Case No: CO/1370/2006

Neutral Citation Number: [2006] EWHC 2784 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 10th November 2006

Before :

THE HON. MR JUSTICE GOLDRING

- -

Between :

THE COUNCIL FOR THE REGULATION OF HEALTH CARE PROFESSIONALS	**Appellant**
- and -	
(1) THE GENERAL MEDICAL COUNCIL	**Respondants**
(2) DR GURPINDER SALUJA	

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Robert Jay Q.C. (instructed by **Baker & McKenzie Solicitors**) for the Appellant
Robert Englehart Q.C. (instructed by the **Legal Department of the GMC**) for the Respondant GMC
Christina Lambert (instructed by **Legal Department of the Medical Defence Union**) for the Respondant Dr Saluja

- -

Judgment
As Approved by the Court

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Mr Justice Goldring :

Introduction

1. On 26 August 2005 Dr. Saluja was charged with serious professional misconduct.

2. On 19 January 2006 the Fitness to Practise Panel (FPP) which heard the charge stayed the proceedings as an abuse of process on the basis of entrapment. Three other similar applications by three other doctors failed. The Council now seeks to appeal the stay. Two issues are raised. First, do I have jurisdiction to hear the appeal? Second, if so, was the FPP manifestly wrong in the decision it reached.

The allegations

3. The charge is self explanatory. As material, it read as follows:

> "On 14 November 2003 at [your surgery] at 117 Fulborne Road, London E17, you were consulted by Rachel Dobson, an undercover journalist posing as a patient…Ms Dobson asked you to provide her with a sickness certificate…[she] told you that she wanted the certificate to…enable her to take time off work [and] have a holiday…[She] made it clear to you that illness was not the basis for her request for a certificate…You advised [her] to make an appointment with you nearer the time. …You suggested to [her] that at that future consultation…she could state that she was suffering from 'stress or depression or whatever you feel like'…that she should not mention that she wanted to have a holiday…'I can guarantee that I will give it [the certificate] you at that time'…
>
> You had no basis upon which reasonably to conclude that Miss Dobson was suffering from an illness which could properly give rise to the issuing of the certificate …
>
> Your actions as outlined above were…inappropriate… dishonest… an abuse of your position…
>
> And that in relation to the facts alleged you have been guilty of serious professional misconduct."

The transcript of the conversation

4. Ms Jobson surreptitiously recorded what was said between her and Dr. Saluja. I shall only refer to part of what was said. The recordings were not very clear.

5. She said she was trying to get some time off work: that she had been told she needed to get a note to do that. She was wondering what the procedure would be. Dr. Saluja's initial reaction was that

> "We normally give a medical certificate after the first week…you need to give a medical reason."

6. Ms Dobson made it plain that she did not want to work over Christmas. Dr Saluja suggested she speak to her employer. She said that she needed a note. A friend had suggested

> "sort of, privately I might be able to pay a fee in order to get a private note, as an option."

7. This interchange took place.

> "When do you want that, actually? I want to get it to make sure that I have the week of Christmas off. You must come at that time, then I'll give it to you at that time I can't do it now."

8. Dr Saluja said he could give her a certificate "If she had a valid problem from today." When she offered more money he said

> "No we can't do that…if it is at that time if you can give us a medical reason then fine we can give it to you…"

9. She said she didn't want to give a medical reason. She wanted time off work, that is why she went "sort of privately." Dr Saluja said that he couldn't do it at that time (November) for Christmas. This interchange took place.

> "We've got to give a medical reason…it can be stress or depression, whatever you feel like…
>
> No, No, I understand that, but you could for example say it was stress or something like that.
>
> That's fine, we can do it but at that time.…
>
> … my boyfriend's basically given me about £1,000 to get a note… Is there any way I could get a note with that to guarantee that I've definitely got the time…I just really, really want to get the time off.
>
> We can do it…at [Christmas]…not…now…I can't give it today. I'll have to give it to you at that time. I can guarantee that I can give it to you at that time…not that much in advance."

10. Ms Dobson asked,

> "How much would a certificate like that cost at the time?
>
> Normally it is not very costly, but we've got to see what problem you are having at that time…and what medical condition you are having."

11. When Dr Saluja asked her if she was there privately she said she was. She was not unhealthy. She needed a holiday. Dr Saluja said,

> "What we can do in your scenario, we can document that you are suffering from stress nearer the time I can give you medical certification at that time…Supposing you don't need it, that's fine."

12. Dr Saluja said that for £1,000 he could not provide a certificate in advance. He could provide one a couple of days before,

> "If you let me know and tell me you have a problem.
>
> …the reason I want to have one is because I want to have a holiday…
>
> …[you] should not tell me. If you tell me then I perhaps won't be able to do it. The best thing is just to take it easy and let me know at that time and we can issue. I need to know that, yes you are not well then I'll issue a certificate – not now…
>
> A patient can come to me and tell me "look I'm having this problem and I want a sick note" and the patient might be going on holiday or whatever he was going to do, it's not my concern…
>
> Do you understand that?
>
> …So if I come the week before?
>
> Yes that's fine … we'll give documents…
>
> OK and then I'll pay at that time? Do you want me to pay today for the consultation?
>
> Yes for consultation…
>
> So at the moment your feeling stressed about work is it?
>
> Yes, well, not so much at the moment.
>
> Well for domestic purposes …"

13. Dr Saluja began to write some notes, presumably for the medical records. He said Ms Dobson could see him before Christmas.

> "…I can assure you that if you still have the problem then I can give you [the certificate] no problem. It's not a very big deal. But…not in advance. [It looks] very abnormal for me to tell you now that yes you will be sick at that time."

14. The General Medical Council relied upon the recording. Ms Dobson was present to give evidence.

The legal framework

15. By Section 35(D) of the Medical Act 1983,

> "(1) Where an allegation against a person is referred…to a[n] [FPP], subsection (2) and (3) below shall apply.
>
> (2) Where the Panel find that the person's fitness to practise is impaired they may, if they think fit -
>
> (a)…direct that the person's name shall be erased from the register;
>
> (b) direct that his registration…shall be suspended…
>
> (c) direct that his registration shall be conditional…"

16. Because Dr. Saluja's case had been referred to the Professional Conduct Committee before the coming into force of section 35(D), it fell to be dealt with by the FPP under section 36 of the Act. For present purposes it is agreed to make no difference. The possible sanctions are identical and the power to impose them similarly expressed.

17. Section 25 of the National Health Service Reform and Health Care Professions Act 2002 created the Council. The history and the Council's general functions are referred to in detail in the judgment of the Court of Appeal in *CRHCP v. General Medical Council* [2005] 1 WLR 1 at paragraphs 5-7.

18. By section 26,

> "(3) The Council may not do anything in the case of any individual in relation to whom –
>
> (a) there are, are to be or have been proceedings before a committee of a regulatory body…, or
>
> (b) an allegation has been made to the regulatory body or one of its committees…which could result in such proceedings.
>
> (4) Subsection (3) does not prevent the Council from taking action under section 28 or 29, but action under 29 may only be taken after the regulatory body's proceedings have ended."

19. By Section 29(1),

> "This section applies to –
>
> …(c) a direction by a [FPP] under section 35(D) of the Medical Act 1983…that the fitness to practise of a medical practitioner was impaired otherwise than by reason of his physical or mental health…"

20. By Section 29,

> "(2) This section also applies to –
>
> (a) a final decision of the relevant committee not to take any disciplinary measure [under Section 35D of the Medical Act 1983]…
>
> (3) The things to which this section applies are referred to below as "relevant decisions."
>
> (4) If the Council considers that –
>
> (a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or
>
> (b) a relevant decision falling within subsection (2) should not have been made,
>
> and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court…
>
> …(8) the court may –
>
> (a) dismiss the appeal,
>
> (b) allow the appeal and quash the relevant decision,
>
> (c) substitute for the relevant decision any other decision which could have been made by the committee…or
>
> (d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court,
>
> and may make such orders as to costs … as it thinks fit."

Jurisdiction

21. The Council accepts that the FPP had the power to stay proceedings for abuse of process. It amounts, submits Mr Jay Q.C. on behalf of the Council, to "a final decision of the relevant committee not to take any disciplinary measure." It is a "relevant decision" and therefore can be referred by the Council to the court. Mr Englehart Q.C. submits that to stay proceedings on the grounds of abuse of process does not amount

to “a final decision”. It is not “a relevant decision” under section 23(4) and therefore an appeal does not lie.

22. In *CRHCP v General Medical Council* [2004] EWCA Civ 1356 (above) the Council sought to appeal the acquittal of Dr. Ruscillo. The Court of Appeal had to decide whether Leveson J (as he then was) was right to rule that section 29 gave the Council a right of appeal against an acquittal. Dr. Ruscillo’s argument on section 29(2)(a) was encapsulated in the Court’s judgment in this way.

> “38 …The finding that Doctor Ruscillo had not been guilty of serious professional misconduct precluded any possibility of the [Professional Conduct Committee] making a decision to which section 29…could apply
>
> 39. As a matter of the natural use of language we consider that there is force in [that] contention. A decision to do or not to do something naturally suggests the exercise of an option. It is not however an abuse of language to say that a disciplinary tribunal “[decided] not to take any disciplinary measure” because it concluded that no case was made out on the facts which would permit it to do so. Thus the natural meaning of the language cannot be determinative of the point. It is appropriate to adopt the purposive approach to resolving the issue as to the true construction of section 39…”

23. In response to the submission on Dr. Ruscillo’s behalf that the scheme under section 29 permitted an appeal against the sanction imposed, but not a finding of whether professional misconduct had been established, the Court said this.

> “45…the mischief against which section 29 is aimed occurs just as much where a disciplinary tribunal wrongly concludes that conduct does not amount to professional misconduct as where the tribunal imposes a too lenient penalty.
>
> 46…section 29(4)(a)…makes express provision for the Council to have regard to the lack of a finding of professional misconduct when considering whether a decision…has been unduly lenient…What is quite clear…is that in some circumstances a failure to find professional misconduct where [it] should have been found is a relevant consideration in deciding whether a reference should be made to the High Court. It would be anomalous if, under section 29(4)(b), no regard could be had to an erroneous failure to find professional misconduct.”

24. The court also observed that the construction contended for would mean that after a finding that professional misconduct had occurred, the court could only intervene where the tribunal decided in its discretion to take no action. That would be “the most glaring anomaly.” The Court concluded that,

> "Leveson J was correct to hold that section 29 confers on the council power to refer to the High Court a decision that…a health care professional has not been guilty of alleged professional misconduct provided always that the criteria in section 29(4) are satisfied."

25. Mr. Jay submits that section 29(2)(a) similarly applies to the stay imposed on the grounds of abuse of process. A stay amounts to "a final decision…not to take any disciplinary measure."

26. The Court of Appeal went on to consider the scheme of section 29. It referred with approval to the Department of Health's explanatory notes in which it was envisaged the Council would refer to the Court "extreme cases where the public interest in having a clearly perverse decision reviewed by the court outweighs the public interest in the independent operation of self-regulation." See paragraph 60 of the judgment.

27. The court said,

> "That application is achieved if the right of appeal is restricted to an attack on the final decision as to penalty. Intervention will be justified where, because no penalty has been imposed, or the penalty is inadequate, the public remains at risk."

28. The difficulty was to reconcile what was said in section 29(4)(a) with subsection (1). It is not necessary for present purposes to set out the Court's reasoning. Its solution was to give section 29(4)(a) the following meaning.

> "If the council considers that- (a) a relevant decision falling within subsection (1) has been unduly lenient, whether because the findings of professional misconduct are inadequate, or because the penalty does not adequately reflect the findings of professional misconduct that have been made or both…" See paragraph 67 of the judgment.

29. Relevantly to the present appeal, the Court went on to say

> "Although section 29(4)(b) says nothing about undue leniency, it seems to us implicit that the council will not refer a case to the High Court unless it considers the failure of the disciplinary tribunal to impose any penalty is unduly lenient to the practitioner."

30. As to the task of the High Court when considering an appeal, the Court of Appeal emphasised that the appeal is against the "relevant decision;" in other words, the penalty. It considered, among other things, the criteria to be applied by the High Court when deciding whether a relevant decision was "wrong." It said this (in paragraph 73).

> "The role of the court when a case is referred is to consider whether the disciplinary tribunal has properly performed [its] task so as to reach a correct decision as to the imposition of a

> penalty. Is that any different from the role of the council in considering whether a relevant decision has been "unduly lenient?" We do not consider that it is. The test of undue leniency in this context must…involve considering whether having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession….
>
> 77…In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public."

31. The issue resolves itself to this. Was the FPP's imposition of a stay "a final decision" which was "unduly lenient" or "manifestly inappropriate?"

The nature of a stay

32. I shall for the moment only consider the nature of a stay in the context of its applicability to section 29. I shall return to the topic later when dealing with the decision reached by the FPP.

33. Mr. Jay submits that a stay imposed in circumstances such as the present amounts to a final decision not to take any disciplinary measure. Applying a similar purposive interpretation of section 29 as did the Court of Appeal in relation to an acquittal, it is clear, he submits, that a stay falls within the section. The final nature of a stay for abuse of process can be seen he submits from the following observations of Lord Bingham of Cornhill in Attorney General's Reference (No 2 of 2001) [2004] 2 WLR 1. The context was the application of a stay on the grounds of abuse of process because of delay.

> "13. It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence he should not be tried for it at all…In such a case the court must stay the proceedings…
>
> …17 If the court were satisfied, before an impending trial, that… the authorities were shown to have acted in such a way as to render any trial of the defendant unfair…further proceedings would be restrained as an abuse of the court's process…If such an abuse were shown after trial, any resulting conviction would be quashed….
>
> 24….The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."

34. Mr. Jay submits that it is clear from the observations of Lord Bingham that in such circumstances as he envisages a stay means the end of the prosecution. That must

similarly be so in the present proceedings which, while not criminal, are conducted substantially in accordance with criminal procedure. It must, he submits, amount to a final decision in the present context.

35. Section 40 of the Medical Act 1983 gives a doctor the right to appeal to the High Court decisions by the FPP to penalise him. Mr. Jay submits that a decision by the FPP to refuse a stay and go on to penalise the doctor could similarly be the subject of an appeal by the doctor under section 40 of the Act. His position would be similar to that of the defendant convicted after a trial which should not have taken place because of the abuse of the process. That suggests the decision is final. It suggests too some equivalence between the position of the Council and that of the doctor as far as appeal is concerned.

36. Mr. Englehart disagrees. He emphasises that never before has the Council sought to extend its right to appeal when there has not been a hearing and a decision on its merits. That is consistent, he submits, with the aim of the legislation which is to correct "undue leniency." He makes these points.

37. First, a stay is not a decision for the purposes of the Act. It cannot be a "relevant decision" under subsection 3 and for the purposes of subsection 4. Section 29(1) can only apply to a direction by the FPP. Section 35D of the Medical Act 1983 (which for present purposes are identical to section 36) refers to the directions the FPP may apply. Section 29(2) refers to final decisions not to impose such directions. Parliament did not intend that anterior decisions not based on the merits should fall within the scope of section 29. Section 40 of the Medical Act 1983 does not give an aggrieved doctor a right of appeal in respect of a finding against him that there had been no abuse of process. An appeal would only lie if there is a final decision.

38. Second, the meaning of the expression "final decision" is well established as far as appeals are concerned. Mr. Englehart relies upon the jurisprudence about final and interlocutory decisions in civil cases where whether leave to appeal was required depended upon the nature of the decision. For there to be a final decision, he submits, there has to be a final determination of the case. It is necessary to have regard to the nature of the application, not the result: see *Salter Rex v Ghosh* [1971] 2 QB 597. In *Hunt v Allied Bakeries Limited* [1956] 1 WLR 1326 orders striking out the whole or part of a claim and staying all further proceedings were treated as interlocutory. In the Access to Justice Act 1999 (Destination of Appeals) Order 2000 a "final decision"

> " …means a decision of a court that would finally determine…the entire proceedings…"

39. Mr. Englehart submits that Parliament must have had in mind these decisions when enacting section 29.

40. In support of his submission that this civil jurisprudence is relevant to the present case (and in response to Mr. Jay's submissions that they are not) Mr. Englehart has since the hearing kindly sent me a number of authorities which make it clear that such proceedings as the present are not criminal proceedings.

41. Third, Mr. Englehart submits that however unlikely, by its nature a stay can be lifted. A decision to impose it cannot therefore be said to be final.

42. Fourth, considerable anomalies would arise if a stay were a decision which could be appealed. As he rightly points out, there are other, earlier decisions in the disciplinary process which are not susceptible to appeal under section 29 because they are not decisions of the FPP. Such include case examiners not referring a case or a decision by the President after referral that a hearing before the FPP should not take place. Such decisions, he submits, are equivalent to a stay.

43. Finally, he emphasises that an appeal should only lie in "extreme cases," as was accepted in *CRHCP v General Medical Council* (see above). He refers too to what was said in the House of Lords when the second Reading of the Bill was being moved. It is unnecessary to refer to that.

My conclusion on jurisdiction

44. As I have said, the Council accepts that the FPP had jurisdiction to impose a stay. In doing so the FPP was purporting to apply the principles of English criminal law. That is consistent with what is agreed to be the procedure of such a disciplinary hearing when the facts are being decided. Such a procedure acts as a safeguard for the doctor. While therefore the proceedings are not criminal, as Mr. Englehart rightly submits, it is the application by the FPP of the criminal law to which this appeal relates. It would therefore seem to me artificial when considering the nature of a stay for abuse of process to have regard to the civil jurisprudence relating to different legal provisions in a quite different context.

45. By definition, the imposition of a stay for abuse of process in a criminal case means that it would be an abuse of the process of the court for the case to be tried. Once such a decision has been taken in a given case it seems to me inconceivable that the case could subsequently be pursued. That must be so whether the abuse is on the grounds of executive malpractice or delay. Such a finding is the effective end of the case. It amounts to its final determination. It is a wholly different situation to that which may obtain in civil appeals. It seems to me Lord Bingham's observations in *Attorney General's Reference (No 2 of 2001)* referred to above apply equally to the present situation.

46. The effect of such a ruling means that the case against the doctor can never be decided on its merits. It means that no penalty at all can ever be imposed. If the ruling was wrong it means that however desirable it might be for the protection of the public for action to be taken in respect of the doctor, it never can be. Although taken earlier in the trial process an erroneous finding of abuse of process would have the same effect as would an erroneous acquittal. The mischief against which section 29 is aimed occurs just as much where a disciplinary tribunal wrongly brings the case to an end on the grounds of abuse of process as where it wrongly concludes the conduct does not amount to professional misconduct or where it imposes too lenient a penalty. It would similarly be anomalous for the court not to be able to intervene.

47. In short, in my view a finding by the FPP of abuse of process does amount to a "final decision." It would be artificial to find otherwise. The Court of Appeal's purposive interpretation of section 29 in respect of acquittals can similarly be applied to it.

48. If therefore the decision to stay the case on the basis of abuse of process was manifestly wrong, the court should intervene under section 29(4)(b).

49. Although a doctor would have a right of appeal under section 40 of the Medical Act in the circumstances postulated by Mr. Jay, that does not seem to me a matter of great importance in interpreting section 29.

50. As to the other points raised by Mr. Englehart, I have the following observations.

51. Applying a purposive interpretation of section 29, the FPP's decision on the stay was a "relevant one" under subsection 3. As to what he suggests are the anomalies which would arise were a stay on the grounds of abuse of process to be subject to appeal, the position seems no more than this. Parliament has decided that from some point in a disciplinary process a right of appeal should lie. That point is a decision by, in the present context, the FPP. Until that point has been reached Parliament was, it must be assumed, content that the different disciplinary bodies' (no doubt different) procedures could be followed. That is where it decided to draw the line. I see nothing anomalous in that. I see nothing "extreme" in permitting an appeal such as the present.

The merits of the FPP's decision on abuse of process

The legal principles

52. Before turning to what happened before the FPP I shall try to analyse the nature of abuse of process on the basis of entrapment, its relationship to the European Convention and section 78 of the Police and Criminal Evidence Act 1984.

53. Mr. Jay first submits that on proper analysis abuse of process is essentially about deliberate abuse of executive power. He accepts that there may be exceptional cases in which conduct by those who are not agents of the state may found a basis to stay. However there has as yet been no authority in the higher courts in which that has happened.

54. Secondly, he submits that the right to a fair trial enshrined by Article 6 of the European Convention on Human Rights adds nothing to the position regarding abuse of process under Common Law. That Article, as is well known, provides that,

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair…hearing…"

55. Thirdly, Mr. Jay submits that a breach of Article 8 of the Convention is no more than a factor to take into account in deciding whether there has been an abuse of process or a breach of a person's Article 6 rights. The weight to be attached to it depends upon the facts of the particular case. Article 8 provides that,

> "1. Everyone has the right to respect for his private and family life, his home and correspondence
>
> 2. There shall be no interference by a public body 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…the economic well-being of the country…"

56. Fourthly, Mr. Jay submits that section 78 of the Police and Criminal Evidence Act 1984 is a separate and discrete matter for the court to consider once it has decided it would not be an abuse of process or contrary to Article 6 for the case to continue. First, the court decides whether the case should be stayed. Second, if not, whether evidence sought to be relied on should be admitted. Section 78 provides that,

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely … if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

57. Mr. Jay's second, third and fourth submissions are substantially agreed. His first is not.

58. In *Regina v Horseferry Road Court ex parte Bennett* [1994]1AC 42 the appellant had been forcibly removed from South Africa as a result of collusion between the British and South African police. The House of Lords, by a majority, held that the proceedings against him should not proceed on the basis of abuse of process. Lord Griffiths said this,

> "In the present case there is no suggestion the appellant cannot have a fair trial, nor could it be suggested that it would be unfair to try him if he had been returned to this country through extradition…If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law…
>
> I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

59. In *Attorney General's Reference (No 2 of 2001)* (see above), Lord Bingham also said that,

> "[The category of cases in which it would be unfair to try the defendant] will be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's [Article 6] right[s]."

60. In *Teixeira de Castro v Portugal* 28 EHRR 101 the European Court was considering the conviction of an applicant which was based on the statements of two undercover police officers who had incited the applicant to sell them drugs. He was a man of

previous good character. He said he would never have committed the offence had it not been for the intervention of *agents provocateurs*.

> "The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law…The Court's task…is not to give a ruling as to whether the statements of witnesses were properly admitted…but rather to ascertain whether the proceedings as a whole, including the way the evidence was taken, were fair."

61. The Court decided that the public interest could not justify the use of evidence obtained as a result of the officers' incitement. The applicant was of good character. The officers instigated the offence. There was nothing to suggest had they not done so an offence would have been committed.

62. In *R v Looseley* [2001] 1 WLR 2060 the court was dealing with two cases in which, in broad terms, undercover officers obtained drugs from defendants. In each case it was submitted that for the case to proceed would amount to an abuse of process. The question, answered in the affirmative, was whether the English law concerning entrapment was compatible with the Convention right to a fair trial.

63. In his speech Lord Nicholls of Birkenhead said,

> "1. …every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment…is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts."

64. Lord Nicholls identified the difficulty in identifying what conduct may be caught by words often used in the context of entrapment such as "lure" or "incite" or "entice" or "instigate." He described (in paragraph 4) as "state-created crime" a situation where an undercover policeman repeatedly badgers a vulnerable drug addict who eventually yields. He said this.

> "10…Entrapment assumes the defendant did the proscribed act, with the necessary intent, and without duress. But when entrapment occurs, the commission of the offence by the defendant has been brought about by the state's own agents…
>
> 16…A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way.

> 17…when ordering a stay…the court is not seeking to exercise disciplinary powers over the police…the objection to criminal proceedings…lies much deeper…Entrapment goes to the propriety of there being a prosecution at all…having regard to the state's involvement in the circumstances in which [the offence] was committed…
>
> 25 Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect…[a reference to *Latif* [1996] 1 WLR 104, 112]."

65. Lord Nicholls acknowledged the difficulty in identifying those characteristics which might in a given case give rise to an abuse of process. "A useful guide" is to consider,

> "whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime…The yardstick…is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances…The police did no more than others might do…
>
> ….The investigatory technique…should not be applied in a random fashion, and used for wholesale "virtue-testing" without good reason." See paragraphs 23 and 24.

66. Lord Nicholls emphasised that regard must be had to all the circumstances of the case. Such things as the nature of the offence, the reason for the police operation, the nature and extent of police participation in the crime and the defendant's criminal record might be of particular relevance.

67. Lord Hoffman shortly summarised the law of entrapment in the following way.

> "36. Entrapment occurs when an agent of the state- usually a law enforcement officer or controlled informer- causes someone to commit an offence in order that he should be prosecuted…It may be summarised as follows. First, entrapment is not a substantive defence…secondly, the court has jurisdiction…to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly…the exclusion of evidence [under section 78] is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all."

68. Lord Hoffman too considered the sort of police conduct which might give rise to a stay. He referred to aspects such as the following: whether the police caused the

commission of the offence rather than merely provided an opportunity for its commission, whether the law enforcement officer behaved like an ordinary member of the public, whether there was prior suspicion of criminal acts as opposed to tempting people to commit crimes in order to expose their bad characters, the nature of the offence, how easy it would be otherwise to detect, how active the police officer was (although he said that a "good deal of active behaviour…may be acceptable…").

69. In short,

> "…the principles of English law on which a stay of proceedings may be granted on grounds of entrapment involve consideration of a number of aspects of behaviour of the law enforcement authorities, some of which I have examined in detail, and deciding whether involvement of the court in the conviction of a defendant who had been subjected to such behaviour would compromise the integrity of the legal system."

70. *R v Shannon* [2001] 1 Cr App Rep 12 was a case in which the alleged *agent provocateur* was not an agent of the state but a journalist. Again it involved the supply of drugs. There was an application to exclude the evidence under section 78. Lord Justice Potter (as he then was) said this.

> "If…the unfairness complained of is no more than the visceral reaction that it is in principle unfair as a matter of policy, or wrong as a matter of law, for a person prosecuted for a crime which he would not have committed without the incitement or encouragement of others, then that is not itself sufficient, unless the behaviour of the police (or someone acting on behalf of or in league with the police) and/or the prosecuting authority has been such as to justify a stay on the grounds of abuse of process."

71. In rejecting Mr. Shannon's application to it as manifestly ill-founded, the European Court of Justice said this.

> "The…*Teixeira* case was concerned with an entrapment operation undertaken by police officers and that…judgment did not address the question of entrapment by individuals other than agents of the State…the principles set out…are to be viewed in this context and to be seen as principally directed to the use in a criminal trial of evidence gained by means of an entrapment operation carried out by or on behalf of the State or its agents.
>
> [In the present case]…the State's role was limited to prosecuting the applicant on the basis of information handed to it by a third party…a private individual, who was not an agent of the State…The Court therefore considers that the situation in the instant case is different from that examined in…*Teixeira*…

> However, just as the domestic courts have held that evidence obtained by means of "private" entrapment…may give rise to issues of fairness under section 78…,the court does not exclude that the admission of evidence so obtained may in certain circumstances render the proceedings unfair for the purposes of Article 6…"

72. *R v Hardwicke* 2000 WL 1629663 was another case in which entrapment by a journalist formed a basis of an appeal against conviction for supplying drugs. In that case both abuse of process and section 78 were relied upon. In giving the judgment of the Court of Appeal Kennedy LJ referred to *Bennett* and *Latif* (see above). He said,

> "22…it is of some importance to note that what the court seeks not to condone is "malpractice by law enforcement agencies" which "would undermine public confidence in the criminal justice system and bring it into disrepute." Obviously that is not a consideration which applies with anything like the same force when the investigator allegedly guilty of malpractice is outside the criminal justice system altogether."

73. *Hasan v The General Medical Council* 2003 WL 1202742 concerned, among other things, the alleged provision of bogus medical reports for a fee of £1000 to a journalist pretending to be an asylum seeker; also a journalist pretending to be a claimant in a road traffic accident wanting a false report to boost his claim for damages. The doctor represented himself on his appeal to the Privy Council. He argued that he was duped by the journalists. Giving the judgment of the Privy Council Lord Hope of Craighead said that the fact he was duped,

> "…does not remove the sting from these two heads of charge. The essence of the complaint against him was that he was willing, when approached, to enter into transactions in his professional capacity which were profoundly dishonest…"

74. *R v Marriner and Frain* 2002 WL31676227 was another prosecution in which evidence of an undercover journalist was relied on. Both abuse and section 78 applications were made. Giving the judgment of Court of Appeal dismissing appeals against conviction, Mance LJ (as he then was) said,

> "The present case is not concerned with conduct of the police or prosecuting authorities. The inducements to talk were applied in quite different circumstances and were of a quite different order. The judge was in the best situation to evaluate whether it was fair to allow the proceedings to go before the jury on their basis…"

75. Without going into the facts, *Jones v University of Warwick* [2003] 1 WLR 954 makes it clear that if the conduct of a party to civil proceedings is sufficiently outrageous a stay will lie. That seems to me of limited assistance in the present context.

The broad argument

76. Mr. Englehart, who was in a somewhat difficult position given that at the hearing before the FPP the General Medical Council had argued there should not be a stay, submits that where there was incitement of a doctor to do something he would not otherwise have done, a stay may be appropriate in the discretion of the FPP. The authorities suggest that the fact that the incitement was not by an agent of the state is not decisive but a factor in the exercise of the discretion. When considering such an application, the FPP is entitled to take into account the integrity of the disciplinary process.

77. Ms Lambert, on behalf of Dr. Saluja, similarly submits that abuse of process is not limited to the actions of agents of the state. She submits that in considering the application of abuse of process the FPP is entitled to take into account such things as the very sensitive nature and the quality of the doctor/patient relationship. There is no better judge than the FPP in understanding that relationship. An FPP is entitled to equate the abuse of state power in a criminal case with the abuse of the doctor/patient relationship in a case such as the present. It is entitled to have regard to the effect on its reputation in permitting a case founded on evidence obtained through entrapment to continue.

78. I derive the following from the authorities.

79. First, to impose a stay is exceptional.

80. Second, the principle behind it is the court's repugnance in permitting its process to be used in the face of the executive's misuse of state power by its agents. To involve the court in convicting a defendant who has been the victim of such misuse of state power would compromise the integrity of the judicial system.

81. Third, as both domestic and European authority make plain, the position as far as misconduct of non-state agents is concerned, is wholly different. By definition no question arises in such a case of the state seeking to rely upon evidence which by its own misuse of power it has effectively created. The rationale of the doctrine of abuse of process is therefore absent. However, the authorities leave open the possibility of a successful application of a stay on the basis of entrapment by non state agents. The reasoning I take to be this: given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of Article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity. There has been no reported case of the higher courts, domestic or European, in which such "commercial lawlessness" has founded a successful application for a stay. That is not surprising. The situations in which that might arise must be very rare indeed.

82. As will become apparent, I do not accept that for a journalist to go into a doctor's surgery and pretend to be a patient in circumstances such as the present is similar to abuse of power by an agent of the state.

83. Fourth, in the present disciplinary hearing there is no state involvement in the proceedings being brought. These are proceedings brought against a doctor by his

regulator in order to protect the public, uphold professional standards and maintain confidence in the profession. These are to a significant degree different considerations from those that apply to a criminal prosecution and misuse of executive powers by the state's agents.

84. Fifth, it would be an error of law in considering any application for abuse of process for the tribunal not to have well in mind the differences to which I have referred. It would not be appropriate for an FPP to approach the conduct of journalists as though they were agents of the state.

85. Sixth, "commercial lawlessness" can be a factor in an application to exclude evidence under section 78, although again different considerations apply as between state and non state agents.

86. Seventh, when deciding in any given case whether there has been an abuse of process, the tribunal, here the FPP, is exercising a discretion. In doing so, it must consider all the facts of the case as well as the factors to which I have already referred. While guidance can be obtained from such aspects as were referred to in *Loosely*, no one aspect is determinative and the aspects there set out are not exhaustive.

87. Eighth, if the defendant's Article 8 rights have been infringed that is merely a matter to be taken into account when deciding whether there has been an abuse of process or, (and it amounts to the same thing), his Article 6 rights have been infringed: see for example *R v P* [2002] 1AC 146 and *Jones v University of Warwick* [2003] 1 WLR 954.

88. Ninth, section 78 is concerned with the admissibility of evidence. As Lord Nicholls said in paragraph 12 of *Looseley* (above), it is directed primarily at matters going to the fairness of the conduct of the trial; the reliability of the evidence, how the defendant might test it and so on. Entrapment does not mean the evidence must be excluded. It is a factor to take into account. In considering broader matters going to fairness it is necessary to bear in mind the features referred to above (among others).

What happened before the FPP

89. It is necessary to set out in a little detail what happened.

90. The FPP heard lengthy and at times diffuse submissions from counsel representing the three doctors who were alleging abuse of process and counsel representing the General Medical Council. Among other things, abuse of process, Articles 8 and 6 of the European Convention and section 78 featured. It could not have been easy for a lay panel, albeit with a legal advisor, to follow the submissions.

91. Directions were given to the FPP by the legal assessor. She had drawn a rough "road map" to help the FPP. Although as will become apparent it seems to me those directions did not accurately set out the law, the legal assessor did not have an easy task. She said this.

> "First of all I would say you have to look at Article 8 and decide whether there has been a breach or not. If there has been a breach, then you would have to go on to consider steps 3 and

> 4: exclusion and Article 6. Obviously for the…doctors who have also pleaded entrapment, you would need to look at entrapment as step 2. If there was entrapment, then you go on to consider section 78 and Article 6. Even if you were not to find a breach of Article 8 or indeed if you were not to find entrapment, there is still an argument which could be mounted in relation to exclusion, fairness of the proceedings and Article 6, the right to a fair trial…
>
> The case law has given guidance…but you must assess the situation and the circumstances which are before you today…
>
> At this stage in relation to the evidence of the tape recordings, you are only looking at what took place or allegedly took place for the purposes of Article 8, entrapment, Article 6 and section 78…I believe the best way forward for you is to deal firstly with Article 8 and to decide whether or not it has been breached and then to proceed to the entrapment argument and then the issue of stay under Article 6 Abuse of Process or Exclusion, and section 78…"

92. There then followed a direction regarding Article 8. It is unnecessary to set it out. Suffice to say it was very lengthy. Mr. Jay submits it was wrong. The legal assessor then said this.

> "If you do find a breach of Article 8, then that of itself does not entitled you to stay the proceedings or exclude evidence under section 78. You have to consider those provisions in relation the fairness and the circumstances of the case."

93. That is agreed to be correct.

94. She next dealt with entrapment.

> "Entrapment and Article 8 will both lead to considerations under Article 6 and section 78."

95. She referred to Archbold. As to *Looseley* (see above) she said

> "The conclusion of their Lordships [was]…
>
> (i) It is not acceptable that the State through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Such conduct would be entrapment, a misuse of state power and an abuse of the process of the court.
>
> (ii) By recourse to the principle that every court has an inherent power and duty to prevent abuse

> of its process the courts can ensure that executive agents of the state do not so misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the State."

96. She added,

> "I should pause there to remind you that you are a court and therefore you must not be seen to condone improper behaviour or actions which have obtained evidence which you are asked to admit."

97. She continued,

> "As to where the boundary lies in respect of acceptable police behaviour…Each case must depend on its own facts, but a useful guide to identifying the limits of the type of police conduct which is acceptable is to consider whether, in the particular circumstances, the police…did no more than present [the doctor] with an unexceptional opportunity to commit a crime."

98. Twice during the course of this direction the legal assessor referred to journalists. As to the direction regarding acceptable police behaviour, she said, "In this case it is obviously journalists." As to the reference to the police in the last sentence, she said, "…journalists in this case."

99. Mr Jay submits that the legal assessor there failed to draw any distinction between police and journalists. She effectively substituted for police journalists. It seems to me he is right. On any view what she did not make plain there is a distinction between the police and journalists when considering abuse of process.

100. She went on to say,

> "The yardstick is … whether the conduct of [the journalist] preceding the commission of the offence was no more than might have been expected from others in the circumstances; if not, then the police were not to be regarded as having instigated or incited the crimes; they did no more than others might be expected to do, they were not creating crime artificially…
>
> However, the investigatory technique of providing an opportunity to commit crime should not be applied in a random fashion or be used for wholesale virtue-testing without good reason. … The ultimate consideration is whether the conduct of the law enforcement agency is so seriously improper as to bring the administration of justice into disrepute."

101. She then said this,

> "Obviously in this case you did not have law enforcement officers; you did have a private person, a journalist…Mr Enoch [counsel for the GMC said] that the courts had not necessarily formed such a high threshold in relation to intrusion as they have in relation to public authorities, although no particular case was cited."

102. That was not right. In his skeleton argument Mr Enoch had referred to *Shannon* (see above) and *Hardwicke and Thwaites* (see above). The FPP could well have thought Mr. Enoch's submission was without substance, unsupported as they were told it was, by authority. Moreover, there was a difference between conduct of a journalist and of a police officer, as she should have directed.

103. The legal assessor referred to section 78. Among other things she said,

> "…If you exclude the evidence the case does not come to an end, but…the GMC…could not rely on the tapes or the evidence of the journalists. There may be other evidence, I do not know… if it is excluded under section 78 that does not bring proceedings to an end. There is another doctrine, called the doctrine of abuse of process. This enables the court to stay proceedings when it would not be fair to try a defendant. This really brings into play Article 6. One such situation would be where the procedures resulting from the executive action which threatened either basic rights or the rule of law. There you have your Article 8 and your Article 6 arguments."

104. Abuse of process and section 78 were there dealt with the wrong way round. As will become apparent, they were dealt with in that order by the FPP.

105. She continued,

> "A stay would usually be the more appropriate remedy in an entrapment case. However, sometimes an application would be made for a stay and/or for the exclusion of evidence under section 78."

106. There followed yet more legal argument. Finally, on 17 January 2006, (no less than 6 working days after the case began), the FPP retired to decide whether it would be an abuse of process for the GMC to rely on Ms Dobson's evidence. Two days later it made its determination in respect of each doctor.

107. It said that it had considered all of the authorities to which it had been referred. It said that no single authority was entirely at one with the circumstances of the case and that it was necessary to exercise judgment to apply specific elements from different cases to the relevant issues in the case. It said that,

> "[it] has been assisted in this task by advice from the legal assessor which it has accepted."

108. In other words, it applied the law as directed by the legal assessor.

109. It first dealt with Article 8. It found a breach of Article 8(1) in each case. It found that,

> "Under Article 8(2) the actions of the journalists in entering the premises and covertly recording conversations without consent were not "in accordance with the law" because it was trespass and there was no statutory or common law basis for it.
>
> The panel did not need to make a finding on the second limb of Article 8(2) as, having found that it was not in accordance with the law, no further justification was required. However, it felt that the issues surrounding the breach and the provisions relating to justification as being "necessary in a democratic society" may be relevant under Article 6 when it considered all the circumstances occurring under Article 8 as to whether the doctors could have a fair hearing. The panel therefore considered in each case whether the infringement of Article 8 could be justified as "necessary in a democratic society." The panel took collective account of the interests of the economic well being of the country (in terms of costs of time off resulting from inappropriate sickness certification), the prevention of crime (in terms of fraud or collusion in fraud) and the protection of morals (in terms of doctors acting in accordance with "good medical practice"). The panel noted the practical difficulties involved in discovering and bringing to public notice evidence of alleged misconduct of this kind. The panel also took account of the need to uphold the reputation of the medical profession and regulate standards of behaviour."

110. As to Article 6, it said,

> "At this stage under the provisions of Article 6 it would only be concerned with fairness from the perspective of these doctors."

111. As to entrapment it said,

> "…The panel principally referred to the cases of *Looseley* and *Hasan*. The panel has applied, in each case as appropriate, the test set out in the case of *Looseley* (adapted for the circumstances of this case which are somewhat different, in that this case features journalists acting in the furtherance of a story and not police officers or other agents of the state investigating or seeking to prevent crime)."

112. Mr Jay submits that the FPP appear to have applied the same test for journalists as for policemen: in other words substituted journalists for policemen in the case of *Looseley*. Miss Lambert submits that the FPP there specifically referred to the difference between journalists and police officers. It had with it all the skeleton arguments, including Mr. Enoch's which referred to the difference in threshold and the relevant authorities. It is not conceivable an experienced panel could not have had in mind that difference. Miss Lambert rightly emphasises too (both here and at other

points in the determination) that the court must bear in mind this is the determination of laymen and must not be read as a pleading.

113. The panel went on to say,

> "The panel has considered whether or not the journalist did in fact do no more than present the doctors "with an unexceptional opportunity" to commit the action which has led to this hearing. The newspaper may have possessed anecdotal or hearsay evidence of medical practitioners who might issue sickness certificates without valid medical reasons, but the panel has not been told of any reasonable suspicion against any of these practitioners,…in fact the very opposite has been stated, namely that they were all selected at random and are otherwise of good character. The panel notes that the case law indicates that the technique of "providing an opportunity to offend" can be used even without suspicion of a particular individual but that it should not be applied at randomly or for whole-scale virtue testing, without good reasons."

114. The FPP next referred to Section 78 and set it out.

115. It dealt with each doctor separately. It was only in respect of Doctor Saluja that it found an abuse of process. It said this

> "A journalist entered Dr Saluja's consulting room on a pretence of being a patient. She covertly and without Dr Saluja's consent recorded a conversation that took place, during the course of which she requested a sickness certificate. When this was not immediately agreed, she then offered Dr Saluja a payment of £1,000 as an inducement to comply with her request and she subsequently repeated that offer. She continued to pressurise him to comply with her request
>
> Applying the tests in the case of *Looseley*, the panel has concluded that Dr Saluja was subject to entrapment. The offer of a substantial sum of money, which was repeated, was outwith what could be expected from any ordinary patient. Accordingly the journalist did more than present Dr Saluja "with an unexceptional opportunity" to commit the action which led to this hearing. The panel concluded that it would be disproportionate to receive evidence gained through methods that were so improper.
>
> In these circumstances, the panel finds it appropriate to exclude the covertly recorded evidence of the conversation between Dr Saluja and the journalist. On the basis of finding of entrapment, taken together with the breach of Article 8 of the Human Rights Act, the panel has decided to stay the proceedings against Dr Saluja having regard to his Article 6 rights to a fair hearing."

116. It is clear, submits Mr. Jay, that the panel was effectively substituting journalists for policemen and applying *Looseley* without more to journalists.

117. As for the other doctors, the FPP said that

> "[it also took account of the circumstances of the breach and the factors contained in Article 8(2)] that the panel believe apply in this case. The panel concluded that it was "necessary in a democratic society" there being in its opinion a pressing social need that doctors should not be seen to act against the interest of employers by providing or agreeing to provide inappropriate sickness certificates. The panel further noted the potential for fraud and that it is both morally wrong and in breach of GMC professional guidelines. The panel believes that the journalists, although not acting in accordance with the law, to have been bone fide in that they were carrying out a journalistic exercise following hearsay comments into alleged malpractice by doctors in issuing inappropriate sickness certificates."

118. Miss Lambert submits that there the panel was setting out the assessment of proportionality that it must have applied in the case of Doctor Saluja (albeit it purported to do so in the context of Article 8(2), which cannot apply in this case).

119. Mr. Jay submits that the panel fell into error. It applied the law as directed. That direction failed to draw the distinction between journalists and agents of the state. That distinction could not therefore have been part of any balancing exercise carried out by the panel. The key finding was that by offering money to Dr. Saluja she did more than present him with an "unexceptional opportunity." That formed the basis of the distinction between him and the other doctors, in respect of whom no abuse of process was found. There was no proper consideration of proportionality. This was a professional man at his place of work, not a vulnerable drug addict. It appears to have first decided to exclude the evidence under section 78 and then stayed. What it said about Article 8(2) was not right. Had the FPP correctly applied the law it manifestly could not have found abuse of process. Neither could it have excluded the evidence under section 78.

120. Mr. Englehart submits the FPP was entitled to find as it did. The distinction between Dr Saluja and the other doctors was the pressure placed upon him by Ms Dobson. It cannot be said it was manifestly wrong to have done so.

121. Miss Lambert in well made and succinct submissions, agrees. She submits the journalist's conduct violated the sanctity of the doctor's surgery and the doctor/patient relationship. Ms Dobson's behaviour was close to that referred to an unacceptable by Lord Nicholls in *Looseley*. The offer of money was not an action of a normal patient, as the FPP would well know. There was pressure on Dr. Saluja. There was no pre-disposition for wrongdoing.

122. Miss Lambert further submits that it is clear the FPP approached the case in the right way, albeit the Determination may not have been set out ideally. They found entrapment. They considered proportionality. They must have considered it in the

same way as they did for the other doctors. This experienced panel knew it was the repository of the public interest. It plainly found on the facts before it that it would be an affront to the public conscience for the case to proceed. The Determination must be read as a whole. It put into the balance, as it was entitled to, the infringement of Dr. Saluja's Article 8 rights. Although it might not have properly sequenced abuse of process and section 78, it does not matter. It focussed on entrapment. It found there was entrapment. It was entitled to.

My conclusion

123. I start by referring to the effect of some of the observations expressed by the Council when considering whether this case should be referred to court. It seems to me some significant points are made.

124. Doctors have a key role in the administration of the medical insurance system and of public funds. If any dishonesty were found after a full hearing it required an appropriate sanction in order to maintain confidence in the system. If the allegations were true there would be an (apparent) diagnosis of a patient without examination. It would remain on the patient's records. If Doctor Saluja was influenced by the offer of money, that was an aggravating feature, not one which should play a part in exculpating him. Some disciplinary offences (particularly where the patient has an interest in keeping quiet) will only come to light through the use of techniques such as were used here.

Abuse of process

125. I have already said that in my view what was relied upon here as an abuse of process was very different from that referred to in cases such as *Looseley*. The alleged *agent provocateur* had nothing to do with the state (or for that matter, the General Medical Council, the "prosecuting" body).

126. The FPP was not properly directed to that effect. Mr. Enoch was right (and possibly understated the position) when he said the thresholds were different. The FPP should have been so directed. It should have been made clear how exceptional a stay in circumstances such as the present was. I agree with Mr. Jay: the legal assessor was effectively directing the FPP that for policemen in the authorities could be substituted journalists.

127. Reading the Determination as a whole, I agree too that the FPP, in exercising its discretion to stay for abuse of process, applied the law as directed. That is what it said in terms. It therefore applied the law wrongly. It plainly applied *Looseley*, particularly that part which related to "unexceptional opportunity." Although, as Miss Lambert submitted, the FPP may have had regard when considering proportionality, to the features which it set out by reference to Article 8(2) when considering the other doctors' cases, it could not in the light of the directions it received, have considered proportionality properly.

128. First, as I have said, it substituted journalist for doctor. That error alone is sufficient to impugn the decision.

129. Second, there is nothing to suggest proper consideration of the substantial difference between a doctor at his professional practice being pressed to provide a false medical certificate and a drug dealer being importuned by an undercover officer. On the face of it, (and of course I bear in mind the merits have not been decided) Dr. Saluja could have said no when asked to provide the certificate. He could have asked the "patient" to leave. It is difficult to see how the offer of money in such circumstances, albeit with some importuning or pressure, could be said to amount to such misconduct by the journalist as to compromise the integrity of the disciplinary process. It seems to me to fall well short of that.

130. Third, there is nothing to suggest specific consideration of the important elements of public protection, the upholding of proper professional standards and public confidence in the profession in the context of the balancing exercise the FPP had to carry out.

131. It comes to this. The law was not applied correctly. Had proportionality been properly considered, the proceedings could not have been stayed. In staying them, the FPP, as it seems to me, manifestly erred.

Section 78

132. In the light of the views expressed above, there is no basis to exclude the evidence on the basis of entrapment. To do so was a manifest error. No other basis to exclude it has been advanced. The tape or tapes of what was said (albeit of not very good quality) are available. There are transcripts. Ms Dobson can give evidence. She can be cross-examined. If necessary, Dr. Saluja can give evidence. There is no reason to exclude the evidence under section 78.

The order of the court

133. In the circumstances it seems to me I should make the following order. I should allow the appeal and quash the order for a stay. I should quash too the order excluding the evidence under section 78. I should remit the case to the FPP with the direction to inquire into and determine the issues of serious professional misconduct, and, if necessary, sanction. I will however hear submissions on the precise nature of the order.

134. I have some final observations. To dispose of these issues took no less than nine working days. The costs were no doubt substantial. Expansive and time consuming submissions were made and permitted (although not by Miss Lambert). Most were on a proper construction of the law, without merit. They were difficult for the legal assessor. They must have been much more difficult for a lay panel. Hopefully no judge or bench of magistrates would have permitted the proceedings to take so long. No doubt the GMC is considering how to keep proceedings such as these within bounds.