In the High Court of Justice **CO/9095/2010**
Queen's Bench Division
Administrative Court

In the matter of an Application for Judicial Review

The Queen on the Application of

CASEY WILLIAM HARDISON

Claimant

CRIMINAL CASES REVIEW COMMISSION

Defendant

DRAFT STATEMENT OF CLAIM

"Where a human rights instrument proves inadequate to its task the rule of law is the safety net. Its terrain of application is closely linked with the values of a liberal democracy in which the pluralism of our societies is recognised and the rights of minorities are protected".

– Lord Johan Steyn
Democracy through Law
September 2002

Prepared By

Casey William HARDISON

8 August 2010

CO/9095/2010

Casey William HARDISON <u>Claimant</u>

Criminal Cases Review Commission <u>Defendant</u>

Draft Statement of Claim

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1. Mr Casey William Hardison requests judicial review of the 24 May 2010 decision by the Criminal Cases Review Commission ("the Commission") <u>not</u> to refer his convictions <u>and</u> sentences to the Court of Appeal.

2. Hardison submitted a separate Detailed Statement of Facts. In short, on 18 March 2005, he was convicted at Lewes Crown Court on six counts of producing, supplying, possessing and exporting psychedelic-type controlled drugs contrary to the Misuse of Drugs Act 1971 c38 ("the Act"). On 22 April 2005, he received separate sentences totalling 83 years to run concurrent at 20 years imprisonment.

3. On 25 May 2006, the Court of Appeal refused Hardison's previous Application for Leave to Appeal against Conviction and his Appeal against Sentence.

4. Based on <u>new</u> documentary evidence and a <u>new</u> argument, on 7 September 2009 Hardison requested the Commission refer his convictions and sentences to the Court of Appeal. On 24 May 2010, in their Statement of Reasons ("SoR") the Commission refused referral.

5. Hardison and the Commission exchanged pre-action letters but Hardison was wholly unsatisfied with their response dated 10 June 2010. Hardison maintains that the Commission made <u>six</u> public law errors in reaching their decision:

   1) The Commission failed to direct itself correctly re the fresh evidence and the possible arguments available to show a real possibility that the Court of Appeal would not uphold Hardison's convictions if referred.

   2) The Commission misdirected itself in law re the distinction between and the process of deciding Common Law and Human Rights Act 1998 arguments.

   3) Mr Wagstaff, for the Commission, acted with bad faith.

   4) In deciding the "real possibility" test, the Commission took into account irrelevant civil dicta from a disparate Administrative Court judgment.

   5) The Commission failed to ask itself the right questions re Hardison's Point of Law <u>and</u> so wrongly refused to refer it to the Court of Appeal for decision.

   6) Having failed to direct itself properly re Hardison's Common Law argument, the Commission failed to ask itself the right questions re his sentences <u>and</u> so wrongly refused to refer them for determination by the Court of Appeal.

6. In sum, the Commission did not carry out its duty honestly and with an open-mind.

7. Accordingly, Hardison seeks the following remedies via judicial review:

    1) An Order quashing the Commission's decisions of 24 May 2010 not to refer his convictions, sentences, and point of law to the Court of Appeal.

    2) An Order mandating the Commission reconsider their decision re Hardison's convictions and sentences, taking proper account of the new evidence and each of the allegations in his Common Law argument based upon that evidence.

    3) An Order mandating the Commission reconsider their decision not to refer Hardison's Point of Law to the Court of Appeal for determination.

    4) An Order mandating the Commission anxiously scrutinise Hardison's common law argument; and, if after anxious scrutiny the Commission finds that there was an executive abuse of statutory discretion subsequently giving rise to his unequal treatment under criminal law, an Order mandating the Commission refer Hardison's convictions, sentences and/or point of law to the Court of Appeal.

8. In *R v HM the Queen in Council, ex parte Vijayatunga* [1988] QB 322, Mr Justice Simon Brown (now Lord Brown of Eaton Under Heywood) said that:

    "judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law".

9. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408, Lord Diplock observed that:

    "The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the 'decision maker' or else a refusal by him to make a decision".

10. *R v Criminal Cases Review Commission, ex p Pearson* [2000] 1 Cr App R 141 established that the Commission's decisions are subject to judicial review. *Ex p Pearson* sets out the Commission's legal remit and operating principles at pages 146-150.

11. The Commission's response to Hardison's Letter before Claim helpfully summarised *Ex p Pearson* and related judgments as to their remit.

12. Briefly, under s9 of the Criminal Appeal Act 1995 ("the 1995 Act"), where a person has been convicted on indictment in England, the Commission may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal. And, by s13 of the 1995 Act, a reference shall not be made unless the Commission decide there is a real possibility that the conviction, verdict, finding or sentence would not be upheld by the Court. And this decision must be reached because of argument, evidence or, in the case of sentence, argument on a point of law or information, not raised in the proceedings that led to the conviction or any appeal or application for leave to appeal.

Claim 1

13. The Commission failed to direct itself correctly re the new evidence and the possible arguments available to show a "real possibility" that the Court of Appeal would not uphold Hardison's convictions if referred.

14. In paragraphs 2-6 of his 8 August 2009 "Draft Grounds of Appeal", submitted with his application to the Commission, Hardison alleged (all emphasis in original):

"2. Cm 6941, a Government Command Paper,[1] elucidates abuse of power by the Secretary of State for the Home Department ("SSHD") in the administration of the Act grounded in errors of law, irrationality and unfairness. The subsequent criminal proceedings against Hardison manifested two inequalities of treatment:

1) a failure to treat like cases alike, *viz* the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis; and

2) a failure to treat unlike cases differently, *viz* the failure to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm.

"3. These inequalities of treatment constitute unequal deprivations of liberty at common law and discrimination contrary to Article 14 of the Human Rights Act 1998 ("HRA") within the ambit of Articles 5, 8, 9 *&* Protocol 1 Article 1 on the grounds of "property", "drug preference" and/or "legal status".

"4. On page 24 of Cm 6941, the SSHD unconsciously revealed three errors of law supporting the abuse whilst defending the inequality of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects, contrary to *Padfield*.[2]

"5. Scrutiny of Cm 6941 and the Act shows that the inequality of treatment occurs because: (1) the Parliament neither stated an explicit policy nor fixed any determining criteria to guide the SSHD's decision-making re drug control and classification under s2(5) of the Act; (2) HM Government fettered the SSHD to an overly-rigid and predetermined "policy of prohibition";[3] (3) the SSHD failed to understand and give effect to the Act's policy and objects; and (4) the SSHD arbitrarily exercised s2(5) and the incidental discretionary powers.

"6. Had Cm 6941 been available to discharge the evidential burden inherent in Hardison's pre-trial motion[4] to stay the indictment as an abuse of process, alleging that executive abuse of power threatened his liberty, his trial would not have taken place."

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1 Cm 6941 (2006) *The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06* HC 1031 *Drug classification: making a hash of it?*, 13 October 2006
2 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030; *R v SSHD, ex p Brind* [1991] 1 AC 696
3 Home Office (2007) *Response to Better Regulation Executive re MDAct Proposal*, 27 September 2007
4 13 January 2005 Transcript of Judge's Reasons for Ruling on Abuse of Process/Human Rights Arguments at p4A-B

15. In his 8 August 2009 "Draft Arguments in Support of Grounds", at pages 5-26, Hardison articulated each issue stated in paragraph 14 above in easy to follow detail, presenting, in order: 1) his brief interpretation of the Act; 2) evidence establishing the inequality of treatment and the three errors of law it is based upon; and 4) a full Common Law argument on traditional grounds showing exactly how the SSHD's unlawful actions make his convictions "unsafe".

16. The Commission did not properly direct its attention to any of this material.

17. Whilst the Commission restated the starting points of Hardison's Common Law argument at paragraphs 41-46 of their 30 March 2010 Provisional Statement of Reasons ("PSR") – separating the common law and HRA 1998 claims – at paragraph 47, the Commission asserted, without explanation, that his "submissions" are "in essence" the same as those advanced at trial, fully conflating his Common Law and HRA 1998 claims into a "this argument" by paragraph 49.

18. But as this "essence" cannot be material to the Commission's ultimate duty to confront the fresh evidence and the possible arguments available honestly and impartially, it would appear that the Commission fettered itself to this "essence", so closing its mind to the Common Law claim and so denying due process.

19. Due process demands Hardison receive a fair opportunity to present his Common Law argument; it is entirely new and on a different legal footing to the original HRA 1998 argument; it relies on fresh evidence and the Rule of Law doctrine holding laws neutral on their face equal applicable, so ensuring equal treatment of persons unless reasonable differentiations fairly related to the object of regulation justify differential treatment; and it shows that his trial should not have taken place.

20. Asserting a right to due process, in his further submissions of 5 May 2010, "Errors in the Commission's Legal Analysis", Hardison redirected the Commission to the core of his Common Law argument, stating at paragraphs 23-29:

"23. Six sentences on page 24 of Cm 6941 are crucial to determine whether the SSHD has abused the Act's powers; and, even though Hardison forensically analysed these six sentences in his Arguments in Support of Grounds and ordered his submissions to the Commission around them, the Commission refused to speak their name.

"24. The six sentences of Cm 6941, *mutatis mutandis* and with emphasis, are repeated here:

1) "Government fully [believes] that the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". (Is the Act suitable or not? Is this an error of law?)

2) "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis". (Does the SSHD really mean the distinction between alcohol/tobacco and 'controlled drugs'? Does this word choice unveil another error of law?)"

3) "It is … based in large part on historical and cultural precedents". ([Are these reasonable grounds for not applying a neutral law generally]?) [question altered 20 July 2010]

4) "A classification system that applies to [alcohol, tobacco and controlled drugs] would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Is the SSHD confusing 'control' with 'prohibition' here, if not, why would it be unacceptable? Is this an error of law? [And why are some "users" granted *Cognitive Liberty*?])

5) "[Alcohol and tobacco] are therefore regulated through other means". (Is this rational? [Is this like *Plessy v Ferguson's* "separate but equal" railcars for blacks?])

6) "the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs". (Then why are they not controlled drugs?)

"25. These six sentences from the SSHD contain three errors of law:

1) They show that the SSHD believes that the Act permanently proscribes the enumerated activities re a controlled drug, bar medical and scientific purposes. [Fresh evidence going directly to this belief as of 9 July 2010]

2) In them the SSHD claims a power, the SSHD does not possess, to exempt individuals or classes of individuals from the operation of the law by excluding *de facto* alcohol and tobacco from the Act's control.

3) They show that the SSHD believes in the "illegality of certain drugs",[5] i.e. that some drugs or "substances" are "legal" whilst the Act makes others "illegal".

"26. These three errors of law underpin the SSHD's abuses of the s2(5) discretion and so manifest the two inequalities of treatment of which Hardison suffers:

1) a failure to treat like cases alike, *viz* the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis; and

2) a failure to treat unlike cases differently, *viz* the failure to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm".

"27. Accordingly, Hardison requests that the Commission conduct a proper forensic analysis of the Misuse of Drugs Act 1971 conjunct these six sentences from Cm 6941."

[5] Cm 6941 (2006) page 18

"28. A proper forensic analysis will show that the SSHD's abuse of the Act's discretions, and the inequalities of treatment, flow from the SSHD's failure to "understand the law that regulates [the SSHD's] decision-making power" and "give effect to it": *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401, *as per* Lord Diplock."

"29. If the SSHD is responsible for the unequal deprivations of liberty of which Hardison complains – because the SSHD failed to understand and give proper effect to the s2(5) discretion, amongst others – was it fair to apply the Act to him?"

21. Rather than properly scrutinise these six sentences from Cm 6941, asking at minimum whether they show the SSHD's failure to understand the Act and the SSHD's failure to give proper effect to it, the Commission simply said:

    "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 convictions". (SoR, paragraph 113)

22. Yet looking to paragraphs 56, 61 *&* 67 of the PSR:

    1) No consideration is committed to paper, i.e. other than a declaration there is no demonstration of any consideration of the new evidence, in particular the six sentences on page 24 of Cm 6941 and the alleged public law errors they reveal.

    2) Moreover, paragraphs 56, 61 *&* 67 of the PSR are wrongly reasoned in terms of either Hardison's original HRA 1998 argument or in terms of the Commission's conflated version of "this argument" and not, as requested, in terms of Hardison's Common Law argument based on public law principles.

23. Paragraph 61 of the PSR suggests the Commission believes that all Hardison wants is to slot the new evidence into the HRA 1998 strand of the original abuse of process argument. This is very wide of the mark.

24. The fresh evidence, above all Cm 6941, (whilst supporting his original HRA 1998 arguments that cannot reach the safety of his convictions) provides for an entirely new argument based upon the common law, the founding limb of the abuse of process jurisdiction, which can reach the safety of his convictions.

25. Had Cm 6941, and allied evidence, been available before trial, Hardison would have been able to argue under the common law that he was experiencing unequal treatment because the SSHD had failed to understand and give proper effect to the Act allegedly contravened by Hardison.

26. At that time of the Abuse of Process hearing Hardison was only able to say:

    "I believe this Government is guilty of an abuse of power and I ask you to stop this insanity and rule in my favour".[6]

[6] 13 January 2005 Transcript of Judge's Reasons for Ruling on Abuse of Process/Human Rights Arguments at p4A-B

27. Hardison had no evidence to discharge the burden inherent in such an allegation; and now Cm 6941, and allied new evidence, is capable of discharging that burden.

28. Hence, had Hardison placed a properly articulated common law argument based on abuse of power and evidenced by Cm 6941, and allied documents, before the Trial judge, His Honour Judge Anthony Niblett may have ordered a stay of the trial.

29. But that is irrelevant as the fresh evidence was not available then and it is available now, with some even fresher evidence as of 9 July 2010. This evidence provides for a entirely new argument not previously raised in any proceedings:

    1) Over 39 years, various SSHDs have acted *ultra vires* the executive discretions conferred on their Office by the Parliament in the Misuse of Drugs Act 1971 c38 because the SSHDs have failed to understand them and so have failed to give proper effect to them (and until now, no one noticed *or* gave a damn).

    2) In particular, the SSHD's arbitrary exercise of s2(5) of the Act creates an irrational inequality manifesting conspicuous and extreme unfairness to regulated persons upon executive enforcement, i.e. prosecution.

    3) Hence, Hardison's trial should not have taken place. But as it has, the Court's process has been abused and he now suffers severe inequality of treatment.

30. At paragraph 122 of the SoR, the Commission accept that arguments of this class can reach the "safety" of a conviction:

    > "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" then the Court does have the power to find that the proceedings should have been stayed and as a result the conviction is unsafe". (Emphasis added)

31. To determine whether "the conduct of the executive" is in this case "an affront to the public conscience", at minimum, four substantive questions must be asked:

    1) Did the three errors of law, alleged by Hardison, permeate the SSHD's decision-making process under the Act?

    2) Did that erroneous thinking cause the SSHD to abuse s2(5) of the Act?

    3) Did that abuse ultimately cause Hardison's arbitrary and unequal treatment?

    4) Is that abuse and the resultant arbitrary and unequal treatment of Hardison "an affront to the public conscience" capable of making his convictions "unsafe"?

32. Alas, at no time did the Commission ask these or any other similar questions; alternatively, if it did, it did not commit any of them to paper.

33. Having failed to enquire properly, did the Commission direct itself correctly re the fresh evidence and the arguments available in deciding the "real possibility" test?

Claim 2

34. The Commission misdirected itself in law re the distinction between and the process of deciding Common Law and Human Rights Act 1998 arguments.

35. Hardison submitted to the Commission that Common law and HRA 1998 process is distinct in that common law claims rely on the Court's "inherent duty" to uphold the Rule of Law rather than on a "statutory duty" conferred on the Court by Parliament; thus he said that the Commission must approach his Common Law argument separately and decide whether to refer it on its own merits.

36. At paragraphs 97-99 of the SoR, the Commission rejected this submission:

> "97. 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 under 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."

37. First, Hardison is entitled, as a matter of law, to rely on <u>all</u> possible arguments.

38. Second, Hardison's Common Law argument, uniting public law traditions with the Rule of Law doctrine holding neutral laws equally applicable, is a distinct argument <u>not</u> articulable under the HRA 1998; yet the Commission conflates them.

39. Third, here again, a mythical "essence" appears to fetter the Commission: they approach the crux by hinting at, but stop short of unpacking, the "executive abuse of power" evinced by Cm 6941 and other fresh documentary evidence.

40. Fourth, by paragraph 106 of the SoR, the Commission finally accept that Hardison's Common Law argument was <u>not</u> raised previously but they quickly evoke, for the fourth time, that celebrated "essence" to avoid dealing with it:

> "Whilst the Common Law strand of the argument was <u>not raised</u> at the abuse of process hearing, <u>the essence</u> of the argument that was put forward remains the same". (Emphasis added)

41. And fifth, if by "essence" the Commission means that Hardison considers himself to be "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process",[7] then, yes, the "essence" remains.

42. So, did the Commission misdirect itself in law re common law claims? And did that make their decision <u>not</u> to refer Hardison's case under the 1995 Act a nullity?

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[7] *San Antonio School District v Rodriguez* (1973) 411 US 1, 29; R *(Carson) v SSWP* [2005] UKHL 37 at 56

Claim 3

43. Mr John Wagstaff, for the Commission, acted with bad faith in attempting to impugn Mr Hardison's integrity.

44. In his Letter before Claim, Hardison formally requested, all but begged, the Commission to analyse the new evidence and Common Law argument fully. In response, Mr Wagstaff invoked "the essence" asserting:

> "The essence of [Hardison's] legal argument was fully addressed and analysed in the Commission's Statement of Reasons".

45. But, Mr Wagstaff failed to demonstrate or point to <u>any</u> substantive analysis in <u>any</u> Commission document before condensing Hardison's argument and further obfuscating the issue:

> "It was based upon there having been a fundamental abuse of process such that it was unfair for [Hardison] to have been tried at all".

46. Ultimately, the Commission did <u>not</u> address in <u>any</u> detail the substantive issue, the "fundamental abuse of process", i.e. the SSHD's arbitrary exercise of s2(5) of the Act and the unequal treatment this causes to a multitude of otherwise law abiding persons, above all Hardison, when prosecuted.

47. Mr Wagstaff then continued to mischaracterise Hardison's argument:

> "It is the nature of such an argument that it can be framed within the terms of one of the codifications of human rights, such as the European Convention, or in terms of the Common Law traditions and axioms, upon which the Convention was largely based."

48. This is wrong in law. As stated above, Hardison's Common Law argument, joining public law traditions with the Rule of Law doctrine holding neutral laws equally applicable, is <u>not</u> articulable under the HRA 1998 <u>nor</u>, as Mr Wagstaff is fully aware, could Hardison's HRA 1998 arguments affect the "safety" of his convictions.

49. Mr Wagstaff then 'in essence' accuses Mr Hardison of 'trying it on':

> "[Hardison's] submissions in human rights terms having failed at every stage of the legal process, from first instance to Strasbourg, he seeks to reframe his argument in Common Law terms".

50. <u>Mr Wagstaff's attempt to impugn Mr Hardison's integrity is categorically unfair</u>.

51. Further, it demonstrates that Mr Wagstaff was <u>not</u> willing to approach Hardison's Letter before Claim, or his Common Law argument based on fresh evidence, honestly and with an open mind. More, it disregards the possibility that Mr Hardison has a genuine grievance that has <u>not</u> been heard by <u>any</u> Court of law.

52. Accordingly, Mr John Wagstaff's bad faith made litigation inevitable.

Claim 4

53. In deciding the "real possibility" test, the Commission wrongly took into account, at paragraphs 102, 117-118 *&* 123 of the SoR, irrelevant civil dicta from a disparate Administrative Court judgment re a claim for legitimate expectation to the SSHD's promised 'Review of the UK's Drugs Classification System':[8] *R(Hardison) v SSHD* [2007] EWHC 2133 (Admin).

54. Hardison submitted to the Commission that, if correct in law, his Common Law claims are sufficient to stay the prosecution.

55. Yet, under their heading "Stay of the Prosecution", at paragraphs 122-123 of the SoR, the Commission stated:

> "122. The Commission accepts that if the Court of Appeal were to find that <u>the conduct of the executive</u> was such that it would be "<u>an affront to the public conscience</u> to allow the prosecution to succeed" 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 <u>this argument has previously been considered</u>". (Emphasis added)

56. First, it is <u>not</u> possible that the Administrative Court ("the AC") previously considered Hardison's request for a Stay based on executive abuse of power:

    1) Hardison had <u>not</u> created/discovered the Common Law inequality of treatment claim based on executive abuse of power;

    2) Hardison did <u>not</u> ask the AC for a Stay on that or <u>any</u> other basis; and

    3) The AC was incompetent to grant it.

57. Second, in *ex p Pearson*, at 168, Lord Bingham CJ said that the Commission could "only" predict how the Court of Appeal would act with a referred conviction by:

> "paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions".

58. Third, the AC judgment was <u>not</u> a Court of Appeal judgment; yet the Commission clung to <u>one</u> sentence from the AC judgment as evidence the AC had decided Hardison's claim for a Stay based on executive abuse or power:

> "it is difficult to see that … <u>the decision to prefer a separate system</u> of regulation for substances not prohibited <u>is irrational</u>". (Paragraph 10, emphasis added)

[8] Home Office (2006) *Review of the UK's Drug Classification System – a Public Consultation*, released to Hardison on 9 July 2010 after a 40-month Freedom of Information Act 2000 battle including the SSHD's aborted appeal to the First-tier Tribunal.

59. Fourth, the Commission curiously does not cite the two following sentences:

> "The Government's policy is to regulate drugs which are classified as illegal through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace". (Paragraph 10, emphasis added)

60. Maybe the Commission does not cite the "separate but equal"[9] policy declared above because it displays the three errors of law articulated in paragraph 10(1) of Hardison's 8 August 2009 "Draft Grounds of Appeal", here stated conversely:

    1) The Act cannot classify a drug as "illegal" or "prohibited", i.e. "illegal drugs" do not exist in fact or law, the Act can only "restrict", "regulate" or "prohibit" human action.

    2) The Act makes provision for drugs that "do pose health risks" and "can have anti-social effects": s1(2) of the Act sets these two factors as inclusion criteria..

    3) The SSHD can permit, via ss7(1)-(2), 22(a)(i) *&* 31(1)(a) of the Act, the production and commerce of "historically embedded" dangerous drugs for "responsible" *recreational* "use".

61. Thus fifthly, "regulat[ing] the use of alcohol and tobacco separately" is irrational, unfair and contrary to the principle holding neutral laws generally applicable.

62. For these five reasons, and the three errors of law: was *R(Hardison) v SSHD* [2007] EWHC 2133 (Admin) relevant to the Commission's s9 decision?

Claim 5

63. The Commission failed to ask itself the right questions re the Point of Law and so wrongly refused to refer it for determination by the Court of Appeal.

64. Section 14(3) of the 1995 Act provides that when considering whether to make a reference under s9 of the Act, the Commission may at any time refer to the Court of Appeal any point of law on which they desire that Court's assistance or opinion.

65. Short of referring his convictions and/or sentences to the Court of Appeal, Hardison requested that that the Commission refer the following point of law:

> "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 […], is the issue justiciable and is that defendant entitled to this Court's protection?" (HRA 1998 references removed)

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[9] *Plessy v Ferguson* (1896)163 US 537 at 552; *Brown v Board of Education* (1954) 347 US 483 at 495

66. At paragraph 75 of the PSR, the Commission declared that:

    "The Court of Appeal has already ruled on 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 the five points previously put before the Court of Appeal".

67. It is <u>not</u> possible that the "Court of Appeal has already ruled on this issue", and if they did rule upon this Point of Law, the Commission did <u>not</u> reference it.

68. More, nowhere in Hardison's 8 August 2006 application to certify points of law for the House of Lords is the claim or concept that the Secretary of State had acted *ultra vires* the Misuse of Drugs Act 1971 prior to Hardison's alleged offences; and that this executive abuse of power created the unequal treatment Hardison suffers.

69. The five points of law from Hardison's 8 August 2006 application read:

    1) Can 'inferences' drawn from the UN drug Conventions – which are not explicitly enabled by an Act of Parliament and which themselves explicitly allow non-compliance on human rights grounds – demonstrate a 'pressing social need' justifying interference with Hardison's Convention rights?

    2) Was Mr Justice Keith right to place the instant case within the *ambit* of Article 8?

    3) Is the Act neutral in principle and therefore of general applicability?

    4) Is there an objective and reasonable justification for this disparity of treatment and denial of equal rights and protection?

    5) Is Mr Hardison's sentence of 20 years imprisonment proportionate to the gravity of the acts committed? And, if not, should the sentence be varied?

70. Further, in Lord Justice Hooper's judgment dated 17 October 2006, the only reference to the 5 points of law contained 16 words:

    "I cannot give you the points of law because they were just scattered across 25 pages".

71. Hardison finds this statement incomprehensible as the five points were set under bold headings in paragraph 7 on page 2 of his 8 August 2006 application.

72. In addition, at paragraph 109, the Commission wrongly took Hardison's statement that "as a result of Cm 6941, Hardison can now state the 5 Points of Law as one" to mean that the single point of law was a restructuring of the 5 presented in his House of Lords *certiorari* petition.

73. This is <u>not</u> the case; Hardison meant only that the new Point of Law simply gets to the nub, simplifying the work of the Court.

74. Because of its misunderstandings, the Commission did not considered properly the Point of Law posed by Hardison in his CCRC application.

75. Had the Commission not: 1) misdirected itself re Hardison's Common Law argument; 2) mischaracterised Hardison's Common Law argument; 3) fettered itself to the "essence" of unequal treatment at the core of Hardison's arguments; and 4) attempted to impugn Mr Hardison's integrity, the Commission might have given due attention to his Point of Law.

76. Was the Commission wrong not to refer Hardison's the Point of Law to the appropriate Court for consideration?

Claim 6

77. Having failed to direct itself properly re Hardison's Common Law argument, the Commission failed to ask itself the right questions re his sentences and so wrongly refused to refer them for determination by the Court of Appeal.

78. Hardison's Common Law argument demonstrates that, due to the SSHD's arbitrary and unequal administration of the Act's discretions, Hardison's sentence is disproportionate to the harm risked by his activities.

79. The Commission failed to grasp that the inequality of treatment created by the SSHD's abuse of s2(5) of the Act makes it "manifestly absurd" that Hardison should receive a twenty-year sentence for undertaking identical property activities as those of an alcohol brewer and/or tobacco grower whilst the alcohol brewer and/or tobacco grower might receive a Knighthood, a Peerage, a Queen's Award for Industry, or even become the Secretary of State responsible for administering s2(5) of the Act: *see* PSR at paragraph 88-89.

80. More, Hardison stands by his submission re *R v Kennedy (No. 2) [2008] 1 AC 269*. *Kennedy* asks who is responsible when person A prepares a controlled drug and then supplies that drug to an informed and consenting adult person B who then chooses to self-administer that drug and subsequently comes to harm.

81. *Kennedy* suggests that A is not culpable for any harm suffered by B because of B's choices. Yet, in sentencing, Hardison was held responsible for harm that may have resulted to B by their "use" of his drugs while alcohol and tobacco conglomerates are not held responsible for harm that may result to B by "use" of their drugs.

82. The Commission thought the *Kennedy* analogy unhelpful to Hardison's case; but he counters that *Kennedy* is analogous and helpful where the court considered him culpable for harms his acts "might foreseeably have caused" to others (by *their* use of *his* drugs). *Cf. Sentencing Guidelines: Overarching Principles of Seriousness, at 1.14.*

83. The Commission then wrongly stated "the sentence imposed for the offence or supplying Class A drugs was not considered as an issue at appeal": see *R v Hardison* [2005] EWCA 1502 at 31. Further, the Trial Judge did not accept that Hardison's produce was for personal consumption nor did Hardison ever suggest that it was.

84. The Commission then quoted from *R v Graham*[10], (their mutation):

> "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]".

85. But this begs the question: was Hardison sentenced lawfully? Said another way, if Hardison's Common Law argument demonstrates "the conduct of the executive" was "an affront to the public conscience to allow the prosecution to succeed", and so the proceedings should have been stayed, is it possible that Hardison was "sentenced lawfully"?

86. Because the Commission failed to ask itself the right questions re Hardison's Common Law argument, which includes arguments on the unequal and arbitrary deprivation of his liberty, showing that Hardison's sentence is manifestly excessive for it is <u>not</u> commensurate with the true gravity of his actions when compared with the trans-national alcohol and tobacco conglomerates, it must be asked if the Commission also failed to ask the right questions re his sentences?

Conclusion

87. Throughout the PSR and SoR the Commission relied on variants of this sentence found at paragraph 128 of the SoR:

> "the Court of Appeal would be unwilling to accept any new evidence <u>if</u> it simply supports <u>the arguments previously advanced</u> as the arguments are not capable of affording Mr Hardison a ground of Appeal". (Emphasis added)

88. <u>All</u> of Hardison's previous arguments were claims based on HRA 1998. Here, now Hardison is begging to advance an entirely fresh Common Law claim <u>not</u> previously advanced, discovered via fresh evidence, based on public law principles and the Rule of Law, yet, the Commission will <u>not</u> touch it with a barge pole.

89. At paragraph 122 of the SoR the Commission states:

> "The Commission accepts that if the Court of Appeal were to find that <u>the conduct of the executive</u> was such that it would be "<u>an affront to the public conscience</u> to allow the prosecution to succeed" then the Court does have the power to find that the proceedings should have been stayed and as a result the conviction is unsafe". (Emphasis added)

90. As that the new evidence makes possible new common law arguments, <u>not</u> previously advanced, impugning the "conduct of the executive" <u>and</u> arguments of this class can result in a finding that his convictions are "unsafe", should this Court require the Commission to confront Hardison's Common Law argument with an open mind <u>and</u> honestly question whether "the conduct of the executive" in this case is "an affront to the public conscience"?

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

91. Said another way, as Hardison alleges "flawed decision[s] … imperil [his] liberty a special responsibility lies on the [Commission] in the examination of the decision-making process", i.e., in reaching their decision whether to refer Hardison's convictions and sentences under s9 of the 1995 Act, the Commission must apply "anxious scrutiny" to Hardison's allegations; *Cf. R v SSHD, ex p Bugdaycay* [1987] AC 514 at 537H. Anxious scrutiny suggests the Commission should have asked:

1) Does Cm 6941 reveal executive abuses of the Act's discretionary powers rooted in errors of law when anxiously scrutinized conjunct the Act?

2) Did that executive abuse of the Act violate the Rule of Law doctrine holding neutral laws generally and equally applicable?

3) Does a compelling public interest – based on rational and objective criteria "fairly related to the object of regulation"[11] – justify executive violations of the Rule of Law doctrine holding neutral laws generally and equally applicable?

4) Did the subsequent criminal proceedings against Hardison subject him to arbitrary and unequal deprivation of liberty and thus violate the Rule of Law doctrine of equal treatment of persons (not drugs) under law?

5) Does that violation satisfy the "real possibility" test in s13 of the 1995 Act?

6) Do the above violations, taken together, establish the Commission's jurisdiction under the 1995 Act to refer Hardison's convictions to the Court of Appeal?

92. Is it not "high time"[12] that these questions are asked?

Remedies Sought

93. Mr Casey William Hardison seeks the following remedies:

1) An Order quashing the Commission's decisions of 24 May 2010 not to refer his convictions, sentences and point of law to the Court of Appeal.

2) An Order mandating the Commission reconsider their decision re Hardison's convictions and sentences, taking proper account of the new evidence and each of the allegations in his Common Law argument based upon that evidence.

3) An Order mandating the Commission reconsider their decision not to refer Hardison's Point of Law to the Court of Appeal for determination.

4) An Order mandating the Commission anxiously scrutinise Hardison's common law argument; and, if after anxious scrutiny the Commission finds that there was an executive abuse of statutory discretion subsequently giving rise to his unequal treatment under criminal law, an Order mandating the Commission refer Hardison's convictions, sentences and point of law to the Court of Appeal.

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

[12] "Now it is high time to wake out of sleep; for now is our salvation nearer than we previously believed" – Romans 13:11

Prayer

94. Hardison prays that this Honourable Court grants him permission for judicial review of the Commission's decisions and process re his application and that this Court gives it the anxious scrutiny it deserves.

95. Thank you for your time and effort, it is appreciated; moreover, thank you for upholding the rule of law.

I firmly believe that the facts stated in this Draft Statement of Claim are true.

– *fiat lux, fiat justitia, ruat cælum!*

Casey William HARDISON – Claimant   Date ………………………………