



CRIMINAL APPEAL ACT 1995

PROVISIONAL STATEMENT OF REASONS

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

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 reached a provisional view that there are no grounds on which to refer Mr Hardison's conviction or sentence to the Court of Appeal.

Details of Conviction and Sentence

Date:	Convicted on 18 March 2005 Sentenced on 22 April 2005
Court:	Lewes Crown Court
Offence	Sentence
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)
Total Sentence: 20 years' imprisonment	

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. On the information available, the Commission has reached a provisional view that there is no real possibility that Mr Hardison's conviction or sentence will be overturned. The Commission's view is explained in the "Analysis and Reasons" section of this Statement of Reasons. Mr Hardison is entitled to make further submissions in response to this provisional view. Any further information or submissions in response must reach the Commission by **27 April 2010**.
- v. 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 1971¹. 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 Drugs² and the Parliamentary Science and Technology Committee's report³. 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.

¹ 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).

² *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

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

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."⁴ Beaston J went on to say that "Sullivan J considered this case to be totally without merit ... I entirely agree with that."⁵
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 1971⁶.
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"⁷.

⁴ High Court Judgment paragraph 11.

⁵ High Court Judgment paragraph 12

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

⁷ 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 document⁸, (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.

⁸ 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 the same as those causing harm 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 application⁹. 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".¹⁰
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.¹¹
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."¹²

⁹ Application number 37238/05

¹⁰ Abuse of process ruling – 5D-E

¹¹ Abuse of process ruling – 9C

¹² Abuse of process ruling – 9D

“The [Misuse of Drugs] Act itself, and the individual provisions of the Act, do not...infringe Mr Hardison’s Human Rights as properly interpreted within the context of the European Convention.”¹³

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.”¹⁴

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.”¹⁵

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.

¹³ Abuse of process ruling – 9F

¹⁴ Abuse of process ruling - 14E

¹⁵ 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".¹⁶

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..."¹⁷
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 Appeal would accept the new evidence put forward by Mr Hardison in his application to the Commission.

¹⁶ Court of Appeal judgment paragraphs 9-10

¹⁷ 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.¹⁸

¹⁸ 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 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

The Commission is satisfied that there is no real possibility that the 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 Office¹⁹ 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.

Referral of 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

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.”

¹⁹ Under the Freedom of Information Act 2000

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*²⁰ and *Wilkinson*²¹.
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*²² 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 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*²³ 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.

²⁰ *R v Paul Alexander* [2009] Chelmsford CC

²¹ *R v Wilkinson & Others* [2009] EWCA Crim 1925

²² *Kemp* (1979) 69 Cr.App.R. 330

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

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*²⁴ 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.”
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.

²⁴ *R v De Havilland* (1983) 5 Cr.App.R.(S.) 109

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*²⁵ 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.

²⁵ *R v Graham* [1999] 2 Cr App R (s) 312

The Commission's Provisional View

93. On the information available, the Commission has reached a provisional view that there is no real possibility that this conviction and sentence would be overturned or reduced if they were referred to the Court of Appeal. Mr Hardison has been offered the opportunity to make further submissions in response to this provisional view. Any further information or submissions must reach the Commission by **27 April 2010**.

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.