

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

BETWEEN:

*Regina*

Respondent

&

*Casey William HARDISON*

Appellant

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The Point of Law  
**APPEAL AGAINST CONVICTION**

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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.

– *McLoughlin v O'Brien* [1983] AC 410 at 430

No “floodgates” argument applies because the executive can stop the flood at source by refraining from impropriety.

– *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 at 77



**Prepared By**

**Casey William HARDISON**

**8 August 2009**



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**THE POINT OF LAW**

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1. Mr Casey William HARDISON seeks Leave to Appeal against Conviction based on new documentary evidence showing his convictions under the Misuse of Drugs Act 1971 c.38 (“the Act”) are “unsafely” grounded in executive abuses of statutory discretion giving rise to severe inequality of treatment.

The Point of Law at Issue

Where abuse of power is evident in the exercise of, or failure to exercise, a statutory discretion by the Secretary of State and that exercise of discretion requires approval by either a positive or negative resolution of both Houses of Parliament and the application of that abused statute to a criminal defendant has subjected that defendant to severe inequality of treatment in terms of common law and the Human Rights Act 1998, is the issue justiciable and is that defendant entitled to this Court’s protection?

2. The principal executive discretion at issue in the inequality of treatment Hardison pleads on Appeal against Conviction is found in s2(5) of the Act. Section 2 reads:

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

(1) In this Act – (a) the expression “controlled drug” means any substance or product for the time being specified in Part I, II, or III of Schedule 2 to this Act; and (b) the expressions “Class A drug”, “Class B drug” and “Class C drug” mean any of the substances and products for the time being specified respectively in Part I, Part II and Part III of that Schedule; and the provisions of Part IV of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule.

(2) Her Majesty may by Order in Council make such amendments in Schedule 2 to this Act as may be requisite for the purpose of adding any substance or product to, or removing any substance or product from, any of Parts I to III of that Schedule, including amendments for securing that no substance or product is for the time being specified in a particular one of those Parts or for inserting any substance or product into any of those Parts in which no substance or product is for the time being specified.

(3) An Order in Council under this section may amend Part IV of Schedule 2 to this Act, and may do so whether or not it amends any other Part of this Schedule.

(4) An Order in Council under this section may be varied or revoked by a subsequent Order in Council thereunder.

(5) No recommendation shall be made to Her Majesty in Council to make an Order under this section unless a draft of the Order has been laid before Parliament and approved by a resolution of each House of Parliament; and the Secretary of State shall not lay a draft of such an Order before Parliament except after consultation with or on the recommendation of the Advisory Council.” (Emphasis added)

3. Crucially, s2(5) is constructed in terms of what the Secretary of State “shall not” do rather than what the Secretary of State “may” or “shall” do. Further, there is no reference to the scope of the Secretary of State’s (“SSHD”) discretion and/or the manner of its exercise.<sup>1</sup>
4. Two questions re the SSHD’s s2(5) discretion are thus relevant:
  - 1) What material and relevant facts makes it the SSHD’s duty to “lay a draft Order”, under s2(5), “recommend[ing] to Her Majesty in Council to make an Order under [s2(2)]”?
  - 2) Similarly, when “may” the SSHD “lay a draft Order” under s2(5), “recommend[ing] to Her Majesty in Council to make an Order under [s2(2)]”?

#### Application to Hardison’s Case

5. At heart, Hardison claims that the SSHD’s *de facto* exemption of alcohol and tobacco from the Act’s controls denies equal protection to persons affected by alcohol and tobacco misuse and denies equal rights to persons, like Hardison, who produce and commerce controlled drugs for peaceful, amateur use.
6. Hardison does not contest the control of the drugs of his indictment under the Act; rather he contests the SSHD’s failure to seek equal “control” of the equally or more harmful psychoactive drugs alcohol and tobacco. The SSHD’s failure to act re the s2(5) discretion effectively exempts persons concerned with alcohol and tobacco from the Act’s criminal measures, thus creating the first inequality of treatment:
  - 1) a failure to treat like cases alike, *viz* the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis.
7. The second inequality occurs via ss7(1)-(2), 7(4), 22(a)(i) ~~et~~ 31(1)(a). These executive discretions re regulations are equally unfettered, so the point of law applies here too; however, for ease argument, the second inequality of treatment is omitted here.

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

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

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

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<sup>1</sup> Cf. s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975

Resultant Questions Relevant to Hardison’s Appeal

11. Is the matter justiciable? (See “Arguments in Support of Appeal”, pages 40 & 41)
  - 1) In *Notts CC v SS for the Environment* [1986] AC 240 at 250, Lord Scarman said:

“The courts can properly rule that a minister has acted unlawfully if he has erred in law as to the limits of his power even when his action has the approval of the House of Commons, itself acting not legislatively but within the limits set by a statute”.
12. Do the material and relevant facts enumerated at paragraphs 8-10 above confer a duty on the SSHD to lay a draft Order under s2(5), thus allowing Parliament to recommend that Her Majesty in Council make an Order under s2(2) re alcohol or tobacco?
  - 1) In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030, Lord Reid said:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court”.
13. Has the SSHD’s failure to lay a draft Order under s2(5) re alcohol and/or tobacco denied Parliament the opportunity to recommend that Her Majesty in Council make an Order under s2(2), thwarted the Act’s policy and caused Hardison to suffer the first inequality of treatment in terms of common law and the Human Rights Act 1998?
  - 1) In *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112, Justice Jackson said:

“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected”.
14. Is the inequality of treatment an abuse of power making Hardison’s conviction unsafe?

Prayer

15. Hardison requests that this Court answer the four questions enumerated above at paragraphs 11-14 in the affirmative and thus grant his appeal; or, alternatively, that this Court certify the point of law as a matter of general importance that ought to be considered by the Supreme Court and grant leave to appeal to the Supreme Court for consideration.

– *ab imo pectore, fiat lux!*

Signed .....  
Casey William HARDISON

Dated .....