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THE DIFFICULTY OF CONTROLLING (IL)LEGAL HIGHS—A GUERNSEY PERSPECTIVE

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This article analyses the appeal in Law Officers v Robert Le Billon[1] *and also examines more generally the measures Guernsey has introduced to control the importation of so-called legal highs comparing those with some of the controls in place in the United Kingdom and Jersey.*

Introduction

1 Spice, Toot, F1, Ivory Wave, Miaow Miaow—such terms meant nothing five years ago. Today they are part of a rapidly growing group of harmful drugs that have initially fallen outside normal controls. As a result they have become known as legal highs and the use and emergence of these substances has created a problem for governments all over Europe.[2] Guernsey faced its own particular problem with use becoming widespread between 2007 and 2009. Consequently in late 2008, the Bailiwick Drug and Alcohol Strategy Group carried out a consultation exercise with local primary health care professionals and other key agencies. This study revealed serious concerns about the variety of symptoms being shown by users, and this included children who were attending school under the influence of these substances. In addition to their ready availability on the internet, the situation was not helped locally when a number of shops also began selling legal highs. The principal problems were that as these substances were not unlawful there was no control over what was being sold and there was also a fear that many young people were taking the substances in the false and dangerous assumption they were safe, when at best the consequences to their health were unknown. Initially the most popular

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[1] 2011–12 GLR 128; Criminal Appeal 429, judgment handed down on 15 September 2011.

[2] See for example Europol's Joint Report on mephedrone (at http://www.emcdda.europa.eu/online/annual-report/2010/boxes/p92), and the ACMD report (*Consideration of the Cathinones* at http://www.namsdl.org/documents/ACMDCathinonesReport.pdf)

substance in Guernsey was probably Spice, which has since become a Class B drug under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 as amended (the 1974 Law). This was then overshadowed by mephedrone (a.k.a. Miaow Miaow) which has since been linked to a number of deaths.[3]

2 In light of these concerns, in April 2009 the Guernsey authorities took a bold and innovative step and introduced a ban on the commercial importation of "medicinal products", a definition aimed directly at capturing all legal highs. The first prosecution pursuant to the legislation was of a man called Robert Le Billon, but he was acquitted by Guernsey Magistrate's Court because the court considered the legislation was not human rights compatible as it breached art 7(1) of the Convention.[4] A prosecution appeal to the Royal Court was unsuccessful but a further appeal to the Court of Appeal led to a finding in favour of the prosecution, with the Court of Appeal ruling that the legislation was (and still is) enforceable for the purposes for which it was originally intended. This article therefore seeks to explore the interesting issues arising in the case from the difficulties encountered in enforcing the ban, the issues of European and human rights law arising, and that rare occurrence in Guernsey of the prosecuting authorities appealing an acquittal by the Magistrate's Court.

Banning legal highs—the problem

3 Historically, the primary means of drug control in Guernsey has been through the 1974 Law, and this closely resembles the Misuse of Drugs Act 1971 (MDA) in England and Wales. As the preamble to the MDA reads, it is: "An Act to make provision with respect to dangerous or otherwise harmful drugs . . ." Notably, and as noted by Fortson,[5] the word "drug" is not defined as the law relies upon the specification by list of the substances controlled. As will be familiar to many, drugs are controlled by their inclusion in Class A, B or C, depending on the magnitude of danger of harm attached to them. Naturally the lists are open, meaning that as the years have passed further substances have made their way into the classifications, but this model has been at the core of the approach. In order to add a substance

[3] *Ibid*.

[4] "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

[5] Fortson *Misuse of Drugs and Drug Trafficking Offences*. 5th ed. Sweet and Maxwell.

to the classifications, the MDA requires an Order in Council which must be laid before Parliament, and the Advisory Council on the Misuse of Drugs (ACMD) must always first be consulted (although they need not necessarily approve the proposal).

4 The emergence of legal highs has left this system of drug regulation unable to cope in its present form because these substances have appeared quickly and in such great varieties that it is not alarmist to observe that the authorities have been unable to keep up. Users appear willing to experiment and new substances are quick to gain a foothold. The problem with the current legislation has been delay because classification is predicated upon sound empirical research as to the dangers any new substance presents before the legislative process even begins. A number of examples illustrate the problem. In a meeting of the Advisory Council on the Misuse of Drugs (ACMD) in April 2011 the chairman announced that about 40 new legal highs had come onto the market in recent months.[6] Further, as noted by Europol,[7] mephedrone was first detected in 2007, but it was not until December 2009 that the ACMD recommended it should be classified as a Class B drug, and it was not then until 2010 that the law changed (in Guernsey, Jersey and the UK). Of course the mere process of classifying a substance under the MDA has of itself thrown up various issues over the years, as best illustrated by the sacking of the chairman to the ACMD in October 2009 and the subsequent resignations of various advisors to the government who disagreed with the drug policy of the British Government.

5 Guernsey does not replicate the provisions in the MDA that deal with the process of classification. Generally Guernsey will look, *inter alia*, at the reports produced by the ACMD and come to its own conclusion as to the appropriate classification but without necessarily agreeing with the approach taken in England and Wales. This is perhaps best illustrated by the States of Deliberation's refusal in 2004/2005 to follow the UK approach of reclassifying cannabis as a Class C drug (which of course was in any event reversed by the British Government in 2008).

6 Some of these new substances present a particular problem because it is often difficult to identify the active component that could then be used to form the basis of the classification, and so the identification of the substance as a controlled drug. Perhaps the most common example of this to date has been with "Spice". It was only fairly recently that

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[6] See the articles '*Legal Highs*' by Jason-Lloyd, *Criminal Law and Justice Weekly* 2011, vol 175, March, p 193, and August, p 494.
[7] *Ibid*.

forensic analysis revealed that what was initially thought to be an ineffective collection of herbs had in fact been sprayed with synthetic cannabinoids which delivered "cannabis like effects".[8] It was this that eventually led to the classification of Spice as a Class B drug. At the time Guernsey sought to control Spice, these findings were not publicly available but the authorities were still keen to control the importation of this substance, and other substances that were rapidly entering the local market. Mephedrone (which was the substance Mr Le Billon imported) was only first tested and identified in Guernsey in July 2009 but by September/October 2009 commercial amounts of the substance were already arriving in Guernsey.

7 By this time it was apparent the law was proving insufficient to keep up with these newly-emerging substances and this was leading to adverse health consequences to the local people who had begun to experiment. Further, as noted by Europol,[9] the substances were often created abroad with the specific intention that they would fall outside normal drug classifications yet still retain the effects users desired, and that to further circumvent known controls on labelling they were promoted as substances "not for human consumption" and/or as plant food *etc*. Evidently it was by design, not accident that existing controls were failing.

The UK approach

8 The approach of the British Government has been to amend the MDA to introduce a system of "Temporary Class Drug Orders" which can be made by the Secretary of State and these changes came into force on 15 November 2011.[10] In summary, s 2A of the MDA sets the two main criteria for the issue of such orders. These are that the substance is not already classified, and secondly that—

> ". . . it appears to the Secretary of State that the substance or product is a drug that is being, or is likely to be, misused, and that misuse is having, or is capable of having, harmful effects."

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[8] See further the ACMD report on the major cannabinoid agents from 16 July 2009 at http://www.namsdl.org/documents/ACMDMajorCannabinoidReport.pdf

[9] *Ibid*.

[10] Pursuant to the Police Reform and Social Responsibility Bill published on 30 November 2010. This led to the Police Reform and Responsibility Act 2011 and amendments to the MDA are in Schedule 17 which came into force on 15 November 2011 pursuant to the Police Reform and Social Responsibility Act 2011 (Commencement No 1) Order 2011.

The substance can then be named, or described, as the Secretary of State sees fit and it is then unlawful to import/export, produce/supply such substances (but not to possess them), and in general terms the sentences available are the same as for Class B drugs.[11] Clearly, such an approach requires that something be known about the drug so there is sufficient to name or describe it, meaning that in practice until a substance has been identified and tested no order is likely to be made. At its core, this approach is also still dependent on having defined lists of substances and indeed it is suggested the only real difference in this approach to the classification under the MDA 1971 regime is that it is quicker, requiring only a Ministerial Order and no consultation with ACMD nor an Order in Council. The trade off is that the orders are temporary, in that they only last for a maximum of one year unless an Order in Council causes them to be classified within a shorter space of time. The commitment to this approach was confirmed by the coalition Government, and the ACMD[12] acknowledge that ". . . the primary reason for the new drug orders is one of responsiveness". It is quite clear however that this process would still require some time and the ACMD were at pains to stress that in their view an order would be used sparingly, and based on the ACMD's consideration of the evidence thereby ensuring it would be ". . . a proportionate mechanism with which to prevent harms of a drug where a swift response is essential."[13] Clearly also no offence would be committed in respect of any substance until it was made subject to one of these orders—as will be explained, this is not quite the same in respect of the provisions introduced in Guernsey.

The Jersey approach

9 Unlike Guernsey, the Misuse of Drugs (Jersey) Law 1978 (the 1978 Law) does create an Advisory Council which is empowered by s 2 ". . . to keep under review the situation in Jersey with respect to drugs which are, or appear likely to be misused . . ." Interestingly this group made a recommendation to the Minister for Health and Social Services in September 2009 that mephedrone be classified as a Class C drug and in this respect the Jersey authorities were ahead of the UK—perhaps being less constrained by the politics of drugs regulation alluded to above. It is also clear that the Jersey authorities can use the Medicines (Jersey) Law 1995 (the 1995 Law) to prosecute for the

[11] For some legal analysis of these provisions, see further the article by Jason-Lloyd, *ibid*.
[12] See ACMD report *Consideration of the Cathinones* October 2011. *Ibid*.
[13] As referred to by in the articles by Jason-Lloyd, *ibid*.

importation of some medicinal products not caught by the 1978 Law,[14] although what is not entirely clear (perhaps not at least until *Le Billon*) was whether this could have been deployed to the extent intended by the Guernsey authorities to catch substances that have no therapeutic benefit at all. It is submitted it could be as the definition of medicinal products in the 1995 Law is sufficiently similar to that in the 1946 Law.

The Guernsey approach

10 The Guernsey approach overcomes the basic problem of delay and moves away from an approach based on classification by defined lists. Further, it also ensures that the prosecution only have to prove (sufficient for conviction) at the point of trial (rather than at the time of importation) that the substance falls within the definition of a medicinal product. This means that even if the substance has never been encountered before, if it is capable of being defined as a medicinal product by the Chief Pharmacist all acts of importation are caught, even though they took place before this opinion was given. It is submitted this is a marked departure from a system based on defined lists and indeed is an innovative approach. The ACMD have previously rejected this as a means to control legal highs. What the ACMD have said is—

> "Because of the European Court's approach the [Medicines Healthcare products Regulatory Agency] has had significant difficulties in classifying substances of abuse or novel psychoactive substances where data of suitable quality on the function and effect of the ingredients at the level contained in the product does not exist . . . because the Pharmaceutical Directive [i.e. Council Directive (2001/83/EEC) see further below] is not designed to regulate substances of abuse, products which are not presented for human use or which are presented for human use, but where there is no evidence of significant effect cannot be classified as medicines under the second part of the definition of medicinal product."[15]

As will become apparent, it is in this area that Guernsey has adopted a different view and to follow this development it is worth noting how it came to be part of Guernsey law.

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[14] See *Att Gen v Smith & Jackson* [2010] JRC 086—the substance imported being BZP an anti-worm tablet that produces effects similar to amphetamine (which subsequently became a Class C drug).

[15] See ACMD report *Consideration of the Cathinones* October 2011 para 7.20. *Ibid*.

11 Under art 1 of the Import and Export (Control) (Guernsey) Law, 1946 (the 1946 Law),

> ". . . the Home Department may by order make such provisions as [they] think expedient for prohibiting or regulating . . . the importation into the Island . . . of all goods or goods of any specified description."

The orders since made have banned the importation of products ranging from knuckledusters to obscene prints but generally the prohibited goods have tended to be specifically listed. The new approach involved enacting an order (Guernsey Statutory Instrument 15 of 2009) that provided a generic definition intended to catch all legal highs. This was approved by the Home Department Minister on 6 April 2009 and a media release followed on 7 April 2009 to inform the public of the import/export ban and to explain its remit.

12 The definition used was that of a medicinal product and this was taken from a 2001 European Council Directive (2001/83/EEC), as from time to time amended or re-enacted. This defines a medicinal product in the second part as, *inter alia*—

> "Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action or to making a medical diagnosis."

The ban includes a number of exceptions aimed at ensuring it was a proportionate response to the danger posed. Thus it only applies to goods which were imported in amounts beyond those for the personal use of the importer, *ie* it was intended to catch commercial quantities. It was also intended that it would not interfere with the legitimate trade in herbal medicinal products nor in medicinal products generally. Indeed the law was expressly drafted to exempt a medicinal product for which there was in place a United Kingdom marketing authorisation. In effect this meant that tried and tested medicines that had received the approval of the Medical Health and Regulatory Authority would not be caught. Finally, the method of excluding any other goods that might be caught was to continue through the previous practice of the Chief Officer of Customs and Excise issuing open general licences to permit imports and exports of certain products.[16]

[16] The power to issue such a licence is provided for in s 2 of the Import and Export of Goods (Control) (Guernsey) Order, 1990.

The case against Mr Le Billon

13 Contrary to the view of the ACMD, the Guernsey authorities specifically contemplated that the second part of this definition could catch legal highs and this approach came under great scrutiny in the prosecution of Mr Le Billon. In October and November 2009, Mr Le Billon decided he would import some mephedrone to sell to friends, and after an initial test import of one gram he went on to attempt three separate importations totalling about 100grams—all of which were intercepted by Guernsey Customs and Excise. Mr Le Billon was arrested and admitted what he had done. However, it was not until January 2010 that the authorities were in possession of evidence from the Guernsey Chief Pharmacist to say that in his expert opinion mephedrone fell within the definition of a medicinal product, meaning the evidential test was passed and so Mr Le Billon was charged.

14 In the Magistrate's Court, Mr Le Billon pleaded not guilty on the basis that although he did not dispute the core facts he did not accept the evidence of both the Guernsey and Jersey Chief Pharmacists that mephedrone was a medicinal product. The court readily concluded that mephedrone was a medicinal product but determined the law was incompatible with art 7 of the European Convention on Human Rights (ECHR) and therefore acquitted the defendant. What the Judge of the Magistrate's Court concluded was that the Guernsey provision could only be art 7 compliant if the definition was read with a requirement that the prosecution must prove the substance was a known medicinal product at the time of the importation (and so the Judge read these words into the definition of medicinal product after the words "metabolic action"). This would of course defeat the aim of the authorities to catch the newest of emerging drugs.

15 It is interesting, and assists in understanding the approach of the Court of Appeal, to briefly explore the decision of the Judge of the Magistrate's Court and the starting point is art 7 of the ECHR which provides—

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed that the one that was applicable at the time the criminal offence was committed.
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> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

16 This includes the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). As was said in *Kokkinakis v Greece*[17]—

> ". . . it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."

It also encompasses the notions that the law must be accessible and foreseeable. Indeed, the Judge of the Magistrate's Court correctly referred to *Sunday Times v United Kingdom No 1*[18] in which the Strasbourg court said—

> "First the law must be adequately accessible. The citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case.
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> Secondly a norm cannot be recognised as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able if need be with appropriate advice to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail."

17 The Judge of the Magistrate's Court considered these points and was satisfied the law was accessible but was not satisfied it was drafted with the requisite precision, stating—

> ". . . nothing from the authorities of his own jurisdiction was available to provide him with the foresight of the likely outcome if he were to pursue his intended importations. In other words there was no published information from the authorities of his own jurisdiction that considered the pharmacological effects of mephedrone. Nothing therefore was available from the authorities of his own jurisdiction to enable him to judge whether mephedrone was or was not a medicinal product. Nothing therefore was available from the authorities of his own jurisdiction to enable him to ascertain whether the importation of mephedrone was liable or was not liable to render him subject to prosecution."

18 As was later apparent from the judgment of the Court of Appeal, this approach arose from two principal errors. Firstly, it confused legal

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[17] [1993] ECHR 14307/88.
[18] [1979] 2 EHRR 245.

with factual certainty, only the former being subject to art 7, and secondly it failed to properly recognise that the offence was a strict liability (*ie* where no proof of *mens rea* was required).

19 The prosecution elected to use the power contained in s 1(b) of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 (the 1988 Law), to appeal the acquittal, this being possible where there is an erroneous determination of law or mixed fact and law by the lower court (s 6(3)). The appeal was heard before the Royal Court on 20 May 2011 but was dismissed and the prosecution decided to exercise (it is believed for the first time) the statutory right of appeal to the Court of Appeal found in s 7(1) of the 1988 Law (the appeal being permitted on a question of law alone).

The decision of the Court of Appeal

20 The focus of the submissions to the Court of Appeal was similar to those advanced in the Royal Court and the appeal judges found in favour of the appellant on all points of appeal.

21 On the issue of legal certainty, the court considered the large body of ECHR case law, but with particular reference being made to the case of *Cantoni v France*[19] in which the ECHR had rejected an appeal by Mr Cantoni from a finding of the *Cour De Cassation* that the definition of medicinal product in French law (which followed the definition in 2001/83/EEC) was art 7 incompatible. Throughout the appeals process, the appellant had relied upon this decision as a clear example of the continued existence of what has become known as the "thin ice" principle. This was identified in *Knuller v DPP*[20] when Lord Morris said—

> "It is said that the rules of law ought to be precise so that a person will know the exact consequences of all his actions and so that he can regulate his conduct with complete assurance. This, however, is not possible under any system of law . . . Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in . . ."

As the Court of Appeal went on to say—

> "It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must keep pace with changing circumstances, some degree of vagueness is inevitable

[19] [1996] ECHR 17862/91.
[20] [1972] All ER 898.

> and development of the law is a recognised feature of common law courts."

22 The court therefore rejected the reasoning of both the Magistrate's and Royal Courts and concluded the legislative regime introduced was "intelligible and precise". The scope of the law was sufficiently clear and did allow a person to know with sufficient certainty that they would commit an offence if they imported a medicinal product into Guernsey.

23 The case also highlighted the important difference between factual and legal certainty. In Mr Le Billon's case it was difficult to show that, at the time of the act of importation, mephedrone was a medicinal product because it was a relatively new substance for which there was no body of established scientific opinion. If it had been necessary to show this, the law would be no more adept at dealing with emerging drugs than the temporary orders being used in the United Kingdom. The Court of Appeal agreed with the appellant's submission that the question of whether mephedrone was a medicinal product was a question of fact, and so beyond the remit of art 7 and as the Court of Appeal said—

> "In this case the relevant uncertainty was not what the law was but whether, on scientific analysis, mephedrone might prove in fact to be covered by the 2009 amendment. This is a factual and not a legal uncertainty."

24 This was a distinction the English Court of Appeal had noted in *R v Muhamed*[21] but one not seemingly well explored either by the courts or academics. In *Human Rights and Criminal Justice*[22] there is an overview of retrospectivity and the principle of legal certainty but the possibility for confusion with factual certainty receives no commentary. The authors do refer to the decision in *Muhamed* and it is worthwhile to pause and consider that decision in a little more detail. Mr Muhamed was prosecuted for the strict liability offence of materially contributing to the extent of insolvency by gambling. The appellant argued that part of *actus reus* (the presentation of a petition of bankruptcy within two years of the act of gambling) was outside the gambler's control and therefore unforeseeable. His counsel argued that the offence was uncertain as when one gambled it was by no means sure that a loss would follow. The English Court of Appeal stated—

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[21] [2003] QB 951.

[22] Emmerson & Ashworth. Sweet and Maxwell (2nd ed; 3rd ed due 29 February 2012).

> "The answer to this submission is that it confuses factual uncertainty with legal uncertainty. Article 7 is concerned only with the latter. A person who is considering whether to gamble knows for certain that, if he gambles and loses, and if within two years a petition is presented based on insolvency to which the lost gamble has materially contributed, then he will have committed an offence . . . it is true that, when he places his bet, he does not know whether, if he loses, that will contribute to insolvency so as to trigger the section. But he does not even know that he will lose . . . it is difficult to see why the fact that a bet may be lost does not render the offence uncertain, whereas the fact that a creditor's petition may result within two years does so. The short answer is that it is only legal uncertainty that offends against the principle enshrined in Article 7."

25 The same argument could be raised in respect of many offences, particularly those which prefer to prescribe a category of behaviour, instead of listing offences, such as development,[23] dishonesty, obscenity and indecency *etc*. These are all terms which meet the test of legal certainty but where it may never be possible to advise an accused person with absolute certainty as to the likely outcome before a fact-finding tribunal—hence the thin ice principle and the later recognition of the difference between legal and factual certainty. It is suggested the matter can be analysed this way: legal certainty is the degree of certainty required of the law to enable a person to make an informed choice about whether they are likely (and no more) to commit an offence if they behave in a particular way; factual certainty is that established only by a court finding beyond all reasonable doubt that the facts establish that a particular offence took place.

26 On the issue of strict liability, the court considered a number of decisions from the House of Lords and Privy Council, relying particularly on *Gammon (Hong Kong) Ltd v Att Gen (Hong Kong)*[24] in which Lord Scarman identified the relevant propositions. As he said (to paraphrase), at its heart each criminal offence carries a presumption of *mens rea*, that presumption only being displaced where the statute in question is concerned with an issue of social concern (such as public safety) and where the creation of strict liability will be effective to promote the object of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. The Guernsey Court of Appeal also accepted that in so far as the 1946 Law applies to emerging drugs of concern, there were "significant public health

[23] In a planning law sense.
[24] [1985] AC 1.

implications that engage the safety of the public." The court also agreed with the appellant as to the relevance of *R v Mathudi*[25] and said—

> "A person who chooses to import for sale to others in Guernsey a substance that may be a medicinal product, faced with strict liability, is more likely to take on himself the burden of establishing the nature of the substance before he imports it in order to avoid liability. If he cannot discharge that burden he has the freedom to choose not to import."

Thus the obligation is cast back onto the importer to choose whether to import something if he is unsure what the "good" is. If he does, and the substance turns out to be a medicinal product, then as the court said, ". . . it was irrelevant that the Respondent did not and even could not know the pharmacological characteristics of the substance." Indeed, even the prosecuting authorities may not have known at the time of the defendant's importation what the characteristics of the substance were. This decision has thus made it clear that it need only be shown at the time of trial that the substance fits the definition and this ensures that all newly-emerging legal highs will be covered by this regime if they are subsequently found to be pharmacologically active (as opposed to mere placebos). Any perceived harshness in this approach is ameliorated by the fact that the importer has the choice not to import.

27 In *Att Gen v Jackson*[26] (which was not referred to by the parties in the Court of Appeal in *Le Billon*), the Royal Court of Jersey was asked to rule on the extent to which the 1995 Law provided for a strict liability offence in respect of art 8 which provides that "No person shall import any medicinal product except in accordance with the product license." In some, but not all respects, this is a similar offence to that found in the 1946 Law, and indeed carries the same maximum penalty. The Royal Court concluded that some limited *mens rea* was required in that the Crown must prove an intention to import something. It is evident the Court of Appeal in Guernsey thought differently. The Royal Court of Jersey considered the offence in question was truly criminal in character, stating—"It carries a custodial sentence of up to two years or an unlimited fine or both, and accordingly must be treated with a degree of seriousness." By contrast, the Guernsey Court of Appeal did not consider this rendered the offence contrary to the 1946 Law as truly criminal in character, and indeed went on to note other strict liability offences for which higher

[25] [2003] EWCA Crim 697.
[26] [2010] JRC 47.

sentences are available.[27] The decision by the Royal Court of Jersey can perhaps be distinguished because that court was also influenced by the fact that art 45 of the 1995 Law contains a number of special defences, which are not found in the 1946 Law, and which the court considered mitigated the harshness of the strict liability offences.

28 The question of whether the defendant knew he was importing something was not at issue in the *Le Billon* appeal, the issue was whether he knew the substance was prohibited from importation. However, and without taking too much of a tangent, it is interesting to note that if the Jersey courts were to continue to follow *Jackson* and not *Le Billon* then if a person unwittingly imported a commercial quantity of a medicinal product which had, for example, been planted in his car without his knowledge, then if he did so in Guernsey he would be guilty, whereas in Jersey he would not.[28] In *R v Mathudi*[29] it was accepted the defendant had no knowledge of the presence of a banned item (monkey meat) in a container he had imported yet, as this was a full strict liability offence, the English Court of Appeal considered he was still guilty. Interestingly by the time the English Court of Appeal came to rule in that case the law had changed to allow a defence of due diligence. There is no such defence to the 1946 Law and in such a case it would be for the prosecutor to look closely at the public interest in prosecution.

29 Indeed the question of prosecutorial discretion was considered by the Guernsey Court of Appeal which was conscious of the potential breadth of this offence and whether it might catch legitimate businesses importing, to use the court's example, volatile solvents in household products such as paint thinner. The appellant successfully persuaded the court that the issue was one that was sufficiently covered by prosecutorial discretion, *ie* if the importation did not amount to a genuine effort to import commercial quantities of legal highs then it would be unlikely the authorities would prosecute. In accepting this, the Court of Appeal said—

> "The argument that unfairness may result if a person is strictly liable for an importation when he had no means of knowing that the importation is prohibited is met by reference to the duty of any prosecutor to consider whether it is in the public interest."

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[27] See para 42 of the judgment.
[28] Unless of course he could avail himself of one of the exceptions *etc*.
[29] [2003] EWCA Crim 697.

This could be said to provide a reassuring endorsement of the trust placed in the Guernsey prosecuting authorities (no doubt aided by the decision not to seek a rehearing in Mr Le Billon's case).

30 The final issue the respondent sought to raise was whether the definition of a medicinal product required the prosecution to prove the substance had some therapeutic purpose as most (if not all) legal highs have none. As there was no local case law on the meaning of medicinal product, the respondent sensibly analysed the jurisprudence of the European courts to attempt to decipher the definition. The Magistrate's Court concluded that the case law offered "nothing useful" to assist in interpreting the definition but there was clearly mixed jurisprudence from the European courts and the respondent sought to raise the issue again before the Court of Appeal who rejected their contentions stating—

> ". . . any reference to views expressed by the ECJ must be subject to the recognition that the Guernsey legislation imported only part of the definition section of the 2001 Directive and not the wider scheme of the Directive which is associated with the industrial production and marketing authorisation of medicinal products . . . we do not consider that the authorities cited can be relied on as requiring, as an element of the . . . offence, in the case of substances alleged to be a medicinal product by function, proof of therapeutic benefit or use against disease."

31 This is perhaps something that the ACMD might now consider as it could influence their reluctance (as referred to earlier) to use this definition to control legal highs.

Chris Dunford is an Advocate of the Royal Court of Guernsey and works for the Law Officers of the Crown in St Peter Port and was responsible for the prosecution of this case and each of the subsequent appeals. *The author wishes to express his gratitude to his colleagues in St James' Chambers (particularly Crown Advocate Graeme McKerrell and Roy Lee) for their assistance in the preparation of the appeals and this article.*