



## CRIMINAL APPEAL ACT 1995

### STATEMENT OF REASONS FOR A DECISION NOT TO MAKE A REFERENCE TO THE COURT OF APPEAL

CCRC Reference:	<b>00687/2009</b>
Applicant:	<b>Mr Casey William Hardison HMP Wellingborough</b>
Applicant's Representatives:	<b>Mr D. Bickler Paradigm Legal Services / Drug Equality Alliance 48 Ridgeway Leeds LS8 4DF</b>

In the exercise of its powers under the Criminal Appeal Act 1995 ("the Act") the Criminal Cases Review Commission ("the Commission") has considered the application of Mr Hardison for review of his conviction and sentence.

The Commission has decided not to refer Mr Hardison's conviction and sentence to the Court of Appeal.

## Details of Conviction and Sentence

<b>Date:</b>	Convicted on 18 March 2005 Sentenced on 22 April 2005
<b>Court:</b>	Lewes Crown Court
<b>Offence</b>	<b>Sentence</b>
3 x Production of Class A drugs	20 years' imprisonment
1 x Possession of Class A drug with intent to supply	15 years' imprisonment (concurrent)
1 x Possession of Class A drugs	1 years' imprisonment (concurrent)
1 x Evasion of Prohibition on the export of drugs	7 years' imprisonment (concurrent)
<b>Total Sentence: 20 years' imprisonment</b>	

## Summary

- i. The Commission may refer a conviction to the Court of Appeal only if there is a real possibility that the conviction will be overturned. The reference must be based on some new evidence or argument that was not raised at trial or appeal, unless there are exceptional circumstances.
- ii. The Commission may refer a sentence to the Court of Appeal only if there is a real possibility that the sentence will be reduced. The reference must be based on some new information or an argument on a point of law that was not raised at trial or appeal.
- iii. Further details of the Commission's powers are outlined in Annex A.
- iv. Mr Hardison was notified on 30 March 2010 of the Commission's provisional view that there was no real possibility that this conviction or sentence would be overturned or reduced. Mr Hardison was given until 27 April 2010 to make further submissions to the Commission. This date was extended to 7 May 2010 by agreement with Mr Hardison.
- v. The Commission received further submissions on 7 May 2010. Having considered both the initial and further submissions the Commission has decided not to refer the conviction or sentence to the Court of Appeal. The Commission's decision is explained in the

vi. The position in relation to disclosure of material is set out in Annex B.

## **The Trial**

This section summarises the background to the case and the evidence and arguments put forward by the prosecution and defence at trial. It does not necessarily reflect the Commission's view of that evidence or of those arguments or indeed the applicant's assessment of the evidence or arguments as presented to the Commission.

1. Mr Hardison stood trial at Lewes Crown Court charged with five counts of producing Class A drugs, namely 2C-B, 2C-I, DMT, LSD and Mescaline (counts 1-5); one count of possessing a Class A drug with intent to supply, namely LSD (count 6); one count of possessing a Class A drug, namely 5-Methoxy DMT (count 7); and one count of being concerned in the fraudulent evasion of a prohibition on the export of goods, namely MDMA, more commonly known as ecstasy (count 8).
2. Mr Hardison pleaded not guilty to all eight counts on the indictment and chose to represent himself during the trial.
3. On 18 May 2005, following an eight week trial, Mr Hardison was convicted of six counts on the indictment (1, 3, 4, 6, 7 and 8) and acquitted of two counts (2 and 5).
4. On 22 April 2005 he was sentenced to concurrent terms of imprisonment on each count totalling a sentence of twenty years' imprisonment.

### **The prosecution case**

5. The prosecution case was that Mr Hardison, an American citizen, came to the United Kingdom (UK) in December 2001 and lived at a number of different addresses in the Sussex area. The prosecution alleged that during this time, Mr Hardison was involved in producing a number of Class A controlled drugs in a laboratory at his home address, and had been in possession of a Class A drug with intent to supply it to others. The prosecution also alleged that Mr Hardison had knowingly exported two packages containing MDMA (ecstasy) to the United States of America (USA).

### **The prosecution evidence**

6. At trial, the court heard evidence that officials in the USA had intercepted two packages sent from the UK. The packages were found to contain MDMA (ecstasy) and were traced back to having been sent by Mr Hardison on 8 July 2003. This is the subject of count 8 on the indictment.
7. The court heard that as a result of this, Sussex Police instigated 'Operation Pathfinder' which led to Mr Hardison's arrest on 11 February 2004.

8. Evidence was given that after Mr Hardison's arrest, the police searched his home address which revealed a fully functioning chemistry laboratory and a garage store of chemicals. Dr Griffin, an expert from the Forensic Science Service, told the court that following his analysis of many of the materials found at the address, he had reached the conclusion that Mr Hardison had produced a total of six Class A drugs at the premises, five of which formed the subject of counts 1-5 on the indictment. The prosecution decided not to proceed with a charge in relation to the sixth drug.
9. The court heard evidence from the police that a further search of the premises was conducted a few days later and this revealed 145,000 doses of LSD, impregnated into sheets of blot art paper, found in a cupboard at the address. The prosecution alleged that Mr Hardison had been knowingly in possession of the LSD with intent to supply it to others. This formed count 6 on the indictment.
10. The police told the court that a small quantity of another Class A drug, 5-Methoxy-DMT, was found in a bedside cabinet and this was the subject of count 7 on the indictment.

### **The defence case**

11. In relation to count 8, Mr Hardison accepted that he had sent the two packages to the USA, but denied any knowledge that the packages contained drugs.
12. Mr Hardison denied producing 2C-I and Mescaline (counts 2 and 5).
13. Mr Hardison accepted producing LSD but stated that this had been whilst he was outside the jurisdiction of the UK (count 4).
14. Mr Hardison denied any knowledge of the LSD found in the cupboard at his address and therefore denied any intention to supply it to others (count 6).
15. Mr Hardison accepted that he was a skilled and experienced chemist and accepted producing the drugs 2C-B (count 1) and DMT (count 3) and accepted being in possession of 5-Methoxy-DMT (count 7). In relation to these three counts, the basis of Mr Hardison's defence was that he believed he was the victim of a war on drugs which was contrary to his human rights. Whilst he accepted the facts alleged by the prosecution in relation to these three counts, he denied any guilty state of mind or criminal intent

## **The defence evidence**

16. Mr Hardison gave evidence to the court and also adduced expert evidence from Dr Aitken regarding the findings of Dr Griffin. Dr Aitken agreed with Dr Griffin that 2C-B had been produced (count 1) but stated there was nothing to suggest 2C-I had been produced in the laboratory (count 2). In respect of the production of mescaline (count 5) he noted that there was the absence of a crucial ingredient required for production of this drug.
17. Initially, Dr Aitken did not express an opinion either way as to whether or not LSD had been produced at the laboratory, however after seeing the laboratory notebook he agreed that there was adequate evidence that LSD had been produced (count 6).
18. He said that there was conclusive evidence that DMT had been produced (count 3) but it was not in a saleable form and it was probable that Mr Hardison had not realised that he had produced it.

## **Legal arguments and rulings**

19. Mr Hardison made a number of legal applications prior to his trial. Of relevance to his application to the Commission is his abuse of process argument which concluded on 13 January 2005 with the Judge ruling against Mr Hardison.
20. In his abuse of process argument, Mr Hardison contended that as a drug user, he was demonised in society and that his basic Human Rights had been violated by his arrest, detention and prosecution, and that the continuation of the legal process within the context of the Criminal Justice system within England and Wales was a continuing violation of his Human Rights under Articles 3, 8, 9, 10, 14, 17, 18 and Protocol 1, Article 2 of the Human Rights Act 1998.
21. For this reason, Mr Hardison applied to the judge to stay the proceedings and to direct an acquittal on all charges.
22. The Judge rejected each and every one of Mr Hardison's arguments concluding that the Misuse of Drugs Act 1971 did not infringe Mr Hardison's human rights.

## The Appeal

This section summarises the arguments raised on appeal and the outcome of the appeal.

23. On 25 May 2006, Mr Hardison renewed an application for leave to appeal against conviction after refusal by the Single Judge. Mr Hardison relied on a number of grounds of appeal all of which were rejected. The grounds relevant to this application can be summarised as follows:

- The application of the Misuse of Drugs Act 1971 in this case contravened Mr Hardison's Human Rights under Articles 3, 6, 8, 9, 10, and 14 of the Human Rights Act;
- The Trial Judge's failure to treat the argument regarding breach of human rights as a preparatory hearing wrongly deprived Mr Hardison of the opportunity to seek an interlocutory appeal.

24. The Court of Appeal rejected these grounds and gave the following reasons:

- The Trial Judge was correct to reach the conclusion, and direct the jury, that Mr Hardison's Human Rights arguments did not afford him a defence in law.
- Even if the judge had held a preparatory hearing in respect of the human rights argument, the judge would still have ruled, correctly, that Mr Hardison's human rights arguments did not amount to a defence in law.

25. Mr Hardison also appealed against his sentence with leave of the Single Judge and relied upon the following grounds:

- The totality of the sentence was manifestly excessive;
- The individual sentences imposed were manifestly excessive;
- The Judge overstated the gravity of the case;
- The Judge erred in his findings with regard to the aggravating features of the case;
- The Judge failed to take into account the extent to which the offences of production lacked sophistication;
- The Judge failed to take sufficient account of the applicant's personal circumstances, antecedents and background.

26. The Court of Appeal acknowledged that sentences totalling twenty years' imprisonment must be reserved for cases of the utmost gravity,

but they took the view that the Judge was right to treat Mr Hardison's case in that way. They agreed that the sentences were very tough,

27. On 17 October 2006, the Court of Appeal declined to certify the following five points of law for the House of Lords as requested by Mr Hardison:

- Can inferences, drawn from the UN drug Conventions, demonstrate a 'pressing social need' justifying interference with Mr Hardison's Convention rights?
- Was Mr Justice Keith correct to place Mr Hardison's case within the ambit of Article 8?
- Is the Misuse of Drugs Act 1971 neutral in principle and therefore of general applicability?
- Is there an objective and reasonable justification for the disparity of treatment and denial of equal rights and protection resulting from the application of the Misuse of Drugs Act 1971?
- Is Mr Hardison's sentence of 20 years' imprisonment proportionate to the gravity of the acts committed? If not, should the sentence be varied?

28. Following the conclusion of the criminal proceedings, Mr Hardison made an application seeking leave to apply for a Judicial Review of the decision made by the Secretary of State not to review the classification system under the Misuse of Drugs Act 1971<sup>1</sup>. Mr Hardison submitted that the Secretary of State's decision was contrary to the recommendations made in reports by the Advisory Council on the Misuse of Drugs<sup>2</sup> and the Parliamentary Science and Technology Committee's report<sup>3</sup>. Mr Hardison argued that those three documents provided overwhelming proof that classification decisions are not based on the objective risks drugs pose to society, but are based upon an unrecognised form of unconscious discrimination.

29. On 31 August 2007, the High Court of Justice, Queen's Bench Division, dismissed Mr Hardison's application stating that there was not "...any grain of basis for a challenge."<sup>4</sup> Beaston J went on to say that "Sullivan J considered this case to be totally without merit ... I entirely agree with that."<sup>5</sup>

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<sup>1</sup> The decision is stated at page 5, paragraph 12 of the Introduction to the document: 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?' October 2006 (Cm 6941).

<sup>2</sup> *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, September 14 2006

<sup>3</sup> *Drug Classification: making a hash of it?*, July 31 2006, HC 1031

<sup>4</sup> High Court Judgment paragraph 11.

<sup>5</sup> High Court Judgment paragraph 12

30. Mr Hardison also applied to the European Court of Human Rights (ECtHR) in February 2007 seeking a declaration of incompatibility in relation to the Misuse of Drugs Act 1971<sup>6</sup>.

31. On 27 February 2007, the ECtHR wrote to Mr Hardison informing him that his application was inadmissible as it “did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols”<sup>7</sup>.

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<sup>6</sup> Albeit that it is not within the power of the ECtHR to grant this remedy.

<sup>7</sup> Letter from the ECHR to Mr Hardison dated 27 February 2007 (Application number 37238/05)

## **The Applicant's Submissions**

32. Mr Hardison applied to the Commission for a review of both his conviction and sentence in an application dated 7 September 2009, which was received by the Commission on 9 September 2009.
33. Mr Hardison has made detailed submissions to the Commission accompanied by a number of documents in support of his arguments, all of which have been considered by the Commission during the course of its review. A detailed list of the material that has been considered can be found in "The Commission's Review" section of this Statement of Reasons.
34. In summary, Mr Hardison seeks the following:
- A referral of his convictions under section 9(1)(a) of the Criminal Appeal Act 1995 as new documentary evidence reveals an abuse of power in the way the Government has applied the Misuse of Drugs Act 1971 rendering his convictions unsafe;
  - A point of law to be referred to the Court of Appeal under section 14(3) of the Criminal Appeal Act 1995;
  - An investigation into his case by the Commission, including seeking disclosure of Government documents;
  - In the event that the Commission does not refer Mr Hardison's conviction, a referral of his sentence under section 9(1)(b) of the Criminal Appeal Act 1995 as the sentence imposed was disproportionate and "manifestly absurd".
35. Mr Hardison's submissions are analysed in more detail in the "Analysis and Reasons" section of this Statement of Reasons.

## **The Commission's Review**

36. In the course of its review the Commission has considered the following material:

### **Crown Court Documents**

- Abuse of Process ruling – 13 January 2005
- Summing-up – 16 March 2005
- Sentencing remarks – 22 April 2005

### **Appeal Documents**

- Notice and Grounds of Appeal – 1 November 2005
- Single Judge form – 13 February 2006
- Court of Appeal summary
- Court of Appeal judgment – 25 May 2006
- Judgment refusing leave to refer a point of law to House of Lords – 17 October 2006
- High Court Judgment dismissing application for leave to Judicially Review the Secretary of State – 31 August 2007

### **Mr Hardison's Documents**

- Mr Hardison's application form – 7 September 2009;
- Correspondence dated 7 September 2009, 17 September 2009, 17 November 2009, 16 December 2009, 25 February 2010, 10 March 2010, 23 March 2010.
- Briefing paper 10 – October 2009 – Estimating drug harms: a risky business? Professor David Nutt, Eve Saville Lecture 2009;
- Letter of instruction to Dr Nutt – 13 December 2009;
- Letter to Professor Leslie Iverson (Advisory Council on the Misuse of Drugs) – 10 February 2010
- Grounds for CCRC prioritisation – 16 December 2009;
- CCRC bundle & CD including:
  - Draft Grounds of Appeal – 8 August 2009;
  - The Point of Law – 8 August 2009;
  - Argument in support of grounds – 8 August 2009;
  - Statement of facts – 8 August 2009;
  - The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-
  - Home Office response to better regulation executive – 27 September 2007.
- Skeleton Defence Arguments pursuant to the ECHR – 1 January 2005;

- The amplified version of the above document – 1 January 2005.
- Mr Hardison’s website containing documents relating to the criminal proceedings, Judicial Review applications and application to the ECtHR.
- Letter from the Information Commissioner’s Office dated 9 March 2010

37. In the course of its review the Commission has had access to the Crown Prosecution Service file, however, given the nature of Mr Hardison’s submissions, the Commission has not considered it necessary to review this material in any detail.

## **Analysis and Reasons**

38. By section 13 of the Act, a reference shall not be made unless the Commission considers that there is a real possibility that the conviction would not be upheld, or the sentence reduced, were the reference to be made. By the same section, this consideration must be reached in respect of conviction because of argument or evidence, and in respect of sentence because of information or argument on a point of law, not raised in the proceedings which led to the conviction or sentence or any appeal or application for leave to appeal.
39. In determining whether new evidence should be received, the Court of Appeal will consider whether it is necessary or expedient in the interests of justice to do so, and have regard to the criteria laid down in s.23(2) of the Criminal Appeal Act 1968, as amended. The Court of Appeal will 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 new evidence would have been admissible in the proceedings from which the appeal lies; and
  - d. whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.
40. It is on the basis of these statutory provisions that the Commission has considered the issues raised by Mr Hardison. Those issues and the Commission's reasons are set out below.

## **Safety of Convictions**

41. In relation to the safety of his convictions, Mr Hardison states that the grounds he relies upon in his application are unrelated to the issue of guilt or innocence.
42. Mr Hardison states that since his appeal in May 2006, new documentary evidence in the form of a Government document<sup>8</sup>, (hereinafter referred to as *CM 6941*) shows that his convictions are 'unsafe' as it reveals an abuse of discretionary power by the Government in the way it administers the Misuse of Drugs Act 1971.

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<sup>8</sup> 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?' October 2006 (Cm 6941).

43. Mr Hardison argues that illegality, irrationality and unfairness have caused the Government to apply the Misuse of Drugs Act unequally by exempting alcohol and tobacco from control under the Act. He states that in document *CM 6941*, the Government defends its actions on grounds that are subjective, incoherent and not rationally connected to the Act's policy or objectives.
44. Mr Hardison argues that this unequal application leads to a severe inequality of treatment which manifests itself in two ways:
- a. A failure to treat like cases alike, namely, not applying the Misuse of Drugs Act to people who use alcohol and tobacco which are equally harmful as controlled drugs;
  - b. A failure to treat unlike cases differently, namely, treating people involved in peaceful activities with controlled drugs.
45. Mr Hardison submits that these inequalities of treatment amount to:
- a. Unequal deprivations of the common law rights of liberty, security and property, namely:
    - those who commerce or produce controlled drugs are denied the same rights as are available to those who commerce or produce alcohol and tobacco, and;
    - the public are not given equal protection from the harmful effects of alcohol and tobacco misuse as they are from the effects of controlled drugs.
  - b. Discrimination contrary to Article 14 of the Human Rights Act 1998 causing breaches of:
    - Article 5 – the right to liberty;
    - Article 8 – the right to private life;
    - Article 9 – the right to freedom of thought;
    - Article 1, protocol 9 – the right to protection of property.
46. The main crux of Mr Hardison's submissions to the Commission is that had document *CM 6941* been available at the time of his trial, it would have been evidence that was capable of discharging the evidential burden upon him in his abuse of process argument and would have persuaded the Judge to stay the proceedings against him. The trial would therefore not have taken place and so his convictions are 'unsafe'.
47. The Commission has considered these submissions alongside document *CM 6941* and takes the view that whilst the document is

new evidence that has not previously been raised in the proceedings, the argument that this document is being used to support is not new. The submissions made by Mr Hardison are, in essence, the same as those advanced before the Trial Judge in his abuse of process argument; as part of his defence at trial; in the grounds of his

48. These arguments have been rejected at each and every juncture throughout the proceedings.
49. In addition, although not part of the same proceedings, this argument has also been rejected by the High Court following Mr Hardison's application for Judicial Review, and by the ECtHR following Mr Hardison's application<sup>9</sup>. This further confirms that Mr Hardison's submissions are considered by the courts to be entirely without merit
50. The Commission has considered the reasons given by the Trial Judge, the Court of Appeal, and the High Court when rejecting Mr Hardison's arguments, the pertinent parts of which are set out below.

### **The Trial Judge**

51. In his ruling on Mr Hardison's Abuse of Process argument on 13 January 2005, the Trial Judge asked Mr Hardison to "...resist the temptation of using [the] court as a platform from which to express his personal views and beliefs".<sup>10</sup>
52. The Judge rejected Mr Hardison's application, stating that having considered all of the written material presented to him, he had "come to the sure and clear conclusion" that Mr Hardison's arguments were "misconceived" and therefore the Judge rejected "each and every one" of Mr Hardison's Human Rights arguments.<sup>11</sup>
53. The Judge gave the following reason for reaching this conclusion:

"Parliament in the United Kingdom is sovereign. The Misuse of Drugs Act 1971 is a Statute, an Act of Parliament which is binding upon every citizen of, and visitor to, this country. It is binding upon the courts."<sup>12</sup>

"The [Misuse of Drugs] Act itself, and the individual provisions of the Act, do not...infringe Mr Hardison's Human Rights as

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<sup>9</sup> Application number 37238/05

<sup>10</sup> Abuse of process ruling – 5D-E

<sup>11</sup> Abuse of process ruling – 9C

<sup>12</sup> Abuse of process ruling – 9D

properly interpreted within the context of the European Convention.”<sup>13</sup>

54. Under Article 14 of the ECHR, as enacted into UK law by the Human Rights Act 1998, the Judge found that:

“...there is no discrimination of Mr Hardison, or any other group, other than those from whatever background, who choose to disobey the law.”<sup>14</sup>

55. The Judge went on to say:

“I am the judge of the law. It is no part of my function, or any court’s function, to engage in philosophical debate, or to make decisions based upon arguments relating to the efficacy, or otherwise, of any particular enactment of the Legislature. Nor is it my function to make moral judgments one way or the other. I must apply the law in my decision and direct the jury, in due course, to apply the law in making their decisions.”<sup>15</sup>

56. In light of these clear and unequivocal comments from the Judge, the Commission does not agree with the submission put forward by Mr Hardison that, had document *CM6941* been available at the time, the Judge would have stayed the proceedings against Mr Hardison. The Judge, having had regard to “a volume of technical and other literature and information” presented by Mr Hardison, was clearly of the view that no part of the Misuse of Drugs Act 1971 involved an infringement of any of Mr Hardison’s human rights. The Commission therefore concludes that had document *CM 6941* been available at the time, it would not have had any bearing on the decision made by the Judge.

### **The Appeal Court**

57. The Court of Appeal clearly supported and endorsed the Trial Judge’s ruling on the abuse of process argument by saying:

“The criminalisation of what [Mr Hardison] did was said to be an infringement of his and everyone else’s human right to have autonomy over their own person. The judge was unimpressed by this argument. He told the jury that it was not a defence in law.

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<sup>13</sup> Abuse of process ruling – 9F

<sup>14</sup> Abuse of process ruling - 14E

<sup>15</sup> Abuse of Process Argument 15E-G

In our judgment, the judge was right to reach that conclusion for the reasons which he gave. Although [Mr Hardison] has filed reams of material challenging that ruling on this application for leave to appeal, we do not regard it as necessary to address his argument in any detail. If there is any Convention right which is properly engaged by this argument, it is that which guarantees the right to respect for one's private life. But as this Court was to say in *Taylor (Paul)* [2002] 1 Cr.App.R. 519, in which the appellant argued that the consumption of cannabis was part of his religion and was used as an act of worship, the prohibitions contained in the Misuse of Drugs Act 1971 did not amount to an unwarranted interference with the appellant's rights to a private life or to his freedom to practice his religion. They were part of this country's policy to combat the dangers of narcotic drugs to public health which included international treaty obligations".<sup>16</sup>

58. It is clear to the Commission that the Court of Appeal did not find any merit in Mr Hardison's application. Given that the "reams of material" already supplied by Mr Hardison did not persuade the Court of Appeal to agree with Mr Hardison's argument, the Commission concludes there is no reason to believe that document *CM 6941* would alter their position.
59. Furthermore, where there is 'new evidence' that has not previously been raised in proceedings, the Commission has to consider the likelihood that the Court of Appeal would agree to receive the new evidence if the Commission were to refer the case. Under section 23(2)(b) of the Criminal Appeal Act 1968, one of the factors the Court of Appeal should have regard to, is whether the evidence may afford any ground for allowing the appeal.
60. In considering this issue, the Commission notes the comments made by the Court of Appeal when dismissing Mr Hardison's application for leave to appeal against his conviction:
- "...we do not regard any of the grounds as having sufficient merit to justify granting the appellant leave to appeal against his convictions..."<sup>17</sup>
61. The Commission takes the view that document *CM 6941* does not add any merit or substance to Mr Hardison's argument and would therefore not afford him any grounds that would persuade the Court of Appeal to allow an appeal. There can therefore be no likelihood that the Court of

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<sup>16</sup> Court of Appeal judgment paragraphs 9-10

<sup>17</sup> Court of Appeal judgment paragraph 23

62. Moreover, the Commission believes that the Court of Appeal would be unwilling to receive any new evidence from Mr Hardison if the evidence simply goes to support the same arguments that have been raised and rejected previously in the proceedings. This is because the basis of Mr Hardison's argument does not affect the safety of his conviction.

### **Declaration of Incompatibility**

63. The Misuse of Drugs Act 1971 is a duly enacted Act of Parliament. The Trial Judge ruled that it did not breach any Convention rights; the Court of Appeal affirmed this; as did the ECtHR.

64. The Commission concludes that even if the Misuse of Drugs Act was found to infringe Mr Hardison's Convention rights, the only remedy available to Mr Hardison would be a Declaration of Incompatibility from the Court of Appeal (the Trial Judge not being empowered to grant this). Such a declaration would not affect the ongoing obligation of the courts to enforce the existing law

65. That being the case, the Commission would not refer a case to the Court of Appeal for it to make a Declaration of Incompatibility as even if it did, the court would not quash Mr Hardison's convictions. Nor would the Trial Judge have been able to stay the prosecution as an abuse of process, as the Misuse of Drugs Act would remain the law until such time as the Government, under the Human Rights Act 1998, decided how to respond to the Declaration of Incompatibility.

66. Even if the Government decided to amend the legislation in relation to drug classification, this would not have retrospective effect and could not therefore affect the safety of Mr Hardison's convictions.

67. In any event, there is nothing in *CM 6941* that points to any incompatibility. The Commission is reinforced in this view by the judgment of the Administrative Court of 31 August 2007 of Beatson J.<sup>18</sup> The Commission is satisfied that there is no real possibility that the

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<sup>18</sup> At paragraph 11 he stated:

"I turn to the arguments based on the combination of Article 1 Protocol 1 and Article 14 of the Convention. The failure to review the classification does not of itself affect the prohibitions in the Misuse of Drugs Act 1971. The failure does not arguably violate Article 1 Protocol 1 given the breadth of paragraph 2 of that Article. Paragraph 2 entitles the State to deprive a person of possessions in the public interest and subject to conditions provided for by law. A wide margin is given by the Strasbourg Court to national authorities in deciding what is in the public interest. It is clear that the Misuse of

Court of Appeal, faced with essentially the same argument, would arrive at any different decision. This being the case, the document would not be received by the Court of Appeal as it neither supports an argument for a declaration nor, more particularly, could it provide any basis for quashing Mr Hardison's convictions if referred to the Court of Appeal.

68. Furthermore, Mr Hardison has recently applied to the Information Commissioner's Office seeking disclosure from the Home Office<sup>19</sup> of a copy of a draft consultation document relating to a review of the UK drugs classification system.
69. Mr Hardison argues that this document will further show that the Secretary of State knew at the time of his conviction, sentence and appeal, that the drug classification was arbitrary and not evidence based and is therefore not consistent with the object and purpose of the Misuse of Drugs Act 1971.
70. The Commission has considered the potential relevance of this document and, in light of the decision made by the High Court in relation to Mr Hardison's application for Judicial Review, the Commission concludes that this document would be treated in the same manner as document *CM 6941* and would have no bearing on the safety of Mr Hardison's convictions.
71. For these reasons, the Commission has reached the view that there is no real possibility that the Court of Appeal would not uphold Mr Hardison's conviction were a reference to be made in relation to this issue.

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Drugs Act 1971 and the allied confiscation legislation makes provision for the deprivation of possessions by law. In the light of the wide margin of discretion, the fact that the prohibition of certain substances but not others is very common throughout the states subject to the European Convention, and indeed elsewhere, it is not arguable that the failure to review the position with a view either to removing certain matters from the 1971 Act or bringing in alcohol and/or tobacco is a violation of this provision. Mr Hardison bases his claim not just on Article 1 but on its combination with Article 14. It is the discrimination, he alleges, between the position of those who wish to use drugs which are proscribed and those who wish to use alcohol and/or tobacco which causes the breach. It is important to remember that the Article 14 right is not a freestanding right but is only engaged in regard to enjoyment of rights and freedoms guaranteed by the Convention. The status of being a person who wishes to use drugs, to put the matter in its most neutral form, is not one of the statuses recognised as protected by Article 14, and I do not consider that it is arguable that, taken together with Article 19 the First Protocol, there is any grain of a basis for a challenge."

<sup>19</sup> Under the Freedom of Information Act 2000

## **Referral to a Point of Law**

72. In his application, Mr Hardison requests that the Commission refers the following point of law to the Court of Appeal under section 14(3) of the Criminal Appeal Act 1995:

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

73. Section 14(3) of the Criminal Appeal Act 1995 provides that when considering whether to make a reference under section 9 or 10 of the same Act, the Commission may at any time refer to the Court of Appeal, any point on which they desire the Court of Appeal’s assistance or opinion.

74. The purpose of the Commission’s review of Mr Hardison’s case is to consider whether there is any new evidence or argument that would create a real possibility that the Court of Appeal would not uphold Mr Hardison’s conviction or that they would reduce his sentence. The Commission does not consider that the question of law posed by Mr Hardison has any bearing on the safety of his conviction, or the length of his sentence, and therefore it is not necessary for the Commission

75. In any event, the Court of Appeal has already ruled upon this issue, declining Mr Hardison’s application to certify five points of law for the House of Lords on 17 October 2006. The point of law posed by Mr Hardison in his application to the Commission is simply a restructured version of those five points previously put before the Court of Appeal. The Commission therefore concludes that there is no new evidence or argument advanced by Mr Hardison that gives rise to a real possibility that the Court of Appeal would not uphold his conviction or reduce his sentence in relation to this issue.

## **Investigation and disclosure**

76. Mr Hardison requests that the Commission conducts all necessary investigations in relation to his case including exercising its powers under section 17 of the Criminal Appeal Act 1995 to seek disclosure of Government documents relating to the administration of the Misuse of

Drugs Act 1971, particularly the exclusion of alcohol and tobacco from control under the Act.

77. Section 17 of the Criminal Appeal Act 1995 gives the Commission the power to obtain documents or other material from a public body which the Commission believes may assist in the exercise of any of its functions. The Commission may require disclosure of this material where it is reasonable to do so.
78. The Commission has decided not to exercise its powers under this section as it does not consider that Government documents relating to the administration of the Misuse of Drugs Act 1995 would have any relevance or bearing on the safety of Mr Hardison's conviction, or the length of his sentence.
79. It follows that disclosure of these documents would not assist the Commission in the exercise of any of its functions and therefore it would not be a reasonable use of the Commission's powers to request this information.

## **Sentence**

80. Mr Hardison seeks a review of his sentence on the basis that it is disproportionate when compared to cases involving gun production and commerce and refers to the cases of *Alexander*<sup>20</sup> and *Wilkinson*<sup>21</sup>.
81. The Commission has considered these cases but does not regard them as having any relevance to Mr Hardison's case since they relate to offences of an entirely different nature and category to the offences of which Mr Hardison was convicted. The Commission therefore takes the view that it is not appropriate to use these cases as a comparison when considering the proportionality of Mr Hardison's sentence.
82. A more appropriate analogy would be to compare Mr Hardison's sentence to other cases involving a similar level of production and commerce of Class A controlled drugs. The Court of Appeal took this approach when considering Mr Hardison's appeal against sentence and endorsed the Sentencing Judge's consideration of the case of *Kemp*<sup>22</sup> which was a case that arose out of Operation Julie and resulted in a large number of people being convicted of conspiracy to produce LSD. The Court of Appeal found that the criminality of Mr Hardison equated with the criminality of the individual members of the

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<sup>20</sup> *R v Paul Alexander* [2009] Chelmsford CC

<sup>21</sup> *R v Wilkinson & Others* [2009] EWCA Crim 1925

<sup>22</sup> *Kemp* (1979) 69 Cr.App.R. 330

conspiracy which Operation Julie exposed and agreed with the resulting sentence of twenty years' imprisonment imposed by the Judge.

83. Mr Hardison further submits that his activities in no way merited the culpability and seriousness suggested by a twenty year sentence and he refers to the case of *Kennedy*<sup>23</sup> arguing that this case suggests he is not culpable for the possibility of harm that may result from the use, by consenting adults, of drugs he has produced or commerced.
84. The Commission has considered the case of *Kennedy* and again concludes that this is not an appropriate analogy to make. The case of *Kennedy* relates to an offence of manslaughter and deals with the question of whether a person can be guilty of the offence of manslaughter if they have supplied Class A drugs to a person, the self-administration of which by that person, results in that person's death. The sentence imposed for the offence of supplying Class A drugs was not considered as an issue at appeal, and therefore the Commission concludes that this is not a case that can be of any relevance to Mr Hardison's case since again, it relates to an offence that is different in both nature and category and provides no guidance on sentencing.
85. The Commission takes the view that the conclusions drawn by Mr Hardison can not properly be reached when considering the specific facts of the individual cases he refers to.
86. The Commission has considered the case of *De Havilland*<sup>24</sup> in which the Court of Appeal expressed their views in relation to the application of sentencing guidelines drawn from previous case law. In their judgment, the Court of Appeal stated that:

“...the appropriate sentence is a matter for the discretion of the sentencing judge. ...[T]he circumstances of the offence and of the offender present an almost infinite variety from case to case. As in any branch of the law which depends on judicial discretion, decisions on sentencing are no more than examples of how the Court has dealt with a particular offender in relation to a particular offence. As such they may be useful as an aid to uniformity of sentence for a particular category of crime; but they are not authoritative in the strict sense. Occasionally this Court suggests guidelines for sentencers dealing with a particular category of offence or a particular type of offender. Each case depends on its own facts.”

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<sup>23</sup> *R v Kennedy (No.2)* [2008] 1 AC 269, HL

<sup>24</sup> *R v De Havilland* (1983) 5 Cr.App.R.(S.) 109

87. In light of this judgment, the Commission takes the view that the Court of Appeal would not look favourably on Mr Hardison's submissions in relation to sentence and would not be minded to reduce his sentence on the basis of the comparisons made with cases of an entirely different nature.

88. Finally, Mr Hardison also submits that his sentence is "manifestly absurd" considering that he was undertaking identical commerce activities to those of an alcohol brewer or tobacco grower.

89. Again, the Commission does not agree that this is an appropriate comparison to make. Mr Hardison was sentenced under the law prevailing at the time (and the law which still prevails now), which is that the production of, and commerce in, controlled drugs is illegal in the United Kingdom and punishable on conviction to a term of imprisonment. The production of, and commerce in, alcohol and tobacco are not illegal activities as long as they are carried out within the regulations set by the Government.

90. The Court of Appeal made its views abundantly clear on issues of this nature in the case of *Graham*<sup>25</sup> when they stated:

"A defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as the victim of [a miscarriage of justice]."

91. The Court of Appeal has already considered the appropriateness of the length of Mr Hardison's sentence and, whilst it was agreed that sentences of twenty years' imprisonment should be reserved for cases of the utmost gravity, they took the view that the Sentencing Judge was correct to treat Mr Hardison's case in this way and upheld the sentence imposed.

92. The Commission therefore concludes that there is no new information or argument raised that would persuade the Court of Appeal to alter their view in relation to the length of sentence, and therefore there is no real possibility that the Court of Appeal would reduce Mr Hardison's sentence if the Commission were to refer his case.

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<sup>25</sup> *R v Graham* [1999] 2 Cr App R (s) 312

## **Further Submissions**

93. On 30 March 2010, Mr Hardison was informed that the Commission had reached a provisional view that there was no real possibility that his conviction or sentence would be overturned or reduced if they were referred to the Court of Appeal. Mr Hardison was offered the opportunity to make further submissions in response by 27 April 2010. This date was extended to 7 May 2010 by agreement with Mr Hardison.
94. Further submissions from Mr Hardison were received on 7 May 2010. These further submissions are analysed in detail in the “Further Analysis and Reasons” section of this document and can be summarised as follows:
- There are a number of errors in the Commission’s legal analysis of Mr Hardison’s application.
  - The Commission has failed to properly consider Mr Hardison’s Common Law arguments in light of the new evidence presented;
  - Mr Hardison concedes that his Human Rights arguments cannot affect the safety of his convictions, but nevertheless requests that the Court of Appeal forensically examines his argument in the event that the Commission refers his case;
  - There is additional new evidence in the form of a document entitled ‘Pathways to Problems: A follow up report on the implementation of recommendations from *Pathways to Problems*’, which Mr Hardison submits supports his submissions;
  - The Commission should use its powers under section 17 of the Criminal Appeal Act 1995 to seek disclosure of Government documents relating to the administration of the Misuse of Drugs Act 1971;
  - Mr Hardison’s sentence is disproportionate when taking into account the Common Law inequalities of treatment alleged.

## **Further Analysis and Reasons**

95. The Commission has fully considered the further submissions made by Mr Hardison. The Commission's analysis and reasoning in relation to the further submissions is set out below.

### **Errors in legal analysis** **Conflation of arguments**

96. Mr Hardison submits that the Commission has mistakenly conflated his Common Law and Human Rights arguments. Mr Hardison asserts that they are distinct branches and must be considered separately.

97. The Commission rejects this submission. The Commission is of the view that there is in essence, only one argument advanced by Mr Hardison: namely, that the exemption of alcohol and tobacco from the Misuse of Drugs Act 1971 is an executive abuse of power which creates inequalities of treatment. Mr Hardison submits that this inequality causes his convictions to be unsafe and his sentence manifestly excessive and disproportionate.

98. It is possible to advance this argument under either the Common Law rule of equality of treatment, or Article 14 of the Human Rights Act 1998 (the prohibition against discrimination).

99. Whilst the Commission recognises that these are two distinct branches, the argument that underpins them remains the same.

100. In his application for Judicial Review, Mr Hardison considers "Equality under the Rule of Law and the Prohibition of Discrimination" and states:

"Notwithstanding the availability - and potentially wider scope - of the Common Law principles of equal protection and equal treatment under the Rule of Law, attention has inevitably shifted in England since the coming into effect of the Human Rights Act 1998 to the more limited yet better defined 'Prohibition of

Discrimination' afforded by Article 14 of the European Convention on Human Rights"<sup>26</sup>

101. Mr Hardison thereby chose to advance his argument under the "better defined" Human Rights Act as opposed to the Common Law. The fact that he now chooses to advance his argument under both the Common Law and the Human Rights Act, does not alter the substance of the underlying argument in relation to inequality of treatment.
102. The Commission takes the view that whichever branch Mr Hardison seeks to advance his argument under, it does not affect the safety of his conviction or the length of his sentence. The Commission refers to the view expressed by the Administrative Court when rejecting Mr Hardison's application: that the failure of the Government to review the classification system, or indeed to prefer a separate system of regulation for substances not prohibited by the Act, does not affect the prohibitions already in existence.<sup>27</sup>
103. The Commission therefore finds that there are no grounds upon which to refer to Mr Hardison's case, either in respect of the Common Law argument or the Human Rights Argument.

**Jurisdiction**

104. Mr Hardison submits that the Commission is wrong at paragraph 56 of the Provisional Statement of Reasons, to seek to bring Mr Hardison's Common Law arguments back under the jurisdiction of the Trial Judge. Mr Hardison submits that any jurisdiction to stay the criminal proceedings now lies with the Court of Appeal.
105. The Commission does not seek in paragraph 56 to bring Mr Hardison's Common Law arguments back under the jurisdiction of the trial judge. The Commission recognises that any jurisdiction to consider a stay of the criminal proceedings now lies with the Court of Appeal. However, when considering whether to refer Mr Hardison's case back to the Court of Appeal, the Commission must consider whether there is a real possibility that the Court of Appeal would find that the conviction is unsafe. The Commission has therefore considered the approach the Court of Appeal is likely to take, and in doing so, has had regard to the previous decisions made in respect of this case.
106. A strong indication that the Court of Appeal would reject the arguments put forward by Mr Hardison is the fact that the Court of Appeal has already endorsed the view taken by the Trial Judge in the Abuse of

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<sup>26</sup> Draft statement of claim for Judicial Review – 18 February 2007, page 9 paragraph 49

<sup>27</sup> Administrative Court judgment, 31 August 2007, paragraphs 10 -11.

Process Ruling. Whilst the Common Law strand of the argument was not raised at the abuse of process hearing, the essence of the argument that was put forward remains the same.

107. The purpose of referring to this ruling at paragraph 56 is to demonstrate the likelihood that the Court of Appeal would similarly reject the arguments raised by Mr Hardison in his application to the Commission.

### **The Point of Law**

108. Mr Hardison submits that the Commission is wrong to declare at paragraph 75 that “the point of law posed by Mr Hardison in his application...is simply a restructured version of the five points previously put before the Court of Appeal”. Mr Hardison states that they are incomparable and bear no resemblance to each other.
109. The Commission refers Mr Hardison to his Statement of Facts<sup>28</sup> which states: “As a result of *CM 6941*, Hardison can now state the 5 Points of Law as one”. From this, the Commission understands that Mr Hardison has restructured his arguments into one single point as opposed to the five points previously advanced.
110. Mr Hardison further submits that the Commission has not properly considered the Point of Law posed by Mr Hardison in his application and requests that the Commission refer the Point of Law to the proper Court for consideration.
111. The Commission has fully considered the Point of Law posed by Mr Hardison and its analysis is set out in paragraphs 72-75 of the Provisional Statement of Reasons. The Commission remains of the view that the Point of Law posed has no bearing on the safety of Mr Hardison’s conviction, or the length of his sentence, and therefore the Commission has no grounds upon which to refer his case to the Court of Appeal in relation to this issue.

### **Common Law argument and document CM 6941 Failure to consider properly**

112. Mr Hardison states that beyond mere assertion, the Commission has not properly considered his Common Law claims and has failed to consider the new evidence presented, in particular page 24 of *CM 6941*. Mr Hardison submits that there are six sentences in document *CM 6941* which are crucial in determining whether the Government has abused

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<sup>28</sup> Statement of Facts, Appeal Against Conviction, 8 August 2009 – page 5, paragraph 13

the power under the Misuse of Drugs Act. Mr Hardison requests that the Commission conducts a proper forensic analysis of the Misuse of Drugs Act 1971 in conjunction with the six crucial sentences from document *CM 6941*.

113. The Commission has fully considered Mr Hardison's arguments and the new evidence presented and maintains the view expressed in paragraphs 56, 61 and 67 of the Provisional Statement of Reasons: that the evidence does not have any bearing on the safety of Mr Hardison's conviction.

### **Argument not previously raised**

114. Mr Hardison submits that his Common Law argument has not previously been advanced before any court and therefore the Commission is wrong to assert at paragraph 47 of the Provisional Statement of Reasons that the argument advanced is not new.
115. The Commission remains of the view that the arguments advanced by Mr Hardison in his application to the Commission are in essence, the same as those previously raised before the trial court, the Court of Appeal, the Administrative Court and the ECtHR. Whilst the arguments may previously have been advanced under the heading of the Human Rights Act, the underlying issue raised by Mr Hardison is the same: that there has been an abuse of power in the manner in which the Government has administered the Misuse of Drugs Act by excluding the prohibition of alcohol and tobacco, thereby creating inequalities of treatment.
116. The Commission also refers Mr Hardison to his application for Judicial Review in which he does in fact raise the issue of the Common Law principle of equal protection and submits that "...fairness and rationality are essential components of the Common Law principle of 'equal treatment'"<sup>29</sup>.
117. In summarising Mr Hardison's arguments, the Administrative Court stated:

"Essentially, this application challenges the separate methods of regulation and prohibition of tobacco and alcohol, and the substances prohibited by the 1971 Act. The applicant submits there is scientific evidence for regarding these items as all capable of altering behaviour and therefore all capable of classification as some form of drug."<sup>30</sup>

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<sup>29</sup> Draft Statement of Claim for Judicial Review, 18 February 2007 – paragraph 46

<sup>30</sup> Administrative Court Judgment, 31 August 2007 – paragraph 5

“...his claim also relies on the irrationality of the decision and the failure of the Secretary of State to take into account relevant matters, in particular the reports of the Science and Technology Committee and the Advisory Council on the Misuse of Drugs. I do not consider that putting the case in those ways assists him.”<sup>31</sup>

118. The Commission therefore concludes that the arguments raised in Mr Hardison’s application are not new and in any event, do not affect the safety of his conviction. There are therefore no grounds on which to refer his case to the Court of Appeal as there is no real possibility that they would quash his conviction.

### **Stay of the prosecution**

119. Mr Hardison submits that, if correct in law, his Common Law claims are sufficient to stay the prosecution.

120. Mr Hardison suggests that the Commission must ask three questions:

- a. does the new evidence show the Government’s arbitrary abuse of the Act’s discretionary power?
- b. has this abuse subjected Mr Hardison to a severe unequal treatment contrary to the rule of law?
- c. is this abuse and unequal treatment capable of making Mr Hardison’s trial a trial that should not have taken place?

121. Mr Hardison submits that if the answers to these questions are affirmative, then his convictions are unsafe within the meaning of the Criminal Appeal Act 1968.

122. The Commission accepts that if the Court of Appeal were to find that the conduct of the executive was such that it would be “an affront to the public conscience to allow the prosecution to succeed”<sup>32</sup>, then the Court does have the power to find that the proceedings should have been stayed and as a result the conviction is unsafe.

123. The Commission has considered whether there is a real possibility of the Court of Appeal finding Mr Hardison’s conviction unsafe and has concluded that there is no such possibility. The Commission again refers to the Administrative Court’s Judgment in which this argument has previously been considered:

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<sup>31</sup> Administrative Court Judgment, 31 August 2007 – paragraph 10

<sup>32</sup> *R v Mullen* [1999] 2 Cr.App.R. 143

“...it is difficult to see that ... the decision to prefer a separate system of regulation for substances not prohibited is irrational.”<sup>33</sup>

“The failure to review the classification does not of itself affect the prohibitions in the Misuse of Drugs Act 1971”.<sup>34</sup>

124. As stated in paragraph 67, the Commission is satisfied that there is no real possibility that the Court of Appeal, faced with essentially the same argument, would arrive at a different conclusion.

### **Human Rights argument**

125. Mr Hardison concedes that his Human Rights Arguments cannot reach the safety of his convictions; however, Mr Hardison requests that the Court of Appeal forensically examines his arguments in the event that the Commission refers his case.

126. For the reasons set out in paragraph 64 of the Provisional Statement of Reasons, the Commission has concluded that there is no real possibility that the Court of Appeal would overturn Mr Hardison’s conviction in relation to the Human Rights Arguments advanced, and therefore there are no grounds upon which to refer Mr Hardison’s case to the Court of Appeal.

### **New Evidence**

127. Mr Hardison has submitted new evidence in the form of a document<sup>35</sup> which states that the Home Office “...considered alcohol and tobacco to be implicit in the ACMD’s terms of reference as these are substances that can be misused”<sup>36</sup>. Mr Hardison suggests that this shows that the belief, expressed twice in document *CM 6941*, that the Misuse of Drugs Act is not a suitable mechanism for regulating substances such as alcohol and tobacco, is wrong. Mr Hardison suggests that this false belief creates the inequality of treatment he believes he suffers.

128. The Commission has considered the new evidence presented by Mr Hardison and remains of the view expressed in paragraph 62 of the Provisional Statement of Reasons: the Court of Appeal would be unwilling to accept any new evidence in this case if it simply supports the arguments previously advanced as the arguments are not capable of affording Mr Hardison a ground of appeal.

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<sup>33</sup> Administrative Court Judgment, 31 August 2007 – paragraph 10

<sup>34</sup> Administrative Court Judgment, 31 August 2007 – paragraph 1

<sup>35</sup> ‘Pathways to Problems: a follow-up report on the implementation of recommendations from *Pathways to Problems*, Advisory Council on the Misuse of Drugs 2009

<sup>36</sup> Page 13, paragraph 4.2

## Investigation and Disclosure

129. Mr Hardison argues that as the Commission has not considered his Common Law arguments alongside the new evidence that has been presented, the Commission cannot properly say whether a section 17 investigation seeking disclosure of Government documents would “bear any fruit” affecting the safety of his conviction.
130. Mr Hardison has provided a copy of a draft consultation document<sup>37</sup> which he has obtained through a Freedom of Information request. Mr Hardison re-iterates the submission put forward in his letter to the Commission, dated 23 March 2010: that this document shows that the Government knew before his arrest that the classification system was administered arbitrarily. Mr Hardison suggests that this goes to the crux of his Common Law argument.
131. Mr Hardison requests that the Commission conducts all necessary investigations in relation to his case including exercising its powers under section 17 to seek disclosure of the full consultation document and any other Government documents relating to the administration of the Misuse of Drugs Act.
132. The Commission has already considered these arguments and the Commission’s analysis and reasons are set out at paragraphs 70, 78, and 79 of the Provisional Statement of Reasons. The Commission’s view remains the same: it would not assist the Commission in the exercise of its functions to seek disclosure of the above mentioned documents, as there is no prospect that they would have any impact on either the safety of Mr Hardison’s convictions or the length of his sentence.

## Sentence

133. Mr Hardison submits that the Court of Appeal has not considered his sentence in light of his new Common Law inequality of treatment argument. Mr Hardison states that this argument demonstrates that his sentence is disproportionate to the harm risked by his activities. Mr Hardison submits that the Commission has failed to grasp that the inequality of treatment caused by the abuse of power makes it “manifestly absurd” that he received a twenty year sentence for carrying out identical activities as those of an alcohol brewer or tobacco grower.

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<sup>37</sup> Review of the UK’s Drugs Classification System – a Public Consultation, Home Office Crime and Drug Strategy Directorate, May 2006 (redacted version)

134. Mr Hardison also re-iterates his submissions in relation to the case of *Kennedy* and suggests that the Commission should recommend to the Court of Appeal that Mr Hardison's sentence is manifestly excessive and arbitrary as it is not commensurate with the true gravity of his actions when compared to alcohol and tobacco conglomerates.
135. These arguments have already been considered by the Commission and the Commission's reasoning is set out in paragraphs 84, 85, 89 and 90 of the Provisional Statement of Reasons. The Commission's view remains the same: there is no real possibility that the Court of Appeal would reduce Mr Hardison's sentence in relation to this issue.

### **Decision**

136. The Commission has decided not to make a reference and this statement sets out the Commission's reasons in accordance with section 14(6) of the Act. This decision has been made by a Commissioner and is signed by the Commissioner on behalf of the Commission.

Signed:

Date:

M J Allen

## Annex A

### Summary of the Referral Powers of the Commission

1. Under sections 9 to 12 of the Criminal Appeal Act 1995, where a person has been convicted on indictment or by a magistrates' court in England and Wales or Northern Ireland, the Commission may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal, Crown Court or County Court as appropriate.
2. By section 13 of the Act, a reference shall not be made unless the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.
3. By the same section, this consideration must be reached because of argument, evidence or, in the case of a sentence, argument on a point of law or information, not raised in the proceedings which led to the conviction or any appeal or application for leave to appeal.
4. A reference shall not be made unless an appeal has been determined or an application for leave to appeal has been refused.
5. In exceptional circumstances, the Commission may refer a case where there has been no previous appeal or application for leave to appeal.
6. In exceptional circumstances, the Commission can also refer a conviction, verdict or finding (but **not** a sentence) even if the evidence or argument upon which the reference is based, has been raised previously before the trial court or on appeal.

## Annex B

### Disclosure by the Commission

1. The Commission has a legal duty to disclose any material that it has obtained during its review which would help the applicant to make his best case for a reference to the Court of Appeal. The material may be sent to the applicant in its original form, or as an extract or it may be summarised in the Statement of Reasons.
2. The Commission may, in its discretion, provide other material where it considers it appropriate.
3. In this case, the Commission has not sent Mr Hardison any material other than the Statement of Reasons. This is because the information relied on by the Commission in its consideration of the case is adequately summarised in the Statement of Reasons or in material already available to Mr Hardison.