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:

> "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".[74]

185. And since the Act regulates human action, not drug action, this subjects Hardison to two unjustifiable discriminations:

1) The dangerous drugs alcohol and tobacco are not controlled under the Act whilst the equally or less harmful drugs of Hardison's indictment are.

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

186. Mr Hardison asserts that the first discrimination is arbitrary and the second is excessive; together they 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.

B. The Human Rights Act 1998

187. The Human Rights Act 1998 ("HRA") gives further effect in domestic law to the civil and political rights guaranteed by the European Convention on Human Rights ("Convention").

188. State interference with a Convention right must: (1) be based in law; (2) have a legitimate aim relevant to the Convention right; and (3) be "necessary" in a democratic society. To be "necessary" an interference must: (i) "meet a pressing social need"; (ii) be "proportionate to the legitimate aim"; and (iii) have a "relevant and sufficient" justification.[75]

189. In determining whether an interference by an act, rule or decision is arbitrary and/or excessive this court must ask 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".[76]

190. In *R v SSHD, ex p 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".

191. Accordingly, Hardison requests this Court's proper analysis of his Convention claims.

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[74] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added and crucial
[75] *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 at 62
[76] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80

C. Article 14 – The Prohibition against Discrimination

192. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

193. Article 14 only prohibits discrimination that: (1) falls "within the ambit"[77] of another Convention right; (2) on "any grounds such as"[78] those enumerated in Article 14; (3) which does not pursue a "legitimate aim"; and/or (4) where there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[79]

194. In *R (Carson) v SS for Work & Pensions* [2005] UKHL 37 at 3, Lord Nicholls advocated a "simple and non-technical approach" to scrutiny of Article 14 claims:

> "Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on "any grounds such as" those enumerated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometime the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact".

195. In the same case, at 31, Lord Hoffmann considered that the single crucial question in seeking to identify the presence of discrimination was "is there enough of a relevant difference between X and Y to justify different treatment?"

196. The European Court of Human Rights ("ECtHR") has identified four circumstances in which discrimination occurs:

1) when States, without an objective and reasonable justification, treat differently persons placed in similar situations;[80]

2) when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different;[81]

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;[82] and

4) when a State's general policy or measure has a disproportionate, prejudicial effect on a particular group, even if such an effect was not intended.[83]

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[77] *Rasmussen v Denmark* (1984) 7 EHRR 371 at 29; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at 10
[78] *Engel & Others v Netherlands* (1976) 1EHRR 647 at 30; *AL (Serbia) v SSHD* [2008] UKHL 42 at 20
[79] *Marckx v Belgium* (1979) 2 EHRR 330; *A & Others v SSHD* [2004] UKHL 56 at 50
[80] *Belgian Linguistic Case* (No 2) (1968) 1 EHRR 252 at 10; *The Diane Pretty Case* [2001] UKHL 61 at 32
[81] *Thlimmenos v Greece* (2001) 31 EHRR 411 at 44; *SS for Work & Pensions v M* [2006] UKHL 11 at 74
[82] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40; *R (RJM) v SS for Work & Pensions* [2009] UKHL 63
[83] *Nachova & Others v Bulgaria* (2006) 42 EHRR 43 at 167; *R v SS for Employment, ex p Seymour-Smith* [2000] 1 WLR 425 at 449

D. The Particularised Comparator Groups – Article 14

197. Four comparator groups are essential to elucidate Hardison's Article 14 claims.

a. The First Comparator Group

198. The first comparator group is composed of individuals and/or bodies corporate that use, commerce and/or produce alcohol and/or tobacco peacefully.

199. For clarity, these individuals take on one or more of the following roles: (1) user; (2) possessor; (3) supplier; (4) importer and/or exporter; and (5) producer.

200. To experience "meaningful use"[84] of alcohol and/or tobacco, a user who does not also engage in roles 2, 3, 4 & 5 is reliant on individuals 2, 3, 4 & 5.

b. The Second Comparator Group

201. The second comparator group is composed of individuals that use alcohol and/or tobacco but fail to do so peacefully.

202. The Act implicitly targets these individuals and the drugs they use:

> "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".[85]

203. By s37(3) of the Act, these individuals "misuse" the drugs alcohol and/or tobacco.

c. The Third Comparator Group

204. The third comparator group is composed of individuals that use controlled drugs but fail to do so peacefully.

205. The Act explicitly targets these individuals and the drugs they use as the Act regulates the enumerated activities re drugs explicitly "controlled" under s2.

206. By s37(3) of the Act, these individuals "misuse" controlled drugs.

d. The Fourth Comparator Group – Hardison's Group

207. The fourth comparator group is composed of individuals and/or bodies corporate that use, commerce and/or produce controlled drugs peacefully.

208. As with the first group, these individuals take on one or more of the following roles: (1) user; (2) possessor; (3) supplier; (4) importer and/or exporter; and (5) producer.

209. To experience "meaningful use" of controlled drugs, a user who does not also engage in roles 2, 3, 4 & 5, as Hardison did, is reliant on individuals 2, 3, 4 & 5.

210. Hardison's unauthorised production and/or commerce of controlled drugs is said to have breached "the Queen's peace" as defined by the Act; so, his inclusion in this group may be contentious; even so, he asserts: (1) that his actions were peaceful; (2) that the Act discriminates unlawfully; and (3) that he belongs to this fourth comparator group.

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[84] *Fredin v Sweden (No 1)* (1991) 13 EHRR 784 at 44

[85] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added and crucial

E. The Grounds of Discrimination – Article 14

211. Hardison claims that the Act discriminates against him on the grounds of property and "other status", namely "drug orientation" and/or "drug preference" and "legal status".

212. The ECtHR recently said that:

> "[Article 14] safeguards persons who are in analogous or relevantly similar positions against discriminatory differences in treatment that have as their basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other".[86] (Emphasis added)

213. In *R (RJM) v Secretary of State for Work & Pensions* [2009] UKHL 63 at 5, Lord Walker of Gestingthorpe said that:

> ""Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality, gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate … or may be acquired … but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14".

214. *Clayton & Tomlinson's The Law of Human Rights* 2nd Ed. (2009) criticises this "personal characteristic" approach at paragraph 17.136:

> "the personal characteristic test adopted by the House of Lords is unduly restrictive:[87] it involves a misreading of the decision of the [ECtHR] in *Kjeldsen, Busk, Madsen & Pedersen v Denmark* (1976) 1 EHRR 711; and is difficult to reconcile with the view of the [ECtHR] that 'other status' includes matters such as professional status, whether a person is employed or self-employed, military rank, status based on previous employment with the KGB, and place of residence". (Most internal references omitted).

215. Hence, "a generous meaning should be given to the words 'or other status'"[88] in Article 14.

a. Property

216. The Act's policy is to regulate enumerated property activities re particular property:

> "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".[89]

217. The State claims that people use, commerce and/or produce this type of property to "alter mental functioning".[90]

218. Schedule 2 lists the drugs property "controlled" under the Act but excludes alcohol and tobacco, the dangerous drug property preferred by the electoral majority but which the State "acknowledges" causes the most harm to society.

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[86] *Kafkaris v Cyprus* (2008) (Application No 21906/04) (unreported) 12 February 2008, at 160
[87] Internal reference to: *R (RJM) v SS for Work & Pensions* [2009] UKHL 63 at 42
[88] *R (Clift) v SSHD* [2007] 1 AC 484 at 48
[89] *Misuse of Drugs Act 1971* c.38, Preamble conjunct s1(2), emphasis added and crucial
[90] Cm 6941 (2006) page 24

b. Drug Orientation or Drug Preference

219. Drug orientation or drug preference is a "personal characteristic" important to the development of personality. It is often associated with cultural identity; and, like sexual orientation, it may be either a choice or a genetic predisposition.

220. In Cm 6941 the State made two declarations relevant to drug preference and culture; first, re classification decisions under s2 of the Act, the State said:

> "Decisions are based on 2 broad criteria – (1) scientific knowledge (medical, social scientific, economic, risk assessment) and (2) political and public knowledge (social values, political vision, historical precedent, cultural preference)".[91] (Emphasis added)

Then, re the distinction between alcohol and tobacco and controlled drugs, the State said:

> "The distinction between [these] substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is … based in large part on historical and cultural precedents".[92] (Emphasis added)

221. As indicated above, drug orientation or drug preference is analogous to the "homosexual tendencies" articulated in *Dudgeon*[93] by the ECtHR on its way to fully accepting "sexual preference"[94] as a prohibited ground of discrimination:

> "In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life […]: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution". (Emphasis added)

222. Hardison does not smoke tobacco and he rarely drinks alcohol; rather, he prefers the mindstates engendered by the psychedelic-type drugs of his indictment. Crucially, they have shaped his belief system and developed his personality.

c. Legal Status

223. The State via the Act discriminates between drugs, and thus those concerned with them, on the ground of "legal status", i.e. whether the drug is a "legal [or an] illegal substance".[95]

224. Thus, those concerned with the so-called "legal substances" alcohol and tobacco have the right to exercise property activities in them, as the State excludes them from the Act, whilst those concerned with so-called "illegal substances" are denied equal rights.

225. Referring to alcohol and tobacco in 2006, the ACMD said that, "For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate".[96] (Emphasis added)

226. In 1994, G. Giacomelli, the Executive Director of the UN International Drug Control Program said in his opening statement to the 37th Session of the Commission on Narcotic Drugs that: "[It is] increasingly difficult to justify the continued distinction among substances solely according to their legal status and social acceptability". (Emphasis added)

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[91] Cm 6941 (2006) page 15
[92] Cm 6941 (2006) page 24
[93] *Dudgeon v United Kingdom,* [1982] 4 EHRR 149 at 41 & 60, Article 8 violated, Article 14 not considered.
[94] *EB v France* (2008) 47 EHRR 41 (GC) sexual orientation as "suspect class"; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at 10
[95] Cm 6941 (2006) page 17 & 24
[96] ACMD (2006) *Pathways to Problems*, page 14

F. Article 14 within the ambit of Article 5

a. Hardison's Article 5 Claim

227. The Act, as administered, 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".

228. In sum, the State has severely deprived Hardison of his liberty for his activities re certain "dangerous or otherwise harmful drugs"[97] property: psychedelic-type drugs, whilst not depriving the liberty of those engaged in identical activities with equally "dangerous or otherwise harmful drugs" property: alcohol and tobacco.

229. The State justifies this arbitrariness on "historical and cultural precedents".[98]

b. Article 5

230. The relevant part of Article 5, the "Right to Liberty and Security", reads:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law … (a) the lawful detention of a person after conviction by a competent court".

231. The ECtHR described the role of Article 5 in *Kurt v Turkey*:

> "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy [is] to be free from arbitrary detention at the hands of the authorities. […] any deprivation of liberty must not only be effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness…against any abuse of power".[99] (Emphasis added)

232. In *A & Others v United Kingdom* the ECtHR said that:

> "the notion of arbitrariness … extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention".[100]

233. Article 5 holds that deprivation of liberty is justifiable if three conditions are satisfied:

1) The deprivation is "in accordance with a procedure prescribed by law";

2) The deprivation meets one of the specific grounds set out in Article 5(1); and

3) The deprivation can be justified on a substantive legal basis.

234. Hardison accepts that the deprivation is in accordance with a procedure prescribed by law and that the deprivation was by a competent court, but Cm 6941 when read with the Act shows that the deprivation is arbitrary and thus unjustifiable as a matter of substantive law.

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[97] *Misuse of Drugs Act 1971* c.38, Preamble
[98] Cm 6941 (2006) page 24
[99] *Kurt v Turkey* (1998) 27 EHRR 373 at 122
[100] *A & Others v United Kingdom* (2009) All ER (D) 203 (Feb); *Saadi v United Kingdom* (2007) 44 EHRR 50 [GC]

c. Analysis of Hardison's Article 5 Claim

235. Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by a state with his or her right to liberty. The Act, as administered and applied to Hardison, violates this principle:

1) The threat to the welfare of the United Kingdom ("the UK") presented by the misuse of "dangerous or otherwise harmful drugs" is irrefutable. Hence, the Act's purpose is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" [101] that may arise via the self-administration of these drugs.

2) The Act seeks to accomplish this purpose by imposing "restrictions" ss3-6, "prohibitions" ss8-9, and/or "regulations" ss7, 10 & 22, on the exercise of enumerated activities re such drugs, e.g. import, export, production, supply, possession, etc.

3) The State claims in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than [controlled drugs]". However, because of "historical and cultural precedents"[102] the State does not apply the Act to alcohol and tobacco and thus to the first and second comparators who use, commerce and/or produce alcohol and/or tobacco.

4) Thus, via the Act, the State discriminates arbitrarily and contrary to the Act's policy on the type of property "cultural[ly] prefer[red]"[103] by the first and second comparators rather than on the rational and objective factors of whether that property "is being or appear[s] … likely to be misused and of which the misuse is having or appears… capable of having harmful effects sufficient to constitute a social problem".[104]

5) The Act therefore fails to address rationally the threat to public welfare presented by the misuse of "dangerous and otherwise harmful drugs" property because the Act does not address the threat presented by the second comparator's misuse of alcohol and tobacco.

6) In sum, the State arbitrarily permits the first comparator the right to pursue production and commerce activities with the drugs alcohol and tobacco for non-medical and non-scientific use whilst denying, via the Act, identical rights re equally or less harmful drugs to the fourth comparator under threat of severely disproportionate deprivation of liberty.

7) Accordingly, if the threat presented to the welfare of the State by the first and second comparators is addressed without infringing their right to personal liberty, it is not shown why similar measures cannot adequately address the threat presented by the third and fourth comparators.

8) Alternatively, if the Act rationally addresses the threat to the welfare of the State presented by the third and fourth comparators then it is not shown why the Act is not similarly applied to the threat presented by the first and second comparators.

9) Hardison, as a member of the fourth comparator group, has been arbitrarily deprived of his liberty for twenty-years.

236. These circumstances fit the first, second and third type of discrimination identified by the ECtHR and enumerated above at paragraph 196.

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[101] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2)
[102] Cm 6941 (2006) page 24
[103] Cm 6941 (2006) page 15
[104] *Misuse of Drugs Act* 1971 c.38, s1(2)

G. Article 14 within the ambit of Article 8 or Article 8 alone

237. The relevant part of Article 8, the "Right to Respect for Private Life", provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … public safety … the protection of health and morals, or for the protection of the rights and freedoms of others".

a. Hardison's Article 8 Claims

238. Hardison makes two claims under Article 8:

1) The Act, as administered, 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".

2) Alternatively, the Act regulates Hardison's private life contrary to Article 8.

b. Analysis of the First Article 8 Claim – Conjunct Article 14

239. Hardison's first Article 8 claim is composed of a liberty right afforded by the State to the first and second comparator but denied to Hardison contrary to Article 14.

240. Hardison characterises this liberty right as the "people's rights to make free and informed choices"[105] in the peaceful production, commerce and/or use of "dangerous or otherwise harmful drugs" property subject only to reasonable, necessary and proportionate regulation.

241. In *Stec v United Kingdom*, the ECtHR held that:

> "Article 14 also applies to "those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide".[106]

242. In addition, in *Pretty v United Kingdom*, the ECtHR said:

> "The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. […] However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8(1)".[107] (Emphasis added)

243. *Stec* and *Pretty* respectively bring the liberty right asserted by Hardison and the Act's criminal measures within the ambit of Article 8 allowing his claims that the State denies him the same respect for private life and autonomy extended to the first and second comparators and in so doing the State has treated the third and fourth comparators alike.

244. This embodies the first, second, and third type of discrimination identified by the ECtHR and enumerated above at 196.

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[105] Cm 41(1998) *Smoking Kills* White paper, para 1.26, "the right to smoke"
[106] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40
[107] *Pretty v United Kingdom* (2002) 35 EHRR 1 at 62

c. Analysis of the Second Article 8 Claim

245. Article 8 protects the person against arbitrary interferences by public authorities in the private sphere. The public order provisions set out in Article 8(2) provide the reasons by which such interference may become "necessary in a democratic society".

246. The Act regulates Hardison's private life and autonomy contrary to Article 8.

1) The object of the Act is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via the self-administration of "dangerous or otherwise harmful drugs".[108]

2) Hence, Hardison accepts that the Act's regulation of the production and commerce of controlled drugs has a legitimate aim relevant to Article 8, *viz* public safety, the protection of health and the protection of others.

3) And whilst the regulatory measures enacted by the State under the Act re production and commerce of controlled drugs appear rationally connected to the Act's object, the blanket prohibition of production and commerce for other than medical or scientific use purposes is excessive; it goes further than is necessary to accomplish the objective; wiht enforcement invading private life, hampering freedom of contract, and denying all meaningful and peaceful non-medical and non-scientific use of controlled drugs.

4) Consequently, Hardison does not accept that blanket prohibition of his activities is "necessary in a democratic society" as: (1) the State has not demonstrated "a pressing social need" for blanket prohibition of his peaceful activities; (2) the blanket prohibition is not "proportionate to the legitimate aim"; and (3) the blanket prohibition does not have a "relevant and sufficient"[109] justification.

5) More, as Hardison's activities occurred in his domicile they should have been subject only to reasonable, necessary and proportionate restrictions. Indeed, as the ECtHR emphatically said in *Niemietz v Germany*:

> "There appears…to be no reason of principle why [an] understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know what capacity he is acting at a given moment.".[110]

6) Accordingly, State action against Hardison for his peaceful activities re controlled drugs invaded his privacy and was disproportionate to the Act's aims.

247. Consequently, the very existence of the Act, as administered, continuously and directly affects Hardison's private life: he either respects the law and refrains from engaging – even in private – in prohibited acts to which he is disposed because of his drug preferences, or he commits such acts and thereby becomes liable to criminal prosecution.[111]

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[108] *Misuse of Drugs Act* 1971 c.38, s1(2) conjunct Preamble
[109] *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 at 62
[110] *Niemietz v Germany* (1992) 16 EHRR 97 at 29-30; *Peck v United Kingdom* (2003) 36 EHRR 41 at 57
[111] *Cf. Dudgeon v United Kingdom,* (1982) 4 EHRR 149 at 41 & 60, *mutatis mutandis*

H. Article 14 within the ambit of Article 9 or Article 9 alone

248. The relevant part of Article 9, the "Right to Freedom of Thought", provides:

> "(1) Everyone has the right to freedom of thought".

249. As this case concerns "[property] that alter[s] mental functioning",[112] Article 9 is engaged.

a. Hardison's Article 9 Claims

250. Hardison makes two claims under Article 9:

1) The Act arbitrarily regulates Hardison's thoughts contrary to Article 9.

2) Alternatively, the Act, as administered, 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".

b. Analysis of the First Article 9 Claim

251. Hardison asserts that the State violates Hardison's claim right to freedom of thought.

252. In sum, via the Act, the State denies Hardison all meaningful access to the cognitive processes, ideations and information that resides, occurs or is accessible in the mindstates catalysed by the drugs property he possessed, produced and consumed.

253. And because Article 9(2) does not prescribe or envisage any fettering of the '*forum internum*' by the State, freedom of thought, aka *Cognitive Liberty*,[113] must mean, at minimum, that each person is free to direct one's own consciousness and is the legal right of individuals to autonomous self-determination over their own neurochemistry.

254. Accordingly, constraining freedom of thought via the denial of all meaningful use of Hardison's preferred drugs property violates Article 9(1).

255. A closer examination of one sentence found on page 24 of Cm 6941 elucidates Hardison's notion of freedom of thought. It reads:

> "A classification system that applies to [alcohol and tobacco] as well as [controlled] substances 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".[114]

256. Hardison asserts that there is a deeply embedded drive in humans to "alter mental functioning" by various means: austerity, breathing, chanting, dancing, drumming, lovemaking and using "a number of substances that alter mental functioning", etc.

257. This is why it would be "unacceptable" to apply a "policy of prohibition"[115] to the responsible use of alcohol and tobacco. It would deprive the majority who "use [alcohol and/or tobacco] responsibly" access to the valuable mindstates facilitated by these drugs.

258. Equally, Hardison feels the Act, as administered, deprives him of equally valuable mindstates facilitated by responsible use of the drugs on his indictment. He finds this "unacceptable".

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[112] Cm 6941 (2006) page 24, *mutatis mutandis*
[113] Hardison has asserted his absolute right to *Cognitive Liberty* from the earliest moments of his indictment.
[114] Cm 6941 (2006) page 24, emphasis added
[115] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

c. Analysis of the Second Article 9 Claim – Conjunct Article 14

259. The first claim is composed of a liberty right within the ambit of Article 9 that the State affords to the first and second comparators but denies to Hardison contrary to Article 14.

260. Hardison characterises this liberty right as the "people's rights to make free and informed choices"[116] in the peaceful production, commerce and use of "substances that alter mental functioning"[117] subject only to reasonable, necessary and proportionate regulation.

261. In *Stec v United Kingdom*, the ECtHR held that the prohibition against discrimination extends beyond the enjoyment of the rights which the Convention requires each State to guarantee:

> "Article 14 also applies to "those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide".[118]

262. This brings the liberty right asserted by Hardison within the ambit of Article 9.

263. The facts of Hardison's first Article 9 claim occur because: (1) the State denies the fourth comparators the liberty right extended to the first and second; and (2) the State treats the third and fourth comparators alike.

264. This denies all meaningful production, commerce and use of controlled drugs property to "alter mental functioning".

265. With respect to Article 9, these facts embody the first, second and third type of discrimination identified by the Strasbourg Court, enumerated at paragraph 196 above:

1) The State treats Hardison differently from the first and second comparator without a rational and objective basis.

2) The State treats Hardison's in the same manner as the third comparator without a rational and objective basis.

3) The State extends the liberty right to the first and second comparator yet, without a rational and objective basis, the State denies an equal liberty right to the fourth comparator group.

266. Accordingly, if the threat presented to the welfare of the State by the production, commerce and use of alcohol and tobacco is addressed without infringing the people's right to "alter mental functioning", it is not shown why similar measures cannot adequately address the threat presented by Hardison's production, commerce and consumption of equally or less harmful controlled "[drugs] that alter mental functioning".

267. Alternately, if the denial via the Act of all meaningful access to Hardison's right "to make free and informed choices" in the production, commerce and consumption of controlled "[drugs] that alter mental functioning" is proportionate, in the public interest and necessary in a democratic society then it is not seen why those who produce, commerce and consume the dangerous or otherwise harmful drugs alcohol and tobacco are entitled to this right.

268. In short, a fair balance does not yet exist between public welfare and the need to protect the individual's peaceful, free and informed access to controlled drug mediated mindstates.

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[116] Cm 41(1998) *Smoking Kills* White paper, para 1.26, "the right to smoke"
[117] Cm 6941 (2006) page 24
[118] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40

I. Article 14 within the ambit of Article 1 Protocol 1

269. Article 1 Protocol 1 ("A1P1"), "the Protection of Property", provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

270. The ECtHR described A1P1's object in *Marckx v Belgium*:

> "By recognising that everyone has the right to the peaceful enjoyment of his possessions, [A1P1] is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property". (in French: "biens", "propriété", "usage des biens"); the "travaux préparatoires", for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present [A1P1]".[119]

271. And in *Sporrong & Lonnroth v Sweden* the ECtHR explained A1P1's content:

> "[A1P1] comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; […] The second rule covers deprivation of possessions and subjects it to certain conditions; […] The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; […] The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable".[120]

272. In effect, A1P1 protects the person against arbitrary State interference in the peaceful enjoyment of property. As the ECtHR said in *Chassagnou v France*:

> "[Any] interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of [A1P1] as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law".[121]

d. Hardison's Article 1 Protocol 1 Claim

273. The Act, as administered, 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".

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[119] *Marckx v Belgium* (1979) 2 EHRR 330 at 63
[120] *Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35 at 61
[121] *Chassagnou & Others v France* (1999) 29 EHRR 615 at 75; *Fredin v Sweden* (No 1) (1991) 13 EHRR 784 at 51

e. Analysis of Hardison's A1P1 Claim – Conjunct Article 14

274. The Act's measures are within the ambit of A1P1 as they seek to control the use of drugs property and property activities, e.g. import/export, production, supply, possession, etc.

275. Hardison's A1P1 claim contains two threads:

1) The Act controls the use of his lawfully acquired possessions arbitrarily.

2) The Act arbitrarily deprives him of the right to the peaceful enjoyment of the property produced from those lawfully acquired possessions

276. Hardison lawfully acquired the materials and equipment used in the production of the drugs property of this indictment. The Act placed arbitrary and discriminatory controls on Hardison's use of those materials and equipment.

277. Nevertheless, Hardison produced the drugs property even though the Act, as administered, declared this an unauthorised use of his possessions. Consequently, the State confiscated his possessions and so deprived him "all meaningful use"[122] of the fruits of his labour.

278. Had Hardison used his possessions to produce and commerce alcoholic beverages and/or nicotine, he would not have been subject to controls on the use of that equipment and criminal sanction would only apply to the unauthorised (untaxed) commerce of alcohol and/or nicotine. More, he would be entitled to peaceful enjoyment of his labour's fruits.

279. Crucially, Hardison does not dispute the Act's policy and/or objects; however, he refuses to countenance the "partial and unequal"[123] application of the Act's measures.

1) The State declared in Cm 6941, "alcohol and tobacco account for more health problems and deaths than [controlled drugs]". However, because of "historical and cultural precedents" [124] the State has not applied the Act to alcohol and tobacco and thus to the first and second comparators who use, commerce and/or produce alcohol and tobacco.

2) Thus, via the Act, the State discriminates arbitrarily and contrary to the Act's policy on the type of drug property "cultural[ly] prefer[red]"[125] by the first and second comparators rather than on the rational and objective factors of whether that drug property "is being or appear[s] … likely to be misused and of which the misuse is having or appears… capable of having harmful effects sufficient to constitute a social problem".[126]

3) In short, the State arbitrarily permits the first comparator the right to pursue production and/or commerce activities with alcohol and/or tobacco for non-medical and non-scientific purposes whilst denying, via the Act, identical rights re equally or less harmful controlled drugs to the fourth comparator under threat of severe sanction.

280. Accordingly, by being arbitrary and discriminatory, the interference by the State via the Act with Hardison's peaceful enjoyment of his possessions does not strike a fair balance between the demands of the general interest of the community and the required protection of his fundamental rights.

281. These circumstances fit the first, second and third type of discrimination identified by the ECtHR and enumerated at paragraph 196.

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[122] *Fredin v Sweden* (No 1) (1991) 13 EHRR 784 at 41-45
[123] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ
[124] Cm 6941 (2006) page 24
[125] Cm 6941 (2006) page 15
[126] *Misuse of Drugs Act 1971* c.38, s1(2)

IX. Justiciability

282. As indicated at the close of the common law argument, this case raises questions in that sensitive interstitial space between the judiciary, the legislature and the executive.

283. 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".

284. Regrettably, Parliament has neither stated an explicit policy nor fixed any determinative criteria in the Act to guide the SSHD in promulgating such Orders;[127] but, as they may deprive liberty, these Orders are subject to either approval or annulment by both Houses of Parliament acting within the limits set by the Act.

285. 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 are only to be exercised in furtherance of the Act's policy and objects, which are determined by construction of the Act, and this is a matter of law for this Court.

286. 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)

287. 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".

288. And in the unreported *R v SS for the Environment, ex p the GLC and ILEA* at 31, 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 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".

289. This principle was accepted by the Court in *R v SSHD, ex p Javed* [2001] EWCA Civ 789, which dealt with the Designated Safe Third Countries (Order 1996) for asylum purposes; interestingly, this Designation Order is comparable to a s2 Order under the Act "controlling" a drug because: (1) it is dangerous or otherwise harmful; (2) it is "being misused or appear[s] … likely to be misused"; and (3) that "misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem".[128]

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

[128] *Misuse of Drugs Act* 1971 c38, preamble conjunct s1(2)

290. Crucially, Hardison does not contest the Orders controlling the drugs of his indictment; 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 control; and (2) the SSHD has failed to proffer regulations via s31(2) re the peaceful non-medical and non-scientific production, commerce and use of controlled drugs.

291. 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.

292. Accordingly, the only control 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.

293. And since unequal deprivations of liberty resulting from executive discretion are at the core of this case, the issues must be justiciable. 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*)

294. The SSHD declared in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than illicit drugs". Hardison submits that this is the relevant and established fact re promoting the Act's policy via s2(5). Yet by not seeking alcohol and tobacco control equally under the Act, Hardison is subject to unequal deprivation of liberty for his activities re equally or less harmful drugs. This is an arbitrary abuse of power.

295. 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 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.

296. 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.*"

297. 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)

298. Hence, this Court must now decide whether the SSHD has abused the Act's powers; and if the SSHD has so abused the Act, Hardison's trial should have been stayed and thus his conviction is "unsafe" within the meaning of the Criminal Appeal Act 1968.

X. Burden of Proof

299. The burden of proof falls on Hardison to show on a balance of probabilities that the proceedings amounted to an abuse of power. On the balance of probabilities, the new evidence discharges this burden: *R v Telford Justices, ex p Badhan* [1991] 2 QB 78.

XI. Remedy Sought

300. In *R v Horseferry Road Magistrates' Court*, *ex p Bennett* [1994] 1 AC 42, Lord Lowry stated that this Court has a discretion to stay any criminal proceedings on grounds of abuse of a process in two categories of case: (1) where it would be impossible to give the accused a fair trial; and (2) where it would amount to a misuse of process because it offends the Court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

301. It was not impossible to give Hardison a fair trial, but, on the facts of the case and given the Government's abuse of the rule of law, the only possible outcome was Hardison suffering inequality of treatment and discrimination contrary to common law and the Convention.

302. This was inherently unfair and as such a trial should not have taken place. In *R v Mullen* [1999] 2 Cr App R 143, CA, Lord Justice Rose said that:

> "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".

303. And in *Bennett*, at 61, Lord Griffiths said:

> "If the court is to have the power to interfere with the prosecution in the present circumstances, it must be because the judiciary accept the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

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

305. In the first alternative, as the evidence demonstrates that Hardison's sentence is both ordinally and cardinally disproportionate, conflicting with sentencing principles, this Court should: (1) commute his sentence to time served; and (2) order his immediate release.

306. In the second alternative, this Court should certify the following point of law to the House of Lords [Supreme Court] and grant leave to appeal to the House:

> If abuses of power can be shown in the exercise of, or failure to exercise, a statutory discretion by a minister and that discretion requires either a positive or negative resolution of both Houses of Parliament and the application of that abused statutory discretion to a criminal defendant has subjected that defendant to severe inequality of treatment under both common law and the Human Rights Act 1998, is it justiciable? And would this abuse make the conviction unsafe?

XII. Public interest

307. Government has not demonstrated an overriding public interest for the blanket prohibition of the exercise of enumerated activities re the "dangerous or otherwise harmful drugs" of Hardison's indictment for other than medical and scientific purposes whilst concomitantly not subjecting the exercise of enumerated activities re the "dangerous or otherwise harmful drugs" alcohol and tobacco to the same blanket prohibition.

308. Crucially, Government's attempts at justifying this artificial divide have been subjective, incoherent and not rationally connected to the policy and/or objects of the Misuse of Drugs Act 1971. Gratefully, these justifications have elucidated the abuses of power.

309. More, this unequal treatment of drugs and those who produce, commerce, and/or use them has caused immense harm to society. The under-regulation of alcohol *and* tobacco activities has contributed to over a million deaths in the United Kingdom alone and the over-regulation of the equally or less harmful controlled drugs has criminalised hundreds of thousands of otherwise law-abiding persons whilst fuelling an unregulated black market governed only by the law of unintended consequences.

310. In *R v Looseley*, *Attorney General's Reference* (No 3 of 2000) [2001] UKHL 53 Lord Nicholls of Birkenhead said:

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement provisions of the courts and thereby oppress citizens of the state".

311. Accordingly, it is in the public interest for this Court to prevent further abuses of its process by a mal-administered Misuse of Drugs Act 1971; otherwise, history teaches us, that the executive agents of the state will continue to misuse the coercive, law enforcement provisions of the courts to oppress citizens of the state.

XIII. Prayer

312. Mr Casey William Hardison humbly requests that the Honourable Court grant Leave to Appeal against Conviction based on the new evidence and that this Court grant the remedies he seeks.

313. So, in the spirit of Isaiah 45:21, let us reason the matter together.

– vitam impendre vero, fiat lux!

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

Dated …….