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Non-state agent entrapment - the X factor

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Case: Council for the Regulation of Healthcare Professionals v General Medical Council [2006] EWHC 2784 (Admin); [2007] 1 W.L.R. 3094 (QBD (Admin))

***Arch. Rev. 4** On Monday July 21, 2014 it was suddenly and widely reported that the case against Tulisa Contostavlos, former N-Dubz singer and X Factor Judge, had collapsed. This was as a consequence of His Honour Judge Alistair McCreath, the Recorder of Westminster, having acceded to Miss Contostavlos's re-opened application for a stay on the grounds of an abuse of process. Yet, only days before in a detailed and reasoned judgment, the judge had declined to stay proceedings, rejected all applications to exclude evidence and ruled that a fair trial was feasible. This article outlines the circumstances in which a unique course of events unfolded, culminating in the stay of the proceedings against both defendants and (as the newspapers would say) legal history being thereby made.

The essence of the defence arguments in the original applications were in the background of the prosecution being a product of a *Sun on Sunday* "sting", with the well-known "Fake Sheikh", Mazher Mahmood, as the principal witness. It was in this context that, by a ruling of July 3, 2014, the defence were initially unsuccessful in their attempts to persuade Judge McCreath to treat Miss Contostavlos's case as necessitating a stay in circumstances of non-state agent entrapment. On July 21, however, the learned judge--following a renewed defence application which the prosecution did not support, but equally did not oppose--dramatically reversed that ruling. Even Michael Coombs, the co-defendant, who had pleaded guilty following the original ruling, was permitted to vacate his plea. So what was the extraordinary course of events that triggered this development?

At the heart of the arguments throughout was reliance upon the judgment of Goldring J in *The Council for Regulation of Health Care Professionals v Gurpinder Saluja*,¹ and the relationship between the principles applicable to state and non-state agent entrapment. As summarised below, the ***Arch. Rev. 5** defence attack upon Mahmood was wide-ranging, with allegations of gross misconduct at the core. In *Saluja*, Goldring J reaffirmed the framework for abuse of process in state entrapment cases, and further observed:

[...] 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.

Ultimately, in Miss Contostavlos's case, Judge McCreath was indeed persuaded that Mahmood's actions were sufficiently "gross" to cross the seemingly impenetrable "private" threshold into the realms of abuse.

The basic facts, which were not seriously disputed by the journalist, can be summarised as follows. In the spring of 2013 Tula Contostavlos, better known as Tulisa, was the subject of a *Sun on Sunday* "sting" by the investigative journalist Mazher Mahmood or "the Fake Sheikh" as he has become known. The trap was elaborate; first class flights to Las Vegas, limos, suites in a top hotel, talk of multi-million pound film contracts, sumptuous dinners and copious amounts of alcohol. The plot

continued back in London, reaching its pinnacle in London's Metropolitan Hotel on May 10, 2013 where Mazher Mahmood, posing as a wealthy film financier, succeeded in obtaining a series of on-tape "admissions" by Miss Contostavlos concerning her involvement in the supply and consumption of cocaine. Mahmood was later supplied 13 grams of the class A drug by a close friend of the star, Michael Coombs.

For her part, Miss Contostavlos maintained throughout that she was not knowingly concerned in the supply of the drug, either on that occasion or at all. In her prepared statement to police in the summer of last year, Miss Contostavlos said that Mahmood and his largely anonymous team had lured her into auditioning for a film role. She said she was told that she would be cast opposite her childhood crush Leonardo DiCaprio and her fee for the film, which might rival to the success of *Slumdog Millionaire*, would be £3.5 million. There was to be no formal audition. The audition process for this life-changing opportunity was to be her performance at social encounters, notably the dinner of May 10. The part which was provisionally on offer to her was that of a rough, bad, ghetto girl; a girl who knew her way around street talk and life on the fringes of society and who knew the world of drugs. Throughout, Miss Contostavlos said that she was prompted and encouraged to play this part and it was against this background that on-tape "admissions" about drug use were gathered.

It was in the context of these extraordinary offers of fame and fortune, in a backdrop of whispered conversations and duplicity, and in the context of being liberally plied with alcohol, that Mahmood obtained apparently incriminating audio and video tapes, purporting to evidence Miss Contostavlos confessing to involvement in Class A drugs. These were presented to the police and on the basis of this evidence Miss Contostavlos was charged, alongside her friend Michael Coombs, with being knowingly concerned in the supply of cocaine.

From the start the defence made representations at all levels to the effect that the CPS should be wary of relying on the investigative processes of Mazher Mahmood, whose methods have frequently been criticised. Nevertheless, the matter proceeded and a trial date was set for July 14, 2014 at Southwark Crown Court. Prior to trial, the defence made a three-day application to stay proceedings as an abuse of the Court's process. Miss Contostavlos, it was argued, had been entrapped and importantly, entrapped by an agent provocateur with a questionable track-record. This was crime created pure and simple, the defence argued.

In summary, it was argued on behalf of Miss Contostavlos that evidence of Mr Mahmood's misconduct in past cases demonstrated a propensity to manipulate evidence, to contrive incriminating but ultimately fictional narratives and to present a distorted version of events. With that in mind the Court, it was argued, should not allow a case to proceed where the integrity of the investigator (albeit a non-state agent) and key prosecution witness was so much in question.

Mazher Mahmood was called to give evidence on a *voir dire* and vigorously denied that he had ever shown a lack of integrity insofar as his journalistic methods were concerned. He invoked journalistic privilege to shield other protagonists in the plot from scrutiny. In cross-examination he was questioned about, among other things, his part in the exposure of a supposed plot to kidnap Victoria Beckham (resulting in a trial which collapsed when the prosecution offered no evidence)² and the conviction of Besnik Qema (a case which eventually ended in the defendant's favour following a reference by the CCRC),³ and about issues raised as to the accuracy and integrity of aspects of his evidence at the Leveson inquiry, which had resulted in his recall for further questioning. At the end of all this, in a 20 page ruling dated July 3 Judge McCreath ruled that:

The existing law on this topic is clear. ...Where entrapment is relied on, the affront to the conscience of the court arises from state misconduct and the inappropriateness of the court allowing its processes to be utilised so as to condone and further the misconduct. Although it cannot be ruled out that there may be cases in which misconduct by those who are not state agents might found an application for a stay, they are likely to be very rare and are, on present experience, unknown.

Applying those principles to this case, I am unable to find any evidential basis upon which I can properly find that Mr Mahmood behaved in such an offensive way as to justify a stay. There is a world of difference between the court feeling a sense of distaste at the journalistic methods of Mr Mahmood and others like him on the one hand and, on the other, the court being so outraged by his conduct as to be driven to stay the indictment.

And so a jury were sworn on July 15. Mahmood was called again to give evidence in front of the jury and it was during his cross-examination that the case turned dramatically. Mahmood had largely invoked journalistic privilege to hide the identities of others at the heart of the sting. However, the

identity of one individual, who had seemingly played a very peripheral role as Mahmood's driver, had been made known to the defence. Alan Smith had driven Miss Contostavlos *Arch. Rev. 6 and her associates home from the Metropolitan Hotel meeting on May 10, the dinner at which Miss Contostavlos had made several seemingly incriminating "admissions" about her involvement in class A drugs. "Admissions" which, to repeat the point, Miss Contostavlos always maintained to have been made at the behest of Mahmood and his team and brought about by her desire to land the part of this bad, ghetto girl.

The defence caused a statement to be taken from Mr Smith. When a draft statement was handed to the defence on June 26 (day 2 of the abuse hearing), it contained a passage in which Mr Smith stated that the topic of drugs had been raised in the car and that Miss Contostavlos talked about drugs in a negative way. She made reference to a family member with a drugs problem and firmly condemned the use of hard drugs. This was followed by a handwritten, anonymous, scribbled note questioning the accuracy of the above and when the final signed version of Mr Smith's statement was disclosed to the defence, the passage dealing with Miss Contostavlos's negative attitude towards drugs had gone. In light of this change in his statement, Mr Smith was then interviewed by the defence solicitors, the prosecution having refused to tender Smith for cross-examination. In interview it emerged that Smith had emailed his statement to Mahmood, and discussed the passage with him and, importantly, it was after this discussion that the passage was removed from his statement. Crucially however, at the abuse hearing some few weeks earlier, Mahmood had given evidence to the effect that he was unaware of Mr Smith's statement and that he had no knowledge of its content. He claimed not to know that Smith had heard Miss Contostavlos express negative attitudes towards drugs.

In the context of the above, during cross-examination Mazher Mahmood was exposed as having earlier given false evidence before the judge. Mahmood had no choice but to accept that, contrary to his evidence on the *voir dire*, he had dealt with Smith and had knowledge of the statement and in particular the drugs passage.

Following the reopening of the abuse of process application on behalf of Miss Contostavlos, the judge found that there were strong grounds for belief that Mahmood lied to the court during the abuse of process hearing and also for believing that the purpose of these lies was to conceal the fact that he had been manipulating the evidence by getting Smith to change his account. This, he said, now cast a shadow over Mahmood's decision to use journalistic privilege to suppress the identities of the other persons involved in the "sting". Taken together with the fact that Mahmood was the "sole progenitor" and "sole investigator", these further matters had now caused the "landscape" of the case to change. At this point, the proceedings were now shown to be so tainted by serious misconduct that the integrity of the court would be compromised by allowing them to go ahead. As regards Miss Contostavlos the case must now be stayed. In relation to Coombs the judge went further and concluded that "the clock has been put back". His guilty plea could not wipe out the improper conduct, of which he was the victim too. So Coombs was permitted to vacate his guilty plea, and the case against him was also stayed.

The Recorder of Westminster's ruling has extensive implications, both factually and legally. One consequence is that a number of prosecutions in which Mahmood was involved are to be reviewed by the Crown Prosecution Service urgently. Whether he can ever again be relied upon as a witness of truth is now open to question. Moreover, whether similar operations can ever again be tolerated as triggering prosecution in the criminal courts is surely a matter that needs to be reviewed.

As for the substance of Judge McCreath's ruling, whilst he did not expressly state that Mahmood's behaviour amounted to "... sufficiently gross misconduct by the non-state agent" as to render it an abuse and breach of art.6 for "... the state to seek to rely on the resulting evidence",⁴ it seems fair to interpret this as being the basis upon which the original abuse of process ruling was reversed. Goldring J had "left the door open" in cases of private entrapment and in Miss Contostavlos' case, the threshold was clearly crossed in the judge's view. A combination of lies, interference with evidence and the potential impact upon the defence was inevitably a combination fatal to the propriety of prosecution reliance upon the *Sun on Sunday's* tainted investigation. The Recorder of Westminster evidently felt that the integrity of the court, and the criminal justice process, had been compromised.

For now, the bar still remains a high one for a stay on the basis of misconduct in non-state agent cases. Surely, however, Miss Contostavlos's case should serve as a platform for scrutinising the very framework for proper investigation and prosecution of such cases. Whilst the authorities of *Loosely*,⁵ and more recently *Moore*,⁶ serve to closely regulate the conduct of state agents, no such guidance exists in private entrapment cases. Such cases remain prosecuted in a background of newspaper-led

investigation, journalistic privilege, resultant non-disclosure and both prosecution and judicial “sidelining”. With a complete absence of any legal framework for regulating the evidence gathering process, scope for abuse is overwhelming.

Following her arrest, Miss Contostavlos's case provided the *Sun on Sunday* with front page headlines for days. But for the sensational course of events that unfolded at trial, and Judge McCreath's welcome interpretation of Goldring J's “sufficiently gross misconduct” test, a very different outcome could have followed. That is what currently flows from a structureless non-state agent entrapment approach, one fundamentally in conflict with the modern regime, where transparency and disclosure are deemed to characterize the adversarial system. In staying Miss Contostavlos' case, therefore, it is to be hoped that the Recorder of Westminster brought an end to non-state agent generated prosecutions in their existing form. It should not be for the defence to have to expose the lies of an agent provocateur to avoid unsafe conviction. While undercover journalists are essentially permitted to be “a law unto themselves”, the risks are overwhelming; not least that of miscarriage of justice. It is therefore noteworthy that the CPS have decided not to proceed with outstanding Mazher Mahmood-led prosecutions, whereby, at least for the time being, Miss Contostavlos's case appears to have had the X Factor where the vexed topic of private entrapment is concerned.

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1. [2006] EWHC 2784 (Admin); [2007] 1 W.L.R. 3094.
 2. *BBC News*, Monday June 2, 2003.
 3. The complex course of the criminal proceedings are described in Sharp J's judgment in *Qema v News Group Newspapers* [2012] EWHC 1146 (QB).
 4. *The Council for Regulation of Health Care Professionals v Gurbinder Saluja* [2006] EWCA 2748 (Admin) para.81.
 5. [2001] UKHL 53.
 6. [2013] EWCA Crim 85.

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