In the Wigan and Leigh Magistrates' Court 06/LL/14088/08

In the matter of:

R

v

Alan Taylor

Defendant's (draft) human rights substantive argument to supplement his skeleton 'abuse of process' argument

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A. The General Human Rights Claim - an overview

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

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

3. In determining whether an interference by an act, rule or decision is arbitrary and/or excessive this court must ask three questions:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[2]

4. In *R v SSHD, ex p Daly* [2001] UKHL 26 at 28, Lord Steyn issued an essential caveat:

> "The differences in approach between the traditional grounds of review and the proportionality approach may … sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way".

5. Accordingly, Taylor requests this Court's proper analysis of his Convention claims.

B. Article 14 – The Prohibition against Discrimination

6. Article 14 provides:

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

7. Article 14 only prohibits discrimination that: (1) falls "within the ambit"[3] of another Convention right; (2) on "any grounds such as"[4] those enumerated in

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[1] *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 at 62
[2] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80
[3] *Rasmussen v Denmark* (1984) 7 EHRR 371 at 29; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at 10

Article 14; (3) which does not pursue a "legitimate aim"; and/or (4) where there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[5]

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

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

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

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

    1) when States or their agents, without an objective and reasonable justification, treat differently persons placed in similar situations;[6]

    2) when States or their agents, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different;[7]

    3) when States or their agents, without an objective and reasonable justification, fail to extend to persons placed in similar situations those additional rights, falling within the ambit of another Convention article, which the State has voluntarily decided to provide;[8]

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[4] *Engel & Others v Netherlands* (1976) 1EHRR 647 at 30; *AL (Serbia) v SSHD* [2008] UKHL 42 at 20
[5] *Marckx v Belgium* (1979) 2 EHRR 330; *A & Others v SSHD* [2004] UKHL 56 at 50
[6] *Belgian Linguistic Case* (No 2) (1968) 1 EHRR 252 at 10; *The Diane Pretty Case* [2001] UKHL 61 at 32
[7] *Thlimmenos v Greece* (2001) 31 EHRR 411 at 44; *SS for Work & Pensions v M* [2006] UKHL 11 at 74
[8] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40; *R (RJM) v SS for Work & Pensions* [2009] UKHL 63

4) when states or their agent's general policy or measure has a disproportionate, prejudicial effect on a particular group, even if such an effect was not intended.[9]

C. The Particularised Comparator Groups – Article 14

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

a. The First Comparator Group

11. The first comparator group is composed of individuals and/or bodies corporate that use, commerce and/or produce alcohol and/or tobacco for peaceful purposes.

12. These individuals engage in one or more of the following roles: (1) user; (2) possessor; (3) supplier; (4) importer and/or exporter; and (5) producer.

13. To experience "meaningful use"[10] of alcohol and/or tobacco, an amateur user who does not also engage in roles 2, 3, 4 & 5 is reliant on individuals 2, 3, 4 & 5.

b. The Second Comparator Group

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

15. The Misuse of Drugs Act 1971 ("the Act") implicitly targets these individuals and drugs:

> "An Act to make … provision for dangerous or otherwise harmful drugs … which [are] being or appear … likely to be misused and of which the misuse is having or appears… capable of having harmful effects sufficient to constitute a social problem".[11]

16. By s37(3) of the Act, the users in this group "misuse" the drugs alcohol and/or tobacco.

c. The Third Comparator Group

17. The third comparator group is composed of individuals that use, commerce and/or produce controlled drugs but fail to do so peacefully.

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[9] *Nachova & Others v Bulgaria* (2006) 42 EHRR 43 at 167; *R v SS for Employment, ex p Seymour-Smith* [2000] 1 WLR 425 at 449
[10] *Fredin v Sweden (No 1)* (1991) 13 EHRR 784 at 44
[11] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added and crucial

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

19. By s37(3) of the Act, the users in this group "misuse" controlled drugs.

d. The Fourth Comparator Group - Taylor's Group

20. The fourth comparator group is composed of individuals and/or bodies corporate that use, commerce and/or produce controlled drugs for peaceful purposes.

21. These individuals engage in one or more of the following roles: (1) user; (2) possessor; (3) supplier; (4) importer and/or exporter; and (5) producer.

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

23. The fourth comparator group is composed of individuals and/or bodies corporate that use, commerce and/or produce controlled drugs for peaceful purposes.

24. Taylor's "unauthorised" production of a controlled drug supposedly breached "the Queen's peace" as defined by the Act; so, his inclusion in this group may be contentious; nevertheless, he asserts: (1) that his actions were peaceful; (2) that the Act discriminates unlawfully; and (3) that he belongs to this fourth comparator group.

D. The Grounds of Discrimination – Article 14

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

26. The ECtHR recently said that:

> "[Article 14] safeguards persons who are in analogous or relevantly similar positions against discriminatory differences in treatment that have as their basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other".[12] (Emphasis added)

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

[12] *Kafkaris v Cyprus* (2008) (Application No 21906/04) (unreported) 12 February 2008, at 160

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

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

> "the personal characteristic test adopted by the House of Lords is unduly restrictive:[13] it involves a misreading of the decision of the [ECtHR] in *Kjeldsen, Busk, Madsen & Pedersen v Denmark* (1976) 1 EHRR 711; and is difficult to reconcile with the view of the [ECtHR] that 'other status' includes matters such as professional status, whether a person is employed or self-employed, military rank, status based on previous employment with the KGB, and place of residence". (Most internal references omitted).

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

a. Property

30. The Act's policy is to regulate enumerated <u>property</u> activities re particular <u>property</u>:

> "dangerous or otherwise harmful drugs…which [are] being or appear…likely to be misused <u>and</u> of which the misuse is having or appears…capable of having harmful effects sufficient to constitute a social problem".[15]

31. The SSHD claims that people use <u>and/or</u> produce this type of property to "alter mental functioning".[16]

32. Schedule 2 lists the drugs property "controlled" under the Act <u>but</u> excludes the dangerous drugs property the State "acknowledges" causes the most harm to society <u>but</u> are preferred by the electoral majority: alcohol <u>and</u> tobacco.

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[13] Internal reference to: R *(RJM) v SS for Work & Pensions* [2009] UKHL 63 at 42
[14] R *(Clift) v SSHD* [2007] 1 AC 484 at 48
[15] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added <u>and</u> crucial
[16] Cm 6941 (2006) page 24

b. Drug Orientation or Drug Preference

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

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

> "Decisions are based on 2 broad criteria – (1) scientific knowledge (medical, social scientific, economic, risk assessment) and (2) political and public knowledge (social values, political vision, historical precedent, cultural preference)".[17] (Emphasis added)

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

> "The distinction between [these] substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is … based in large part on historical and cultural precedents".[18] (Emphasis added)

36. As indicated above, drug orientation or drug preference is analogous to the "homosexual tendencies" articulated in *Dudgeon*[19] by the ECtHR on its way to fully accepting "sexual preference"[20] as a prohibited ground of discrimination:

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

37. Taylor does not smoke tobacco and he rarely drinks alcohol; rather, he, like many others, prefers the mind states engendered by cannabis. Crucially, this substance has shaped his belief system and developed his personality.

c. Legal Status

38. The State, via the Act, discriminates between drugs and the persons concerned with them, on the ground of "legal status", i.e. whether the drug is a "legal [or an] illegal substance".[21]

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[17] Cm 6941 (2006) page 15
[18] Cm 6941 (2006) page 24
[19] *Dudgeon v United Kingdom,* (1982) 4 EHRR 149 at 41 & 60, Article 8 violated, Article 14 not considered.
[20] *EB v France* (2008) 47 EHRR 41 (GC) sexual orientation as "suspect class"; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at 10
[21] Cm 6941 (2006) page 17 & 24

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

40. Referring to alcohol and tobacco in 2006, the ACMD said that, "For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate".[22] (Emphasis added)

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

E. Article 14 within the ambit of Article 5

a. Article 5

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

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

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

> "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy [is] to be free from arbitrary detention at the hands of the authorities. […] any deprivation of liberty must not only be effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness … against any abuse of power".[23] (Emphasis added)

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

[22] ACMD (2006) *Pathways to Problems*, page 14
[23] *Kurt v Turkey* (1998) 27 EHRR 373 at 122

"the notion of arbitrariness … extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention".[24]

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

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

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

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

b. Taylor's Article 5 Claim

46. The State, via the Act, seek to deprive Taylor of his physical liberty in a discriminatory and thus arbitrary manner contrary to Article 14 within the ambit of Article 5 on the grounds of "property", "drug preference" and/or "legal status".

47. In sum, the State has threatened to deprive Taylor of his liberty for his activities re his cannabis (a "dangerous or otherwise harmful drug"[25]) property, whilst, due to "historical and cultural precedents",[26] not depriving the liberty of persons engaged in identical activities with the equally "dangerous or otherwise harmful drugs" property: alcohol and tobacco.

48. Taylor does not accept that the threatened deprivation is "in accordance with a procedure prescribed by law" as it occurs via unfettered discretions, ss2(5), 7(1)-(2) & 31(1)(a), granted to the executive indicating neither the scope of the discretions nor the manner of their exercise.[27] This has led to the arbitrary exercise the s2(5) discretion in particular.

c. Analysis of Taylor's Article 5 Claim

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

1) The threat to the welfare of the United Kingdom ("the UK") presented by the misuse of "dangerous or otherwise harmful drugs" is irrefutable. Hence,

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[24] *A & Others v United Kingdom* (2009) All ER (D) 203 (Feb); *Saadi v United Kingdom* (2007) 44 EHRR 50 [GC]
[25] *Misuse of Drugs Act 1971* c.38, Preamble
[26] Cm 6941 (2006) page 24
[27] *Hasan & Chaush v Bulgaria* (2002) 35 EHRR 55 at 84; *Goodwin v United Kingdom* (1996) EHRR 123 at 31

the Act's purpose is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" [28] that may arise via any self-administration of these drugs.

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

3) The State claims in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than [controlled drugs]". Yet, for various subjective and/or incoherent reasons not rationally connected to the Act's policy and/or objects, the State does not apply the Act to alcohol and tobacco and thus to the first and second comparators who use, commerce and/or produce alcohol and/or tobacco.

4) Thus, via the Act, the State discriminates arbitrarily and contrary to the Act's policy on the type of property "cultural[ly] prefer[red]"[29] by the first and second comparators rather than on the rational and objective factors of whether that property "is being or appear[s] … likely to be misused and of which the misuse is having or appears… capable of having harmful effects sufficient to constitute a social problem".[30]

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

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

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

8) Alternatively, if the Act rationally addresses the public-welfare threat presented by the third and fourth comparators then it is not shown why the

[28] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2)
[29] Cm 6941 (2006) page 15
[30] *Misuse of Drugs Act* 1971 c.38, s1(2)

Act is not similarly applied to the public-welfare threat presented by the first and second comparators.

50. These circumstances fit the first, second and third type of discrimination identified by the ECtHR and enumerated above at paragraph 10.

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

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

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

a. Taylor's Article 8 Claims

52. Taylor makes two claims under Article 8:

1) The State, via the Act, regulates Taylor's private life and autonomy in a discriminatory and thus arbitrary manner contrary to Article 14 within the ambit of Article 8 on the grounds of "property", "drug preference" and/or "legal status".

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

b. Analysis of Taylor's First Article 8 Claim - Conjunct Article 14

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

54. Taylor characterises this liberty right as the "people's rights to make free and informed choices"[31] in the peaceful production, commerce and/or use of "dangerous or otherwise harmful drugs" property subject only to reasonable, necessary and proportionate regulation.

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

[31] Cm 41(1998) *Smoking Kills*, at 1.26, "the right to smoke" *Cf. Wockel v Germany* [1998] 25 EHRR CD156, smoker's "interests"

"Article 14 also applies to "those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide".[32]

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

"The Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. […] However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8(1)".[33] (Emphasis added)

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

58. This embodies the first, second, and third type of discrimination identified by the ECtHR and enumerated above at 10.

c. Analysis of Taylor's Second Article 8 Claim

59. Article 8 protects the person against arbitrary interferences by public authorities in the private sphere.[34] Yet, the unfettered executive discretions at the heart of this case gives rise to the arbitrary regulation of Taylor's private life and autonomy by the State:

1) The object of the Act is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via any self-administration of "dangerous or otherwise harmful drugs".[35]

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

3) But, as drug control and regulation occurs via unfettered legal discretions, ss2(5), 7(1)-(2) & 31(1)(a), granted to the executive indicating neither the

[32] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40
[33] *Pretty v United Kingdom* (2002) 35 EHRR 1 at 62
[34] *Marckx v Belgium* (1979) 2 EHRR 330 at 30; *Belgian Linguistic Case* (No 2) (1968) 1 EHRR 252 at 7
[35] *Misuse of Drugs Act* 1971 c.38, s1(2) conjunct Preamble

scope of the discretions nor the manner of their exercise,[36] Taylor does not accept that the regulation of his private and peaceful activities by the Act is "in accordance with a procedure prescribed by law".

4) And whilst the regulatory measures enacted by the State under the Act re production and commerce of controlled drugs appear rationally connected to the Act's object, the blanket prohibition of **private small-scale cannabis production** for peaceful, amateur use by the fourth comparator is excessive and disproportionate. It goes further than is necessary to accomplish the objective; with enforcement invading private life, hampering freedom of contract, and denying all meaningful and peaceful, amateur use of controlled drugs.

5) Hence, Taylor does not accept that blanket prohibition of his activities is "necessary in a democratic society" as: (1) the State has not demonstrated "a pressing social need" for the blanket prohibition of his peaceful activities; (2) the blanket prohibition is not "proportionate to the legitimate aim"; and (3) the blanket prohibition does not have a "relevant and sufficient"[37] justification.

6) More, as Taylor's peaceful activities occurred in his domicile they should have been subject only to reasonable, necessary and proportionate restrictions, similar to home alcohol brewers and tobacco growers. As the ECtHR said in *Niemietz v Germany*:

> "There appears…to be no reason of principle why [an] understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature [… A]s was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know what capacity he is acting at a given moment.".[38]

60. Consequently, the very existence of the Act, as administered by the State, continuously and directly affects Taylor's private life: he either respects the law and refrains from engaging – even in private – in prohibited acts to which he is disposed because of his drug preferences or tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.[39]

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[36] *Hasan & Chaush v Bulgaria* (2002) 35 EHRR 55 at 84; *Goodwin v United Kingdom* (1996) EHRR 123 at 31
[37] *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 at 62
[38] *Niemietz v Germany* (1992) 16 EHRR 97 at 29 & 30; *Peck v United Kingdom* (2003) 36 EHRR 41 at 57
[39] *Cf. Dudgeon v United Kingdom,* (1982) 4 EHRR 149 at 41 & 60, *mutatis mutandis*

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

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

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

62. As this case concerns "[property] that alter[s] mental functioning",[40] Article 9 is engaged.

a. Taylor's Article 9 Claims

63. Taylor makes two claims under Article 9:

1) The State, via the Act, regulates Taylor's thoughts contrary to Article 9.

2) Alternatively, the State, via the Act, regulates Taylor's thoughts in a discriminatory manner contrary to Article 14 within the ambit of Article 9 on the grounds of "property", "drug preference" and/or "legal status".

b. Analysis of Taylor's First Article 9 Claim

64. Taylor asserts that the State violates his claim right to freedom of thought.

65. In sum, via the Act, the State denies Taylor all meaningful access to the cognitive processes, ideations and information that resides, occurs or is accessible in the mind states catalysed by the cannabis he possessed, produced and consumed.

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

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

> "A classification system that applies to [alcohol and tobacco] as well as [controlled] substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning".[41]

68. Taylor asserts that there is a deeply embedded drive in humans to "alter mental functioning" by various means: austerity, breathing, chanting, dancing,

[40] Cm 6941 (2006) page 24, *mutatis mutandis*
[41] Cm 6941 (2006) page 24, emphasis added

drumming, lovemaking and using "a number of substances that alter mental functioning", etc.

69. This is why it would be "unacceptable" to apply a "policy of prohibition"[42] to the responsible use of alcohol and tobacco. It would deprive the majority who "use' [alcohol and/or tobacco] responsibly" access to the valuable mind states facilitated by these drugs.

70. Equally, Taylor feels the State, via the Act, deprives him of equally valuable mind states facilitated by responsible use of the drug on his indictment. He finds this "unacceptable".

71. Accordingly, by denying of all meaningful use of Taylor's preferred drug property to "alter mental functioning", the State violates Article 9(1)

c. Analysis of Taylor's Article 9 Claim - Conjunct Article 14

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

73. Taylor characterises this liberty right as the "people's rights to make free and informed choices"[43] in the peaceful production, commerce and use of "substances that alter mental functioning"[44] subject only to reasonable, necessary and proportionate regulation.

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

> "Article 14 also applies to "those additional rights, falling within the scope of any Convention article, for which the State has voluntarily decided to provide".[45]

75. *Stec* brings the liberty right asserted by Taylor within the ambit of Article 9.

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

77. Thus, the State denies, via the Act, all meaningful production, commerce and use of controlled drugs property to "alter mental functioning" for amateur purposes.

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[42] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[43] Cm 41 (1998) *Smoking Kills*, at 1.26, "the right to smoke"; *Cf. Wockel v Germany* [1998] 25 EHRR CD156, smoker's "interests"
[44] Cm 6941 (2006) page 24
[45] *Stec v United Kingdom* (2005) 41 EHRR SE 295 at 40

78. Thus, the State denies, via the Act, all meaningful production, commerce and use of controlled drugs property to "alter mental functioning" for amateur purposes.

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

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

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

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

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

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

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

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

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

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

> "By recognising that everyone has the right to the peaceful enjoyment of his possessions, [A1P1] is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: "biens", "propriété", "usage des biens"); the "travaux préparatoires", for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject-matter of the successive drafts which were the forerunners of the present [A1P1]".[46]

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

> "[A1P1] comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; […] The second rule covers deprivation of possessions and subjects it to certain conditions; […] The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; […] The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable".[47]

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

> "[Any] interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of [A1P1] as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law".[48]

a. Taylor's Article 1 Protocol 1 Claim

86. The State, via the Act, has deprived Taylor of his lawfully acquired possessions and prevented him from peacefully enjoying his possessions in an arbitrary and

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

discriminatory manner contrary to Article 14 within the ambit of Article 1 Protocol 1 on the grounds of "property", "drug preference" and/or "legal status".

b. Analysis of Taylor's Article 1 Protocol 1 Claim - Conjunct Article 14

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

88. Taylor's A1P1 claim contains two threads:

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

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

89. Taylor lawfully acquired the materials and equipment used in the production of the four plants which are the subject of this indictment. The Act placed arbitrary and discriminatory controls on Taylor's use of those plants and equipment.

90. Nevertheless, Taylor produced the drug property even though the State, via the Act, declared this an unauthorised use of his possessions. Consequently, the State confiscated his possessions and so deprived him "all meaningful use"[49] of the fruits of his labour.

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

92. Crucially, Taylor does not dispute the Act's policy and/or objects; however, he refuses to countenance the "partial and unequal"[50] application of the Act's measures.

    1) The State declared in Cm 6941, "alcohol and tobacco account for more health problems and deaths than [controlled drugs]". However, due to "historical and cultural precedents",[51] the State has not applied the Act to alcohol and tobacco and thus to the first and second comparators who use, commerce and/or produce alcohol and tobacco.

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[49] *Fredin v Sweden* (No 1) (1991) 13 EHRR 784 at 41-45
[50] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ
[51] Cm 6941 (2006) page 24

2) Thus, via the Act, the State discriminates arbitrarily and contrary to the Act's policy on the type of drug property "cultural[ly] prefer[red]"[52] by the first and second comparators rather than on the rational and objective factors of whether that drug property "is being or appear[s] … likely to be misused and of which the misuse is having or appears… capable of having harmful effects sufficient to constitute a social problem".[53]

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

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

94. These circumstances fit the first, second and third type of discrimination identified by the ECtHR and enumerated at paragraph 10.

Presented by Alan Taylor and Darryl Bickler – 17 August 2009

[52] Cm 6941 (2006) page 15
[53] *Misuse of Drugs Act 1971* c.38, s1(2)