



F(10)18

**BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL**

GENERAL OPTICAL COUNCIL

AND

STEPHEN JOHN KIMBERLEY (01-19733)

**SUBSTANTIVE HEARING
Monday, 18 April 2011**

**SUBSTANTIVE HEARING: STEPHEN JOHN KIMBERLEY (01-19733)
Monday, 18 April 2011**

Committee Members: Sir Alistair Graham (Lay, Chair)
Dr Dozie Azubike (Lay)
Mr Arif Khan (Lay)
Ms Catherine Viner (Optometrist)
Mr Peter Charlesworth (Optometrist)

Legal Adviser: Mr James Watson QC

For the GOC: Ms Kate Steele

For the Registrant: Mr Simon Leach

Hearings Manager: Mr David Henley BEM

[Hearing commenced at 09.36]

Sir Alistair Graham: Good morning. My name is Alistair Graham. I am a lay member of the hearings panel and I have been elected by the Committee to chair today's hearing. The Committee today is made up of two optometrists and three lay members, and I will ask the members of the Committee to introduce themselves and the capacity in which they sit. *[Introductions]*

To my right is Mr James Watson QC, the Committee's Legal Adviser, who will provide legal advice and assistance to the Committee and ensure that the proceedings are conducted in accordance with the Rules of Procedure, so as to arrive at a result which is fair and just. The Legal Adviser may accompany the Committee should it sit in private to deliberate. In the event that any matter arises during the course of the Committee's deliberations, upon which the Committee seeks advice, the parties will be invited to return to hear the matter which the Committee has raised and the advice to the Committee. Where advice on any issue is not accepted by the Committee, this will be indicated in the course of its decision on that issue.

To your right is David Henley, the Hearings Manager, who will provide administrative support to the Committee. Next to Mr Henley is the transcriber, who will be keeping an official record of all that is said today during the sessions of the hearing at which the parties are present. The remaining persons sitting in the hearing room, rather than in the public and press areas, are members of the respective legal teams. You should be aware that it is the Council's policy for the determination of the Committee and a transcript of the proceedings to be displayed on the Council's website for public viewing, but where matters of health have been discussed the determination and transcript will be redacted accordingly.

This matter today has been listed first of all as a procedural hearing but I understand the parties have agreed that it can proceed directly to a substantive hearing so unless anything has changed, then I will announce the procedural hearing as having commenced and now we go to the substantive element of the hearing. Can I first of all enquire whether there are any applications that you want the Committee to consider, either party?

Ms Steele: No, sir.

Mr Leach: Not at this stage, sir.

Sir Alistair Graham: Can I ask the registrant to stand please? Sorry, unless that is difficult with your leg. Can I ask the Hearings Manager to read out the allegation please?

Mr Henley: *[Reads]*

The Council alleges that you, Stephen Kimberley (a registered optometrist):

1. On 20 July 2010 at Stoke-on-Trent Crown Court were convicted of making indecent photograph or pseudo-photograph of child.

By virtue of the matter set out above, your fitness to practise is impaired by reason of your conviction.

Sir Alistair Graham: Can I ask you, Mr Leach, whether any of the facts set out in the allegation are admitted?

Mr Leach: The fact of the conviction is admitted, sir. There is no difficulty in that regard.

Sir Alistair Graham: Thank you. Did you wish to say anything about the fact that the facts have been proved?

Ms Steele: You have heard that they have been admitted, sir. Just for the Committee's reference, you will have seen that you have in the bundle at pages 6 and 7 of the main hearings bundle, which I hope you have received, copies of the Certificate of Conviction and the second on page 7, the same Certificate of Conviction but including the sentence. However, you have heard that it has been admitted. I don't think I need to take to them in any more of detail.

Sir Alistair Graham: Does that mean we are happy now to move on the facts having been admitted to stage 2, allegation of impairment?

Mr Leach: Yes, sir.

Sir Alistair Graham: Can I ask you to start?

Ms Steele: Thank you, sir. As you have heard the conviction in this case has been admitted, and you have heard it read in the charge. It may just assist the Committee if I explain at this stage that the 'making' offence that is referred to in the Certificate of Conviction and in head of Charge 1 relates to downloading images from the internet, and that is an act in law which constitutes the making of an image for the purposes of the Protection of Children Act 1978.

Moving on to deal with impairment and the background and circumstances of the conviction first of all, Mr Kimberley is a registered optometrist who first registered with the Council in around September 2003. You will have seen from the Certificate of Conviction at page 6 of the bundle that Mr Kimberley appeared before Stoke-on-Trent Crown Court on 20 July 2010. He pleaded guilty on the morning of the trial to one count of 'making indecent photograph or pseudo-photograph of child', which he was later sentenced in September of the same year.

If I can invite you to turn to the transcript that you have of the Crown Court hearing of 20 July at page 10 of the bundle; that is a little way into that transcript. You will see that you have at the top of that page set out details of the particular of the offence to which Mr Kimberley pleaded guilty; that being that:

“between 5 August 2007 and 24 May 2009 he made indecent photographs, namely four moving images of videos of a child at Level 4 on the Copine scale as described in Exhibit CED 1.”

Now members of Committee don't have a copy of that exhibit before you, but as I go on in my submissions you will see that we do have some further details of the nature of those images as we go through the transcripts of the hearings.

Turning over the page to page 11 of the transcript, you will see that the prosecution on the day of trial took the view that the charge to which Mr Kimberley had pleaded guilty was the most serious on the indictment before the Court and that the four video images in question had been downloaded, viewed and stored in the live document section of Mr Kimberley's computer, and that Mr Kimberley accepted responsibility for that in its entirety. That is at paragraph A of the transcript. You will see from the remainder of that page that the prosecution invited the judge to direct that the remaining counts against Mr Kimberley of downloading and possessing some 144 other images lie on file on the basis that they added little to the ultimate disposal of the case, and it wasn't in the public interest for them to be pursued to trial in light of Mr Kimberley's guilty plea to the most serious charge. It is that most serious charge for which he was convicted and it is in those circumstances that the matter comes before you today.

Before moving on to deal with sentencing, it may assist the Committee if I explain also at this stage some information about the nature and level of the images that are being referred to – it may be something that the Committee

are familiar with – but the Sentencing Guidelines Council categorises such material into five levels of seriousness. The level that we are dealing with in this case is the second from highest, that being Level 4, and you will have seen from the transcripts that all four of the video images in question were Level 4 on the relevant scale, and the definition of Level 4 is penetrative sexual activity involving a child or children or both children and adults.

If I can invite the Committee to turn now to the transcript of the sentencing hearing, which you have from page 20 of the bundle, you will see at the beginning on page 20, which is the first page of the transcript, you have quite a helpful summary from the prosecution of the circumstances of the offence, particularly from paragraph G where Mr Bennett, who appeared for the prosecution, summarised the facts as follows:

“It was at about 9.10am on the morning of 24 May of last year that police executed a search warrant at the defendant’s address. At the time the defendant was employed as an optician for a well-known High Street chain of optician’s. He lived at the address with his wife and one grown-up child.

The defendant was arrested and his LG computer was seized from the kitchen/dining room area along with other similar type equipment. The LG computer was subsequently examined by the Hi-Tech Crime Unit on 30 October last year and 4 November of last year, that being 2009. There was evidence on the hard-drive of the computer that an obscure astronomy website had been accessed by the defendant’s computer on both 4 and 8 August 2007. That website had previously been compromised and indecent images of children were posted on to it. Those who ran the site legitimately did not become aware of the problem for a three-day period and in that short period there were over 12,000,000 hits on that website.

On the hard-drive there was evidence of four indecent movies. There was also evidence of 144 still images of children. The still images were all in connected areas of the hard-drive. There was also LimeWire peer-to-peer file-sharing software present on the defendant’s hard-drive and within the LimeWire folders structure on the computer were the four movies, all at Level 4. These were live files accessible without the need for any specialist recovery software. The four movies were between 10 and 20 minutes in length, one involving a female child as young as seven years of age engaging in oral and penetrative sex with an adult male.”

Sir, if I may, I would also take the Committee to the comments of the sentencing judge in this case which appear from page 27 of the bundle, who sums up his independent assessment of Mr Kimberley’s case when handing down his sentence, in particular from paragraph G of the transcript where the judge makes his sentencing remarks as follows:

“Mr Kimberley, you are fifty-two years old and you have no relevant convictions. You pleaded Guilty to Count 1 at trial therefore the credit you’re entitled to is limited. I will order that Counts 2-7 lie on the file.

The judge who was dealing with your case at that stage indicated that he regarded the quantity of the images as small and he is plainly right about that. Those videos were saved to your computer hard-drive. They were readily accessible. I have seen stills from those videos. They are disgusting. They depict male and female children being abused. One of the females is plainly very young indeed. Those are real children being abused and the activities of people like you, who search for and access that sort of material, encourage those who abuse the children.

I have read the Pre-Sentence Report. I take the view you are continuing to minimise your responsibility despite your plea. You are trying to put the best gloss on events that you can. You need to acknowledge reality. The probation officer’s view – and I share it – is that you are preoccupied with sex and you have some form of sexual attraction towards young children. It ought to be said in your favour there is absolutely no suggestion that you ever sought to embark on any sort of contact offending or have done anything other than use the material for your own devices.

You are an intelligent man. Up until recently you had a good work record. I have read two good references. These offences merit custody but the reality is I have to follow the guidelines. In doing that the term of imprisonment would be short and you would serve probably less than half of the sentence I imposed. In all the circumstances, I think the public interest is better served and the protection of children perhaps better achieved by adopting the course set out in the Pre-Sentence Report. That is what I shall do.

I will make a community order for three years. There will be a supervision requirement for three years. There will be a programme requirement that you attend the Sex Offender Group Work Programme Requirement for Internet Users. You’ll pay a contribution towards the prosecution costs of £500. I’ll give you 12 months to pay that. You’ll be subject now to notification requirements for five years. I think you were already ordered to notify on the last occasion so that will run from the last date. In addition, the Independent Safeguarding Authority will, as I understand it, bar you from a number of activities relating to children. If you breach this order, Mr Kimberley, the likelihood is a term of imprisonment would then be imposed.”

Sir, before I go on to make some further submissions on impairment, perhaps I could explain just for clarification for the Committee, that the notification requirements that are being dealt with by the judge in the sentencing transcript are those required under Part 2 of the Sexual Offences Act 2003, which requires that those who are convicted or cautioned for relevant sexual

offences, of which the one before you is one, shall notify the police of certain details such as their name, their address, their national insurance number. They are also required to notify the police of any change in those details during the qualifying period. Now the police hold those details on what is commonly known as the Sex Offenders Register and that is why you will see reference in the Certificate of Conviction, which includes details of the sentencing at page 7, to Mr Kimberley's name being entered on the Sex Offenders Register from the period of five years from the date of his conviction which was 20 July 2010, and that is why there is no reference explicitly to the Sex Offenders Register in the transcript that you have of the sentencing hearing.

Sir, that deals with the circumstances surrounding Mr Kimberley's conviction and sentencing.

Mr Watson: Forgive me, there is, is there not, reference to that because the sentencing process was two stages, was it not? It was at conviction in July that Judge Tonking dealt with the matter and then it came back before Judge Glenn in September for sentence, and so the first stage, the notification requirements were dealt with, as I recall it, and I can see at page 14 of the bundle in the middle of the page, simply to assist the Committee here, that page deals with the discussion about notification you have just covered.

Ms Steele: Indeed. Thank you. I am grateful. It was more for the avoidance of doubt that the notification requirement is one and the same as the terminology used which is the more common terminology, the Sex Offences Act. I am grateful to you. Thank you.

Moving on then to my submissions specifically in respect of impairment of Mr Kimberley's fitness to practise. Sir, you and your colleagues will be aware that there is no statutory definition of impairment. It is a matter for your judgment on the basis of all the material before you. You will also be mindful that impairment relates not just to clinical ability but also to adherence with proper professional standards. It is clear from the current case law, which is now quite settled, that impairment is something that you must judge in the present tense, so from today going forward, but in making that assessment you are, of course, permitted to take into account how Mr Kimberley has acted in the past including the nature and circumstances of the conviction before you today. You will no doubt want to bear in mind the role of the Council and its Committees in protecting the public, upholding proper standards of conduct and maintaining public confidence in the profession. I would invite you also to have regard to the Code of Conduct, in particular paragraph 19, which requires that registrants ensure –

Sir Alistair Graham: Can you take us to that?

Ms Steele: I can do. My apologies, I do not have a copy of your paginated bundle but I no doubt can find it for you, if you'll forgive me.

Sir Alistair Graham: It's just useful to see the actual document.

Ms Steele: I would imagine that the Code of Conduct will be in the bundle. It doesn't appear to be so, actually, not in my copy. I have one copy which, if it isn't marked, I could happily hand up if that's of assistance when you go into – I have one clean copy which I could hand up if that's helpful. If it helps, I only propose to take you to one paragraph which I can read.

Sir Alistair Graham: I just would like to see the context in which –

Ms Steele: I understand, and my apologies, I thought it would be before you, but the paragraph I was going to draw your attention to, sir, was paragraph 19 which requires that the registrants ensure that their conduct, whether or not connected with their professional practice does not damage public confidence in the registrant or the registrants' profession, and I hope that's easy enough reference to find in the document you have before you.

Sir, on behalf of the Council, I would invite you to find that the case before you is indeed a very serious departure from the proper professional standards and one which, in the Council's submission, renders Mr Kimberley's fitness to practise to be impaired by reason of his conviction. There is one case that I would hand up to you at this stage, if I may, and I am only going to make reference to two particular paragraphs in due course, but perhaps it can be handed up at this stage.

Mr Khan: When referring to those two paragraphs, would you mind reading them out please.

Ms Steele: I will indeed, Mr Khan.

Sir Alistair Graham: What are the paragraphs, sorry?

Ms Steele: They will be 54 and 56, but I wonder whether it might be of assistance if I give – it is the case regarding *CHRE v GDC & Fleischmann* [2005] EWHC 87 QB. It is a General Dental Council case, the Council for the Regulation of Healthcare Professionals and the General Dental Council. I anticipate that it's a case that the Committee will be familiar with, but perhaps it might be helpful if I just very briefly summarise the context of the case, and then I will take you to the two paragraphs specifically that I would wish to draw your attention to.

This is a General Dental Council case so the dentist in question, Mr Fleischmann, was convicted of indicting the distribution of child pornography at Levels 4 and 5 on the scale. Similar to Mr Kimberley's case, he received a non-custodial sentence for three years and was placed on the Sex Offenders Register for a period of five years. Now it is fair to say, sir, that this isn't an identical conviction to the one that comes before you, but no doubt members of Committee will appreciate the parallels in terms of the nature of the conviction and also the sentence that was imposed in that case. There was a hearing before the General Dental Council's Professional Conduct Committee at which stage it was found that Mr Fleischmann's fitness to practise as a

dentist was impaired, and he was suspended from the Dentist Register for a period of 12 months.

That decision was appealed and on appeal the judge concluded that the Committee had given insufficient weight to the gravity of the offending and the fact that the determination of the Committee meant that in effect Mr Fleischmann would be permitted to return to practise before he had actually fully satisfied his criminal sentence. The judge noted in that case that the Committee could not know the outcome of the community sentence being served or the success or otherwise of the Sex Offender Treatment programme that Mr Fleischmann was required to undertake until that sentence had been fully concluded. The judge also noted in that case that inclusion on the Sex Offenders Register wasn't a step taken to punish the dentist, Mr Fleischmann, but one aimed at protecting the public, but in that case Mr Fleischmann remained on the Sex Offenders Register at the time that the matter came before the General Dental Council's Professional Conduct Committee.

The judge in the case of Fleischmann also referred to another case which may well be familiar to the Committee, which is *Bolton v Law Society* [1994] 1 WLR 512, which requires that sufficient weight be given to the maintenance of public confidence in the profession. In particular, it provided that the reputation of the profession is more important than the fortunes of any one individual member.

Returning just by way of conclusion to Mr Fleischmann's case, the judge in that case determined that the order had been unduly lenient and ordered that Mr Fleischmann's name be erased from the Register, and in so doing, created two main rules that arise out of that case, which are quite nicely summarised in the two paragraphs I referred to earlier, and perhaps I can invite you to turn to those now. The first is paragraph 54 of the judgment, and the part I will take you to starts at the fourth line down. It is part of the judge's judgment in that case.

"I am satisfied that, as a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence."

Moving down to the fourth line from the bottom of that paragraph:

"The rationale for the principle is not that it can serve to punish the practitioner whilst serving his sentence, but that good standing in a profession must be earned if the reputation of the profession is to be maintained."

Turning over the page to page 56, the judgment continues:

"I recognise that the variety of circumstances presented by individual cases must be weighed, but where grave and serious offences are

under consideration, personal factors such as character, previous history and the practitioner's livelihood will invariably be insufficient to produce a result different from that which would have applied had the individual been an applicant for registration."

The judge then goes on in that paragraph to deal with the specifics of that case where he states that "had an application been received from Mr Fleischmann during the currency of his Community Rehabilitation Order" it was in the judge's view "inconceivable that it would have been accepted" by the General Dental Council.

Sir, in the Council's submission, the conviction before you today is a very serious one, and it is one for which Mr Kimberley is still serving a community sentence. As in the case of *Fleischmann* that I have taken you to, Mr Kimberley's name also remains on the Sex Offenders Register and you have seen from the transcript, and from the Certificate of Conviction, that it will do so until July of 2015. In my submission on behalf of the Council, sir, this is not conduct which can be seen to be easily or sufficiently remedied, in particular at a time when Mr Kimberley is still serving his criminal sentence.

The issue of impairment is clearly a matter for members of Committee and it is a matter for your judgment, but I would invite you to pay careful regard to the two parts of the judgment of *Fleischmann* that I have taken you to, and the rules arising out of that case which have been subsequently adopted in other regulatory proceedings. Sir, the Council submits that this is a case where Mr Kimberley's past conduct would undermine public confidence in the profession were no action taken in respect of his registration, and that this conviction is by its very nature so egregious that looking forward, Mr Kimberley's fitness to practise as an optometrist is impaired.

Sir, that is all I propose to say at this stage in terms of impairment. I would make some submissions in due course on sanction, but I am very much in your hands as to whether you would prefer to make your finding on impairment having heard from Mr Kimberley's representative first and then hear me on sanction or whether you would wish me to proceed to deal with both together given the nature of the case.

Sir Alistair Graham: Mr Leach, do you have any views about this?

Mr Leach: Sir, if it does assist I have had the opportunity of taking instructions from Mr Kimberley. At this stage, I have no submissions to make as far as impairment is concerned. Clearly the issue of sanction is another matter.

Sir Alistair Graham: Yes. Do you have a view about us going on given you are not going to make any comments on the issue of impairment? Would you prefer the Committee to come to a conclusion on that issue of impairment first?

Mr Leach: I would prefer the Committee to come to a conclusion and then we can move towards sanction in due course.

Sir Alistair Graham: Okay. Thanks very much. Okay we will deal with them as two separate issues. That would be the normal process, and can I see if my colleagues have any questions on this issue of impairment? *[No questions]* We don't have any questions on the issue of impairment. I therefore invite our Legal Adviser to advise the Committee on how we should approach this issue.

Mr Watson: Thank you. May I just seek clarification that the Registrant neither seeks to make submissions on impairment nor call any evidence on impairment, that both being an opportunity at this stage?

Mr Leach: No, sir.

Mr Watson: Thank you. Therefore I advise the Committee that the decision it needs to consider at this stage is firstly to reach a formal decision on the facts, those matters having been admitted informally at the outset. The fact that needs to be proved in this case is, of course, the fact of the conviction. You have heard that that was admitted, although the burden is on the Council to prove those facts. You may have little difficulty in reaching a conclusion that the facts in this case are established to the requisite standard, namely the balance of probabilities.

Moving on to the larger issue of impairment; impairment is a matter which is a decision that is for the judgment of the Committee. There is no burden of proof. This Committee is experienced and is well aware that impairment must be judged by the Committee against firstly the background of the facts that are proven, that is to say in this case the conviction and the nature of its conviction. The Committee will bear in mind that there is no single comprehensive test, but that there are a number of touchstones, and reference has been made, firstly, rightly, I advise you, to the fact that you must have regard to the current position and to the Registrant's fitness to practise therefore now and looking to the future.

When judging impairment in the context of a conviction case you will have regard not only to the nature of the offence, the background facts as they bear on the offence itself – and I will say a word about that in a moment – that is to say, in this case Count 1 of the indictment to which he pleaded guilty and was convicted. Thirdly, the degree to which the conviction affects, in your judgment, the fitness of the Registrant to be maintained on the register, taking into account both the need to protect individual patients and the collective need to maintain confidence in the profession by declaring and upholding proper standards, not only in relation to competence and performance, but also in relation to ethical standards as indeed enshrined in the obligation of the Code of Conduct. The underlying factor in judging impairment is whether or not the purpose and function of these proceedings is borne in mind, that is to say, not to punish registrants for errors or failings, but to protect the public from those who are not fit to practise or whose retention on the register should be called into question.

Turning to the question of current or future; because the concept of impairment requires the Committee to ask whether the Registrant is impaired

today and looking forward, therefore in many cases, and indeed the Committee is obliged in all cases to take into account the extent to which a registrant has addressed past actions and shown insight. In this particular case, no evidence or submissions have been put before you in relation to the position as it has or might have changed since the conviction last year, and in any event, such considerations, that is to say, considerations as to remediability and insight and the degree of risk now and in the future, such considerations in cases of grave misconduct or grave criminal misbehaviour may be outweighed by the nature and gravity of the conduct itself, and the public interest factors to which I have referred. In some cases therefore, particularly those involving criminal convictions and sanctions, the Registrant's fitness to practise may be judged by the Committee to be impaired even though the conviction relates to an event in the past, and that is because in such a case, the importance of maintaining public standards and in maintaining the standards upheld by the profession and the confidence of the public in those standards being maintained outweighs those kinds of consideration.

You have been taken both to the Code of Practice and to the case of *Fleischmann*, and the Council has opened the facts of the offence. May I remind you that the plea of guilty was to a single count, Count 1 on the indictment? I direct you in this case, in fairness, to disregard any explanation as to the other counts which were ordered to lie on the file. I say in parenthesis that those in any event, firstly they are unproven matters that the prosecution did not proceed with, and in any event, you have seen in the transcript that Count 1 on the indictment to which he pleaded guilty was indeed the nub of the matters of which he was accused, and was the most serious matter which he faced.

Turning to the nature of those matters and the levels that you need to bear in mind, the Sentencing Guidelines Council have approached the question of the analysis of sexual offences of this kind in a way which not only takes into account the inherent seriousness of the images, but other factors as well. It is the level of seriousness which is the predominant factor perhaps, and to put this in context, as you were told in opening there are five levels, the least level is Level 1 and those are images depicting erotic posing and images of that kind but with no sexual activity. At the most serious end of the spectrum, Level 5 are images which involve sadism or penetration of or by an animal. In between Levels 1 and 5 are ascending levels and the count to which this conviction relates concerns Level 4, that is penetrative sexual activity involving a child or children or both children and adults. It is at that point on the scale, therefore, that this conviction lies. It is right to say that although no submissions have been made, you have been shown the transcript of evidence of the sentencing process in which the learned judge assessed the quantity of material at Level 4 to be a small quantity. Indeed, there were four images, movie files, and that is a pointer to be taken into account.

The other aspects of the Sentencing Guidelines Council on an assessment of such a matter are the age of the child, and secondly the degree of involvement, if I can put it like that, in the distribution or sharing of such

images. In this case, it is right to say that firstly the age of the children in this case was below the level of 16 or 17; the definition of child being 18 for these purposes. It was below that level of 16 or 17 where, as it were, a non-aggravating factor can be taken into account. However, it was made clear in the sentencing process that this was not a case in which there was any involvement in distribution or sharing of that kind, whether for profit or otherwise, and that needs to be made clear.

Turning from those matters to do with the outline of the offence and the sentencing process, you have heard the nature of the conviction and the sentence passed. You have also been taken to the case of *Fleischmann*. The guidelines, as it were, that you were invited to take into account from that case were described as rules. I advise the Committee that you should be cautious in applying the judgment in *Fleischmann* as though it were any form of rigid rule. It is right to say that the general principle outlined by Mr Justice Newman in paragraph 54, and indeed the general principles which he enunciated in paragraph 56 have both been adopted as statements of general principle which are of assistance in other like cases. Secondly, in relation to paragraph 56, those remarks which indicate in effect that the fortunes of an individual member are of, as it were, lesser importance in the balance than the reputation of the profession itself are reminiscent of the well-known case of *Bolton v the Law Society*, with which this Committee is no doubt very familiar.

I only say state, as a matter of caution, that these are not rules, and in any event these are statements of principle in terms of overall approach and that this Committee must therefore seek to take those into account. However, insofar as you wish to apply them you should apply them to the facts of this case involving an optometrist or a registrant within the Opticians Act remit rather than under the aegis of the General Dental Council. I simply observe that the factual context in which those remarks were made were quite different, although the nature of the offence itself was of a similar character. If you travel back in the facts to paragraph 12 of the judgment in *Fleischmann* you will see a very substantive table setting out the pattern of both levels and numbers of images involved in that case, so for these purposes it is the principle that you should pay regard to rather than the particular outcome in that case.

I think that fulfils the points that I wish to draw to your attention by way of advice. Are there any comments from either of the advocates that you wish to take issue with? [*No comments*]

Sir Alistair Graham: Thank you very much. I think that concludes the position at this stage. It is now for the Committee to come to a conclusion in private.

[*Hearing adjourned at 10.15*]

[*Hearing reconvened at 10.55*]

Sir Alistair Graham: I can now give the determination of the Committee.

Findings in relation to the conviction

The Committee noted the fact that the facts of the Registrant's conviction were admitted. The Committee accepted the advice of its Legal Adviser. The Committee was shown a Certificate of Conviction in the Council's bundle dated 26 July 2010 and thus found the facts of the conviction proved.

Findings regarding impairment

The Committee accepted the advice of the Legal Adviser.

The Committee has no doubt of the seriousness of the offence that the Registrant pleaded guilty to on 20 July 2010 at Stoke-on-Trent Crown Court and for which he was subsequently sentenced on 9 September 2010.

Following the conviction he is now serving a 3 year Community Sentence Order with a specific requirement for sex offender group work in addition to overall supervision by the Probation Service. He is also no listed on the Sex Offenders Register and subject to its notification requirements.

The offences occurred over a 20 month period involving downloading and viewing indecent moving images, one of them involving a child aged 7 and being classified and accepted as a Level 4 image on the "Oliver Scale". The Committee was conscious that a Level 4 image is second highest on a scale of 5, described by His Honour Judge Glenn as "disgusting".

The conduct by the Registrant was clearly in breach of paragraph 19 of the Optometrists Code of Conduct which requires an optometrist to 'Ensure your conduct, whether or not connected to your professional practice, does not damage public confidence in you or your profession.'

The Committee has no hesitation in concluding that the Registrant's grave criminal conduct damages public confidence in the profession and that Mr Kimbelery's fitness to practise as an optometrist is impaired.

So that deals with the issue of impairment. That means we now move on to the issue of sanction. Can I invite you to submit any further evidence or give any views?

Ms Steele: I am grateful, sir. I would, if I may, take the Committee to its guidance document. It is the Fitness to Practise guidance dated, I believe, December 2009, which I hope will be in your red files in front of you, and in particular page 24 of the guidance document which deals specifically with sexual misconduct in cases involving child pornography. I don't propose to read

parts of it out to you, but I would invite the Committee to bear in mind that aspect of your guidance document when considering the issue of sanction. In particular, you will see that it invites the Committee to give careful consideration to the most serious sanction in cases involving child pornography, and makes reference to the case of *Fleischmann*, which I have taken you to in my submissions on impairment. In particular, the guidance highlights that as a general principle where, as here, a practitioner has been convicted of a serious criminal offence he should not normally be permitted to return to practice until he has satisfactorily completed his sentence. It also reminds you as a Committee that in such cases as these, the gravity of the offending may not, you feel, be reduced by the asserted motivation for it and it may be that you hear further submissions from Mr Kimberley and those representing him in due course.

Plainly, sir, members of Committee will appreciate that is guidance only, and you will need to apply that guidance to all of the facts you have before you in connection with this case.

It will be a matter of judgment for this Committee what, if any, order to impose, but on behalf of the Council I would invite you to consider very carefully the seriousness of the conviction that you have before you; the fact that Mr Kimberley's community sentence remains ongoing and that he remains at the date of this hearing on the Sex Offenders Register, and to consider carefully if that is compatible with ongoing registration having regard to your role in protecting the public, upholding proper standards within the profession and maintaining public confidence in the profession as a whole, so I don't propose to put any further evidence before you. That was all I propose to say in respect to sanction.

Mr Watson: One matter of clarification; you refer to the guidance as being 2009. The guidance which is currently posted on the Optical Council website is dated 31 December 2010.

Ms Steele: My apologies, I believe the part in question hasn't changed but I will be guided by you.

Mr Watson: I was going to say, subject to a final crosscheck on my part, I previously compared the most recent version, I think, with the 2008 version, and I don't think that page 26 of the current guidance, as it is, varies in any way from the one that you have quoted, but I simply raise that.

Sir Alistair Graham: This one says on the bottom here revised 31 December 2009.

Mr Watson: As I say, the one that is available to the public on the website is 31 December 2010, so I think that in fairness and for the sake of accuracy, pedantic or not, it should be the most up-to-date one.

Ms Steele: No, indeed, and my apologies if I have caused any confusion.

Sir Alistair Graham: Okay, thank you very much. Mr Leach?

Mr Leach: Thank you, sir. The Committee is clearly familiar with the history of the arrest of Mr Kimberley and his subsequent court appearances. What I will say, on his behalf at this stage, is that he was very cooperative with the police officers who carried out his arrest and interview.

He had the opportunity right at the outset of denying any involvement in the downloading of any images at all, be they of a pornographic nature or specifically in relation to child pornography. He shared his computer with other family members. There were no password protected controls on the computer and it would have been open for him to have said "I know nothing at all about anything that is on this machine bar the material which is stored on my behalf because of my professional work." He didn't do that. He accepted right at the outset that he had been involved in the viewing of pornographic material on the computer.

I would like, if I may, to distinguish his viewing of adult pornographic material from his involvement in the downloading of child pornography. What I can tell you, and this will become pertinent when you consider the various amount of child pornography referred to in cases such as *Fleischmann*, is that Mr Kimberley's computer was analysed by police officers and by a technical expert on behalf of his defence team. The computer which was seized contained some 56,000 files and folder entries. Of those there were 12,700 static and moving image files, but of those only 3,200 were pornographic images, and I say pornographic because I am speaking now specifically about legal adult pornography which is readily available from websites.

You have heard that he entered a guilty plea to a count involving four moving images in respect of obscene material relating to children. The Crown Prosecution Service, as you have already heard, accepted that there were problems relating to the other material, and your learned Legal Adviser has made it quite clear that it is not the role of this Committee to judge that, but to put it into context - and I have clear instructions to do this - Mr Kimberley makes it quite clear that he has not been actively seeking any child pornography at all, and the basis of his guilty plea before Stoke-on-Trent Crown Court was on the basis of what is usually referred to as "reckless browsing". It is a term of art rather than a precise term, but I think that as I go on to develop my points on his behalf, the context of the recklessness may become apparent.

Could I direct you or invite you to consider page 24 of the paginated bundle that is before you? You have there the submissions of Mr Dewsbury on Mr Kimberley's behalf. If I take you six lines or so down, page 24, you see Mr Kimberley accepts downloading those four files, albeit while looking for other material, but although they weren't actively sought out, he knew that receiving child pornography was a real possibility on that site, that the file names under which the files were stored were clear and related accurately to the type of material that was downloaded. Therefore he accepts that he did know what the material was. Put briefly, the mitigation relating to the nature of the offences itself is this: that Mr Kimberley has accepted throughout from the

moment of his arrest and first interview by the police that he has browsed on a repeated basis for adult pornographic material. He has accepted that as such he will face the possibility of being directed to unsavoury sites on the internet. As he trawls the murkier waters of cyberspace he faces an increasing possibility that the material will become increasingly unsavoury and he accepts the degree of recklessness which has led to his guilty plea. It is not because he deliberately sought out anything of a pornographic nature relating to children.

He was involved in peer-to-peer software access relating to software known as LimeWire which the Committee members may be familiar with. LimeWire software simply has keywords typed into it. It searches on the internet for material which contains those keywords. It downloads to the computer material which contains those keywords in its title but obviously material can be downloaded which is both of an illegal nature and a legal nature, depending upon the words that are used and the surrounding other words.

The videos that were downloaded are four in number, as you are aware. The longest was of 20 minutes duration, and the shortest of 10 minutes duration. It is important for me to stress that Mr Kimberley doesn't accept having viewed this material. The Crown Prosecution Service in coming to its conclusion relating to the other counts on the indictment was persuaded not only by the lesser seriousness of the nature of the material but also by the evidential difficulties relating to the grouping of that other material in what is known as "unallocated clusters". The "unallocated clusters" were of a very indistinct nature. It wasn't possible to establish when they had been created, how they had come to appear and you may have seen within the papers before you references to pop-ups on adult pornographic sites. Mr Kimberley's case has been throughout that as he has been surfing adult pornographic sites pop-ups have occurred which have directed him to items of child pornography. If he has visited those by mistake he has automatically deleted them and not pursued them. The Crown Prosecution Service in coming to the decisions that it did, accepted his explanation.

If I may, I'll direct you to page 17 of the paginated bundle. The learned judge who dealt with the hearing where the Sex Offenders Order was made at the time of the entering of the guilty plea was His Honour Judge Tonking. The Sex Offenders Order had to be made at the point of conviction and that is the reason why His Honour Judge Tonking made the order there rather than at the substantive sentencing hearing. At the top of page 17 one reads Judge Tonking's observations:

"Part of this involves the interpretation of what is a 'small quantity' of material and although these were moving images, I would define four as a 'small quantity' and I very much doubt that any judge would do otherwise."

His Honour Judge Glenn at page 28 of the paginated bundle in passing sentence accepted at line five there was

“absolutely no suggestion that Mr Kimberley ever sought to embark on any sort of contact offending or that he had done anything other than use this material for his own devices.”

On Mr Kimberley’s behalf, the guilty plea that was entered on the basis of “reckless browsing” distinguishes his behaviour in my submission to that of the behaviour of Mr Fleischmann whom it was acknowledged had actively sought out pornographic material and who had accessed material in terms of pornographic images which ran to the thousands. The judgment transcript which is available to you, sir, at paragraph 4 makes reference to something in the order of between 2,500 and 3,500 images, and at paragraph 12 you see the numbers of images involved, including I have to say 22 images at level 5, which is by far the most gruesome sort of image; the bestiality and sado-masochistic behaviour. In distinguishing Mr Kimberley’s behaviour because of his reckless browsing when looking for adult pornographic sites from Mr Fleischmann’s behaviour in deliberately seeking out child pornographic material, I think it is fair to say, with a view to inciting the distribution of the material, I am seeking to distinguish between the behaviour of somebody who has been routinely accessing material which is legal from somebody who was deliberately seeking material of an unsavoury nature and which was in itself illegal material.

In terms of hearings which have occurred before this Committee I’m conscious that there was recently a hearing in respect of another optician, a Peter Michael Colbear, which is a reported case as I understand it, sir.

Mr Watson: You look to me. The General Optical Council does publish findings on its website of previous hearings. This is not a jurisdiction which, as it were, the previous findings by other panels are binding on this Committee and this Committee may or may not be aware of the precise facts of the findings of another Committee. There is no inhibition upon you drawing attention to the facts found or the decisions of another Committee within that context, but it will be for you to do so.

Mr Leach: I am grateful, sir. I fully accept that any findings will not be binding on this Committee but I think it important for me to distinguish once more between Mr Kimberley’s behaviour and that of Mr Colbear who found himself the subject of 12 months’ imprisonment having downloaded what I think were something in the order of 11,000 child pornography pictures, of which 33 were at Level 5. Mr Colbear was, as I understand it, actively involved in youth work. He was a scout leader. The material was found on his work’s computer by a colleague and there was a clear suggestion that he had been making use of child pornography during work hours or in the context of work. The sentencing judge, His Honour Judge Overbury, as I understand it, is quoted as saying that he had never come across a case involving so many Level 5 images before, and he was made a subject of a prevention order under the Sexual Offences Act preventing unsupervised contact with children for a period of 10 years.

I'm seeking to distinguish Mr Colbear's behaviour in deliberately accessing 11,000 images from Mr Kimberley's behaviour in accessing four images on the basis of reckless browsing. Mr Colbear, it will come as no surprise, was I understand made the subject of an erasure order.

The basis upon which this material came into Mr Kimberley's possession is clearly very important. It was not deliberately sought out, although it is accepted, as I say, that by venturing into murky waters he was taking a risk.

I am concerned that the Committee will be troubled by his failure to notify his professional body of the fact of his arrest, the fact of his charge and the fact of the subsequent proceedings. It goes without saying that the arrest, which occurred in May of 2009, was traumatic for Mr Kimberley and his family. He was adamant that he had not been deliberately seeking out the material and he was convinced at the time in his own mind that there would be nothing of any illegal nature on the computer which was seized and subsequently examined by the police.

He accepted in his first interview that occasionally pop-up material had arisen. He accepted that he trawled unsavoury sites, but as far as he was concerned they were not illegal sites. He accepts that he erred in his judgment in failing to notify his professional body of the arrest and subsequent charge, but he was adamant of his own innocence, and he was sure that he would be exonerated.

His subsequent guilty plea was, as you have heard, on a very limited basis and the Crown Prosecution Service accepted that there were evidential difficulties relating to a substantial amount of material which was not proceeded with, although Mr Kimberley accepted the guilty plea, that is the inappropriate behaviour in downloading those four movie images. The effect upon him has been devastating. As you will appreciate, firstly he has had the embarrassment, shame and disgrace of having his family come to know, not only about the fact that he was arrested in being possession of child pornography, but just as shaming in his eyes, has been the fact that he has been found by his wife and family to have used pornography generally. He is immensely distressed that child pornography has been found on his computer. He never sought it out. He never knowingly or willingly involved himself in its viewing or production.

He is a fifty-three year old gentleman with three adult children. It goes without saying that there has been a degree of estrangement insofar as his relationship with his wife is concerned. He and she are working on their relationship, but I am sure one has to accept that things may never be the same again.

He graduated from Bradford University in 1979 and established his own practice in 1986. He sold the practice in 2000 when his mother was taken ill and he had to spend a substantial amount of his time looking after her and was unable to continue to run his own practice with the degree of involvement that was necessary. At the time of his mother's illness and his cessation of

practice, he was left with substantial debts and a young family at the time. His children were, at that stage, teenagers. One was still in primary school. He worked for a period as a locum optician, and was then employed by the Specsavers company from 2002 onwards.

On his behalf I will say this, that there have never been any issues relating to his technical ability as an optician or insofar as his professional conduct at work is concerned.

He lost his employment in February of 2010. He was able some months later to secure a modest amount of work for a laser eye surgery company where his involvement was purely, as you will appreciate, with adult patients. The work was sporadic and ad hoc in nature but he was at least able to perform some work until his suspension from practice in August 2010. From that period onwards he has been without employment. The family debts have spiralled, and he has a list of his financial means which I can present in due course.

Since his arrest and charge he has limited his own use of the family computer. He has embarked upon what I would describe as a self-imposed rationing of his leisure time viewing material on the family computer. His wife has control of it. He ensures that he does not visit adult pornography sites and during the course of the proceedings which have been before the court and subsequently he has invited the police to check the computer widgets within the family home. There is no bar upon his own access to it. Police officers who are members of the Child Protection team have checked the computer. They have been satisfied as to its contents. They are quite content, as I understand it, that there is nothing untoward contained on the computer.

I turn now to the sanction which the Committee may impose. Mr Kimberley is alert to the fact that the purpose of this Committee is to protect the public and to ensure that the public has confidence in the profession. You will, as a matter of course, ask yourselves whether public protection and public confidence can be achieved without the penalty of erasure being imposed today, and on behalf of Mr Kimberley, I will say these points. I have already mentioned that his conduct at work has never been questioned. That distinguishes him from Mr Colbear who was found to have been viewing child pornographic images at work and in the context of seeing patients.

Mr Kimberley's technical competence has never been questioned, and as His Honour Judge Glenn made clear in sentencing, there has never been any allegation of any direct contact or any physical impropriety towards children, be they patients, family members or any other child he may have come into contact with. His behaviour towards individuals has always been exemplary.

In emphasising his guilty plea on the basis of "reckless browsing", I would like to draw the Committee's attention to the fact that Mr Kimberley never paid for any of the material. It is commonplace, as I understand it, for pornographic images to be sold and for credit card payments to be made. Mr Kimberley entered his guilty plea on the basis of "reckless browsing". He did not pay for

any of this material. The material was downloaded without any direct involvement on his part. I have already mentioned the fact that he was fully cooperative with the police. There were, I think it is fair to say, a thousand and one avenues that he could have embarked upon in terms of explaining to the police how other people have access to the computers, how he was not responsible for any of the material and it would have been very difficult evidentially to point the finger specifically at Mr Kimberley had he raised such potential defences. He didn't. He accepted that what he was doing was viewing adult pornography, and through his guilty plea, he accepted by extension the recklessness that I have already alluded to. I am sure that the Committee will take into account his cooperation with the police, not only in acknowledging it for what it is, but also in acknowledging the fact that it is a good hallmark test to establish whether or not he will cooperate with the terms of what remains of his community penalty.

He is cooperating with the probation service both in terms of his individual sessions with his supervising officer and also with the group work sessions which were ordered by His Honour Judge Glenn. Mr Kimberley is required, under the terms of the order which was made, to participate in 35 sessions. He tells me that some of the other individuals who are involved in the group work had access or were convicted rather of involvement in creating thousands of images. He has attended 18 of the 35 sessions thus far. His attendance rate is exemplary. The remaining work will be completed, I anticipate, within the next six months.

The period of suspension that he has already been subject of has been a penalty in itself. It has deprived him of the opportunity to work and it has had a very marked impact upon family finances, as I am sure the Committee will appreciate, and today on his behalf I am going to invite the Committee to consider a sanction other than the ultimate sanction of erasure, and that is to impose a condition upon Mr Kimberley's registration which would prevent him from working with anybody under the age of 18 for such period as the Committee considers appropriate.

The terms of his probation supervision have two and a half years to run. I am very conscious that the guidance in the *Fleischmann* case suggests that an individual should have completed any sentence, but given the very unusual facts surrounding Mr Kimberley's involvement in the offence and given his very clear cooperation, I invite the Committee to proceed on that basis nevertheless. Mr Fleischmann's substantial number of deliberately downloaded images and Mr Colbear's substantial number of deliberately downloaded images, which if my memory is correct, went into the tens of thousands, both involve cases where it was considered ultimately appropriate for erasure or its equivalent to be imposed. Those were cases of deliberate targeting of child pornography sites. They involved thousands of images. This case involves what I have already described as reckless browsing with just four moving images the subject of the guilty pleas, and in my submission it is in very marked contrast to the material which was before the tribunals on each of the other occasions.

If I may say very briefly, the learned judge who imposed the three year community penalty upon Mr Fleischmann departed very substantially indeed from the acknowledged sentencing guidelines which for Level 5 offences merited at least consideration of three years imprisonment. I am sure your learned Legal Adviser will provide you with the sentencing guidelines if you wish, but it would appear that the learned judge on that occasion was persuaded to depart from the guidelines because of Mr Fleischmann's mental breakdown and the personal factors relating to his state of health generally rather than because of the nature and the context in which the downloading had occurred.

I will conclude my observations on Mr Kimberley's behalf by re-iterating that this was not deliberate targeting of child pornography. It was, as I say, recklessness when the individual was actively, admittedly, searching for adult material which was, of itself, legal and permissible.

If the Committee has any questions I will be happy to respond, but those are the observations that I make at this stage on behalf of Mr Kimberley.

Sir Alistair Graham: Thank you, Mr Leach. Ms Steele, did you want to come back on anything?

Ms Steele: No, thank you, sir.

Mr Watson: There were three matters of clarification that I wish to raise if you will permit me. Firstly, it may have been, as it were, a trick of my ears, but I wasn't clear whether in addressing the Committee your submission was that your client had never actually viewed the images. You restricted yourself to saying that he had downloaded and I thought you implied that your position was that he had downloaded them recklessly having entered into the murky waters you referred to, but not actually viewed them. I just wondered whether you would like to clarify that.

Mr Leach: Mr Kimberley's case has always been that he was not actively viewing the material. I am conscious that when the matter was first aired before Judge Tonking, Mr Spratt on opening the prosecution case at page 11 of the paginated bundle, at the top of the page says:

"It's clear that it has not only been downloaded, it has been viewed and stored."

It's accepted that it was stored in the 'My Documents' section because it was part of the LimeWire material, the peer-to-peer downloading process. Mr Kimberley doesn't accept that he viewed that material.

Mr Watson: You say the prosecution went on in the presence of the defendant's counsel to say that the basis, in effect, for accepting the count, the plea to Count 1, was as you have read out – I will read it for the benefit of the full Committee – that:

“It is also clear that it has not only been downloaded, it has been viewed and stored in the ‘My Documents’ section of the computer. The defendant accepts responsibility for that in its entirety.”

Just so that you can clarify your position to the Committee in full, when on the subsequent occasion it came before Judge Glenn, the passage that you have already taken the Committee to at page 24 of the bundle, indicated in the words of defence counsel on that occasion:

“He accepts downloading those four files albeit while looking for other material but although they weren’t actively sought out he knew that receiving child pornography was a real possibility on that site, that the file names under which the files were stored were clear and related accurately to the type of material that was downloaded and therefore he accepts he did know what the material was.”

and he went on to say “but these images weren’t viewed repeatedly by Mr Kimberley.”

Is your position that they weren’t viewed at all or is the position that they simply weren’t viewed repeatedly?

Mr Leach: If I may take instructions, sir. [*confers*] Sir, I will have to accept the stance as outlined by Mr Dewsbury on page 24. They weren’t viewed repeatedly.

Mr Watson: My purpose in raising this is so that the Committee have a clear picture, so that there is no ambiguity in the position you are putting forward today.

Mr Leach: I think that is the stance that I am forced to take.

Mr Watson: The second of three matters I wanted to clarify is that you referred in your address to this Committee to the fact that your client has been suspended, I think. I don’t think this Committee is, and would normally be, concerned with the terms of any suspension leading up to this hearing but since you raised it, would you wish that to be clarified as being an interim order suspension?

Mr Leach: Yes.

Mr Watson: I don’t want the Committee to be under any misapprehension, and I think that as you have raised it, it should be clarified that the interim order suspension was imposed by another Committee of the General Optical Council of course on 25 August 2010, so the mitigation that was advanced referred to the period of suspension to this date, refers to that period.

Sir Alistair Graham: This was always in advance of the substantive hearing.

Mr Watson: A period of suspension or any order imposed by the Interim Orders Committee is of course an order of a different kind and nature to an order imposed on a final hearing, nevertheless it is a fact to which you are entitled to have regard if you wish to do so in terms of personal litigation.

The third point, and I simply wanted clarification, is this – this again may be my lapse of concentration – is that I think you were inviting the Committee to consider a condition which restricted your client’s involvement in working with young children. Is that right?

Mr Leach: Yes, sir.

Mr Watson: Two points arise out of that. By young children were you seeking to invite the Committee to consider a differentiation between children as defined under the Sexual Offences Act, that is to say under 18, or were you defining it at a lower level because you used the word ‘young children’ and that may imply a differentiation.

Mr Leach: I wasn’t aware of using ‘young children’ in that context, but my application would be just children, anybody under the age of 18.

Sir Alistair Graham: And I think you did simply refer to children.

Mr Watson: In that case that is my mistake. I do apologise, and you were proposing this by way of an alternative sanction, not by way of suspension with those conditions, because of course the two are alternatives?

Mr Leach: They are clearly alternatives. What the thrust of the proposal amounted to, sir, is he has been the subject of suspension on the interim basis. Now that we are moving to a final decision, the most appropriate sanction that I would submit that is realistically available to this Committee is the condition being placed upon practice preventing work with anybody under the age of 18.

Mr Watson: Thank you. I simply wanted to make sure.

Sir Alistair Graham: Can I just clarify because I think it just related to the first point that the Legal Adviser raised, you didn’t touch on Judge Glenn’s comments when sentencing, referred to on page 27, which touches on the issue of the probation officer’s Pre-Sentence Report? If you look at the fact that the videos were saved on the computer hard drive and the fact that “I have read the Pre-Sentence Report”, Judge Glenn says.

“I take the view you are continuing to minimise your responsibility despite the plea, trying to put the best gloss on events that you can. You need to acknowledge reality. The probation officer’s view – and I share it – is that you are preoccupied with sex and you have some form of sexual attraction towards young children.”

And then he goes on:

“But it ought to be said in your favour that there is absolutely no suggestion you’ve ever sought to embark on any sort of contact offending”, etc.

I just wondered if you were going to touch on that aspect relating to the probation officer’s Pre-Sentence Report.

Mr Leach: I think that it is fair to say that the probation officer – and I am afraid I don’t have access to a copy of the Pre-Sentence Report, it was not one of the papers that was made available to me – I anticipate that any probation officer coming to a case like this will, as a starting point, approach the individual with what is fair to describe as a healthy degree of scepticism, and any probation officer preparing a Pre-Sentence Report will have that degree of scepticism at the forefront of his or her mind. The learned judge took the view that there was a preoccupation with sex. Well, the preoccupation with sex is acknowledged to a certain degree by Mr Kimberley insofar as he has accepted right at the outset that he routinely in his own home environment accessed material on the internet which was pornographic in nature, albeit legal. The judge took the view that there was potentially some form of sexual attraction towards young children. That is the view of the judge. I can’t comment on that.

Sir Alistair Graham: Thank you very much. Can I see if my colleagues have any questions they wish to ask?

Mr Azubike: Just one. I think in your submission, Mr Leech, you refer to the fact that he did not notify the arrest, charge and subsequent proceedings. It is not alleged in the allegations and I was wondering why you were referring to that.

Mr Leach: I mentioned it because I anticipated that it would be at the back of the mind of the members of this Committee. It is something that Mr Kimberley is embarrassed about and I’ll put it no higher than that. It does not form part of the charge in itself.

Sir Alistair Graham: Arif, did you have a question?

Mr Khan: I have one question, Chairman, if I may. My computer skills are poor. I accept that before I ask the question. Your main thrust of litigation is that it wasn’t a deliberate act, and secondly, Mr Kimberley came upon this site when he was looking for adult material. Am I right, sir?

Mr Leach: Correct, sir, yes.

Mr Khan: How difficult is it to delete things which you don’t want or are not looking for?

Mr Leach: When the pop-ups occurred, which you have heard mention of, Mr Kimberley deleted them straightaway. They would still exist within the memory of the computer generally but they were not immediately available

and it was only with the use of forensic software that they became available and the history of the computer was found.

Mr Khan: But in the transcription they were stored and viewed.

Mr Leach: The four moving images, which were the subject of the guilty plea, were stored in the context of there being a total of 10 films of a pornographic nature which were downloaded at about that time using the LimeWire software. Of those 10 pornographic films, six were of a legal adult nature, four were of the illegal child porn nature, and they were all downloaded, as I understand it, at essentially the same time.

Mr Khan: That is really what I am asking. If the thrust is that these were not deliberate acts, why couldn't they have been deleted?

Mr Leach: They were not deleted.

Sir Alistair Graham: If they are stored – because I think we would probably all be interested in this – they were stored under 'My Documents' weren't they? People keep a list of material that they may constantly refer to at different times. It is a storage mechanism of sorts. That is a conscious decision to put something in 'My Documents' isn't it?

Mr Leach: Well yes and no, and again my degree of expertise is very limited I have to say. It is my understanding, sir, that the LimeWire downloads can take place during the course of the night when an individual has gone to bed and the computer can set up to download material using this file sharing software overnight and anything with specific titles or specific keywords in it can be accessed and downloaded.

Sir Alistair Graham: But that wouldn't be stored under 'My Documents' would it?

Mr Leach: When the download is completed the individual simply then transfers it onto a 'My Documents' page and stores it for later viewing. It may be viewed immediately or it may never be viewed depending on how it works.

There is a passage I wasn't intending to necessarily refer to but it may provide some illumination. It comes from the report which was commissioned on behalf of Mr Kimberley in his defence, and it is a description of how the LimeWire software works and how it creates documents which can be stored on the computer, and if you'll permit me I will refer to it very briefly.

Mr Watson: If it is a passage from an expert report, I think the prosecution or the Council should have an opportunity to see the passage you are proposing to read out first.

Mr Leach: Yes, I am quite content for that to happen.

Mr Watson: So there is no issue between you.

Mr Leech: It is a marked page. I was simply going to comment with regards to the description as to how LimeWire operates.

Mr Watson: Ms Steele should have an opportunity to see it.

Mr Leach: Certainly, Sir. [*Document is passed over*] [*Pause*]

Sir Alistair Graham: Mr Leach, I am sorry to interrupt you but I have been made aware that one of the members of the Committee that is sitting today did sit on the Colbear case and I am very conscious you made specific, in fact made constant references, to the Colbear case as dealt with by the General Optical Council at an earlier stage. I am just declaring that a member of the Committee was on that case. Does that cause you any difficulties?

Mr Leach: I am grateful. It doesn't cause me any difficulties. I have simply been made aware of the facts as briefly narrated. I don't think that I need to say anything further as far as the Colbear case is concerned.

Sir Alistair Graham: Okay, I just wanted to make you aware of that.

Ms Steele: I have no objection to it being read into the transcript to assist the Committee but given it's from – it appears, if I am correct, to be an expert report – it might be that it is important that it is attributed in that context in that it is opinion rather than a –

Mr Watson: It is a technical explanation produced by a previous witness.

Ms Steele: Indeed.

Sir Alistair Graham: Which was prepared preliminary to the criminal proceedings.

Mr Leach: The expert in question is Mr Stephen Philip Fisher Davies, and he goes on in his report to provide a brief layman's description, if I can put it this way, as to how the LimeWire software works.

“When downloading files using the LimeWire peer-to-peer gnutella network the filename created on the computer is the same as that selected for download. Unless manually changed by the user after the successful download of the file, the filename will not appear any differently on the computer. However, a common issue that can arise within the LimeWire application is that due to the limited space on a user's computer screen and the long filenames and descriptions given to files in order to increase the likelihood of the file being shown as a search hit, it is possible that if a user does not view enough of a file's description they could inadvertently download an unwanted file.”

He goes on to give this example:

“A user is searching for videos of car shows and thus searches for the term 'car show'. It would return search hits, the title of which displayed

as car show so the user downloads the file. Unbeknown to them the entire file title actually read 'car show streaker ruins everybody's day'. As he only had a small section of the filename showing he could end up with a video, the contents of which is not desired by the user."

And it is in that context of pornographic material that Mr Kimberley has downloaded LimeWire products on the reckless basis that I have already outlined.

Sir Alistair Graham: Sorry, I don't know if Arif had finished. Did you have any further points you wish to raise?

Mr Khan: No, thank you very much.

Mr Charlesworth: My question really relates to the same stuff. There has been an inference that in the LimeWire you have pop-ups with other things, and I don't think that is correct, is it?

Mr Leach: No. In LimeWire, if the search words are not sufficiently specific enough, then there is the possibility that inappropriate material can be downloaded on to the computer. The pop-ups occur in the context of viewing adult pornography sites and it was in that context that I referred to the 'increasingly murky waters'. Mr Kimberley accepts that he may, on occasion, have been viewing an adult site, perfectly legally. A pop-up occurred directing him to something perhaps more salacious. He would follow that. By following that route, moving from one site to another without any pre-planned route in mind, he found himself, on occasion, opening at pop-ups of an illegal child pornographic nature.

Mr Charlesworth: I understand that, and I understand how that then can create illegal images without actually downloading anything. In LimeWire, is it true – because I think you said that you can put a search term in and then it goes and downloads files – does it not work by you put in a search term, it returns a number of files that match that search term and then the user has to make a decision to download and click on it to say I will download that file. We have heard how that might not be displaying its full name, but it is a conscious decision to download a file. You have to click on it. Is that correct? And then you mention that it might then work overnight. I don't think it is the case that you put in a search term and it goes and downloads all those files overnight. Is it not that it will download a list of those terms. You tell it which ones you want to download and then overnight, because they might be big files, it will go away and download them.

Mr Leach: If I may speak to Mr Kimberley regarding that particular point? [Confers] Mr Kimberley tells me that in the past he has essentially clicked on a block of 10 files at a time within a list and downloaded them without checking. So there is an active decision to download. It is not an automatic process, but it is a download in ignorance of the contents if I can put it in that way. What he does tell me in terms of the material being stored in his personal files, and I come back to the point that was made earlier, he says

that within the 'My Documents' section of his computer is the LimeWire software itself, and some saved documents, and some incomplete documents. The mere fact that the material is there does not mean that he routinely accessed it.

Mr Charlesworth: Yes, I understand so clicking it would download it into the LimeWire folder in 'My Documents'. Now just one more question then on that, which is that Mr Kimberley accepts that the images were viewed, the videos were viewed, they weren't viewed repeatedly, so all or part of the images at some point were viewed, and my question really is why not delete it at that point?

Mr Leach: [*Confers*] It is possible, and if I can phrase my submissions in this way, that the material has been opened and therefore gives the appearance of having been watched without it necessarily having been viewed in much the same way that a television can be turned on but the individual is not paying any attention to the programme. Mr Kimberley wishes me to stress that he has not actively viewed the material and did not pay attention to its contents.

Mr Watson: I appreciate the thrust of the submission that you are making, but it is accepted, is it, not by you on your client's behalf that the plea of guilty in the Crown Court was on the basis of an acceptance of knowledge, it being the case that it is a defence to a charge such as that that your client faced, that he was entitled to a defence if there should be a defence for him to prove that he had not himself seen the photographs and did not know nor had any cause to suspect them to be indecent. That was a defence available under that section which your client did not pursue.

Mr Leach: Indeed, and the guilty plea is on the basis of his recklessness in routinely downloading such large quantities of pornographic material.

Mr Watson: Thank you.

Sir Alistair Graham: Can I just ask one final question in relation to the standing of the profession? You have been arguing that the guilty plea related to this "reckless browsing" I think was the term – I struggle a bit with that term – but he pleaded guilty in the Crown Court and it is still subject to the sentence that was given by the Court. This "reckless browsing" in a sense doesn't help us in terms of public standing of the profession. A guilty plea by an optometrist is a guilty plea, isn't it? There were no refinements of the sort that you have tried to put forward to us today.

Mr Leach: I think that the refinements were addressed by Mr Dewsbury very briefly before His Honour Judge Glenn. The importance of the "reckless browsing" mitigation is in the context of the quantity of material which was downloaded. Had he been searching for child pornography because he had an appetite for child pornography, I am sure that the amount of material on his computer would have been significantly greater than that which was found. The other cases which have been briefly referred to, involved tens of thousands of photographs and images. Here we are dealing with four moving

pictures and some other material which wasn't proceeded with by the Crown Prosecution Service because they understood the nature of the defence which was being raised, but the degree of recklessness goes to the heart of Mr Kimberley's approach to this hearing which is to say

"I do not have an unsavoury appetite for child pornography. I accept that I view adult pornography and have done so, and on occasion I have followed courses into rather murky backwaters, but that does not mean I have been deliberately seeking out the child pornography."

In terms of the professional standing the Committee today may have a view as to whether or not an individual should be viewing pornography of any description. I don't know whether that would fall within the remit of the Committee but certainly in terms of Mr Kimberley's approach he has accepted that at home he has viewed adult pornography within the privacy of his own home environment and that, as I said earlier, distinguishes him from behaviour which is perhaps associated with misconduct at work in the context of a working environment where material can be seen by colleagues.

Sir Alistair Graham: Yes, I understand that. Any more questions from my colleagues?

Mr Charlesworth: Just to tie up that last point that I was talking about, so on page 24 of bundle C1 we have this passage that was read out before about Mr Kimberley accepts downloading the files. Although they weren't actively sought he knew that receiving child pornography was a real possibility. The filenames under which the files were stored, and we have heard how that could happen even though you have perhaps not read the whole of the file, and that the images had been viewed. Now you say that Mr Kimberley says that that file might have been opened but not actually viewed. Is that what we are saying? So what we are saying he didn't know the full filename, the file was opened and he has not viewed it enough to know what it contains. Is that what you are saying? Is that how these four files come to be stored for a period of time on the computer?

Mr Leach: He acknowledges that he was reckless in downloading material in the bulk manner that he has described to me without carrying out checks to safeguard its contents. He accepts that there was a real possibility, as Mr Dewsbury has said, that child pornography could have been on that site, and to that extent he was reckless as to his conduct.

Mr Charlesworth: What I am trying to establish is how likely is it that Mr Kimberley knew the content of these images and yet still continued to store them. So I think when you spoke to Mr Kimberley just now, he said that it is possible that the file was opened without being used. So are you saying that Mr Kimberley didn't know what the content of this video was or he did know what the content was and still kept it?

Mr Leach: Mr Kimberley's stance is that he did not watch those videos in their entirety and clearly a more prudent approach would have been to see what

the titles were and to have deleted them automatically, as he did with the pop-ups. By allowing them to remain on the computer he has obviously brought suspicion on himself through not deleting them immediately.

Mr Khan: Can I just, Mr Chair, ask a very short question? I will ask this question because I probably would be asking our Legal Assessor this question and it might be better if I do it in the open tribunal. What meaning are you giving to 'recklessness'?

Mr Leach: The approach that I take is that Mr Kimberley did not know the nature and contents specifically of any website that he started to view until he had opened that website. He accepts that by moving from one website to another he was taking the risk that there would always be increasingly distasteful material and he was taking the risk that some of that material might be illegal. He also accepts that by downloading material from the LimeWire in bulk without imposing specific title safeguards, he was taking a risk that there might be some illegal material downloaded to his computer.

Mr Khan: So the risk, you are saying, is confined to what he might hit by way of searching, but you are not putting a label of 'recklessness' to the storing of that material and not deleting it?

Mr Leach: I am not putting a label of 'recklessness' to the storing. Clearly, had he considered the matter he should have deleted it immediately.

Mr Khan: Thank you.

Sir Alistair Graham: Can I just clarify one thing? Earlier on you did imply that your client was under intense financial pressure. Is there anything further you want to say to us as a factor that we should take into account in coming to a conclusion?

Mr Leach: I have his financial statement available and I am happy for it to be presented to the Committee for consideration, but there was nothing in terms of family finances or any financial pressure externally that caused him to be involved in the offence that brings him before the Committee today.

Sir Alistair Graham: But is it a factor you want us to take into account in terms of mitigation of the sanction?

Mr Leach: In terms of mitigation of the sanction clearly he has been without work for some six months now and that has caused enormous financial hardship for him and his family.

Sir Alistair Graham: He is in receipt of social security benefits.

Mr Leach: No. He is actually receiving some assistance from other family members. His own son is providing a degree of financial support which, as one will appreciate, is rather embarrassing.

Sir Alistair Graham: Okay. Any more questions?

Mr Charlesworth: I just have one more and it may be completely irrelevant and I am not even sure if I am allowed to ask it, but I think you said that Mr Kimberley had registered in 2003, and Mr Leach, you said that he had registered in 1979.

Mr Leach: I think there was a re-registration process. I am not quite sure of the reasons for it, but he qualified in 1979. He tells me, and I am grateful to him, that he lost his registration documents and he made a further payment in 2003 to re-register. I don't think it was anything more sinister than that.

Mr Charlesworth: So it was a procedural thing?

Sir Alistair Graham: Are you happy with that as accurate?

Ms Steele: Yes. I was merely going to say if it assists, that date is taken from the current electronic record. I don't have the details before that, but certainly it is not an allegation before you or anything that I would invite you to consider in relation to that.

Ms Viner: I just have one question please, just to clarify in my own mind the work situation leading up to the interim suspension order in August 2010. You mentioned, I think, that Mr Kimberley had lost his employment in 2010 and then had to carry out some sporadic work with a laser company with adult patients. At what point in 2010 was that employment lost?

Mr Leach: The employment with Specsavers was lost in February 2010.

Ms Viner: Right, okay. Was that for any particular reason?

Mr Leach: That was when the report was made to this Committee.

Ms Viner: And was that something that Mr Kimberley reported to his employers himself, that he was being investigated by the GOC or was it something that the employers found out and then approached him?

Mr Leach: His employer found out about it through a press report. I think it is touched upon in some of the material.

Ms Steele: Not the material before this Committee.

Sir Alistair Graham: Was the Registrant required under his contract of employment – normally if you are arrested or subject to criminal charges you normally have to inform your employer of that.

Mr Leach: I don't have his contract of employment.

Mr Watson: I think I would prefer to intervene, in the sense that the Committee have been told, it has been volunteered on behalf of the Registrant that there

was an issue as to how late it was that he volunteered his predicament to the General Optical Council. He volunteered that information, and as part of his mitigation relating to the impact of all these matters on him and the shame that was the explanation for that, but I would advise the Committee that there is no allegation concerning reporting or non-reporting and that these are matters probably best left there.

Sir Alistair Graham: Thank you very much. If there are no further questions, I will ask the Legal Adviser to advise the Committee.

Mr Leach: If I may say just very briefly, you questioned whether Mr Kimberley was receiving any state benefits. He tells me that he is receiving unemployment benefit at the moment.

Sir Alistair Graham: Thank you.

Mr Watson: Thank you. My task is to advise the Committee now on its final deliberation in terms of the stages of this case. It must decide on the question of sanction. I start by emphasising that what I say is guidance and guidance only, and it is for this Committee to have regard to the various factors which must guide it, and to reach its own decision. ‘Its own decision’ are words that are underlined. Guidance and reference to other cases or authorities are only that. They are guidance which the Committee should have regard to; that includes the General Optical Council’s own guidance, but only take into account and have regard to. The Committee must reach its own judgment on the facts of this case. The Committee likewise in terms of authorities or other cases referred to must have regard to those cases where they offer principles which commend themselves to this Committee but they do not have to follow those principles. They must apply predominantly, again, the facts of this individual case.

Be particularly careful in relation to attempting to compare the facts of one case before the Council as opposed to another case before the Council. I do not propose to advise you in relation to the facts or the outcome in the case of Colbear. Observations have been made to you about both the facts underlying that case and the outcome. It is really, if I may say so, a course of grave risk to attempt to apply the facts of one case to the facts of another. I caution you strongly against that. As to the case of *Fleischmann*, however, there are general principles there to which both the General Optical Council’s own guidance invites you to have regard and which have been cited as enunciating principles of assistance in other cases, and that is of a different ilk.

Now I turn firstly – no sorry, may I rewind slightly and continue to advise you on those matters to which you should not have regard. Firstly, I advise you not to have regard to the point that was just raised as to whether or not the Registrant reported his position to the Council at a particular stage or not, save for the extent that it has been urged upon you by way of mitigation. It is not a matter to be held against him in any way. Secondly, this Committee should not place any particular importance or relevance upon the fact that the

Interim Orders Committee decided to impose a suspension. That was a judgment for that Committee in the context of a completely different jurisdiction. You may take into account the impact of the fact that he has been suspended since August 2010 only in terms of personal mitigation and its impact upon him but you must not read into, as it were, that decision by that Committee any particular significance beyond that. It is for you to form a judgment now upon the principles that you must apply as to what sanction should be imposed in finally determining this case.

Lastly, please disregard the fact that reference has been made to the Registrant's use of and access of adult pornography, save to the extent that the mitigation has been advanced to the effect that he has been open and cooperative with the police authorities to that extent. Please bear in mind that adult pornography is not an offence and that he is not criticised in any way in terms of his fitness to practise in that regard, and so that aspect should not in any way be held against him in your deliberations which must focus upon the conviction and the underlying conduct which relates purely to his plea of guilty on that offence in the Crown Court.

The underlying purpose and function of sanction is, of course, not to punish registrants for errors or misdoings, but to protect the public from those who are not fit to practise or whose retention on the Register should be permitted only subject to an appropriate sanction. The determination of what is an appropriate sanction should be approached having regard not only to the underlying facts and conclusions that you have reached in relation to impairment, but having regard to the mitigation advanced by the Registrant, but then also having regard to fundamental aspects. Firstly, the public interest, the public interest in the wider sense to which I have referred in my previous advice, that is to say not only the protection of the public but the maintenance of public confidence in the standards of the profession and the need to declare and uphold those standards.

The last principle is the principle of proportionality which requires that the context and the gravity of the offence, the personal mitigation advanced and the considerations of the public interest must be balanced one against the other and that the sanction that is imposed must be one that is indeed proportionate to those factors. You should approach your task asking yourself in terms of an escalator whether this is a case in which any sanction should be imposed. If you decide that it is a case in which a sanction should be imposed, you should then consider whether it is sufficient to impose conditions, and only if it is not sufficient to impose conditions should you progress to decide whether suspension is a sanction that should be imposed, and whether that is sufficient. Even if you proceed along the train of decision-making and you reach a point where you are considering erasure, you should still pause and give proper consideration to whether erasure is indeed a sanction which is both proportionate and necessary having regard to the factors which you must consider. The guidance offered by the Optical Council rightly calls into your mind the need to protect patients and to maintain public confidence. It draws attention to the fact that the reputation of the profession is more important than the fortunes of any individual member, and it closes

with the well-known words of the Privy Council in the case of *Bolton v the Law Society* that “membership of a profession brings many benefits but that is part of the price”.

It is in relation to those principles that the case of *Fleischmann* was also referred to in argument before you at the stage of your decision-making as to impairment. I advise you that the principles in *Fleischmann* are relevant also in your deliberations as to sanction. It was noted in that case on, as I have observed previously, very different facts, and so it is the principle that is of relevance.

It was observed that there should be, in the judgment of Mr Justice Newman, no difference in approach between an applicant for registration and a registrant who is facing the possibility of a sanction imposed for misconduct once they have been on the register. The two principles therefore are these; firstly at paragraph 54:

“I am satisfied that as a general principle where a practitioner has been convicted of a serious criminal offence, he should not be permitted to resume his practice until he has satisfactorily completed his sentence. The rationale for the principle is not that it can serve to punish the practitioner while serving his sentence but that good standing in a profession must be earned if the reputation of the profession is to be maintained.”

As to the comparison between an applicant for registration and an existing registrant, Mr Justice Newman observed at paragraph 56 that he recognised that:

“the variety of circumstances presented by individual cases must be weighed but where grave and serious offences are under consideration, personal factors such as character, previous history and the practitioner’s livelihood as a dentist will invariably be insufficient to produce a result different from that which would have applied had the individual been an applicant for registration.”

In the context of the facts of that case, he went on to illustrate that principle by saying this:

“Had an application been received from Mr Fleischmann during the currency of his community rehabilitation order only six months after its imposition it is inconceivable that it would have been accepted.”

So that was the principle, but I emphasise that that was a principle and a view expressed about Mr Fleischmann that sprung from the factual context of that case.

It is for you to have regard to that principle but decide in your own judgment the extent to which it should be applied in this case. You have and will have regard to the width of public interest factors which are outlined in the

guidance, to the points of proportionality that I have referred you to which are also summarised in the guidance, and you will have, lastly, regard to the points which have been made on behalf of the Registrant. It has been said on his behalf that he was not at any stage an active seeker after child pornography but his activities involved what has been termed and justified in answer to the members of the Committee as “reckless browsing” but he never paid for these images, that he has cooperated with the police and suffered a degree of shame which has been described, that his conduct did not involve any activity at work nor has his performance at work been questioned and that there is no allegation or inference or implication of any impropriety in terms of his own contact towards children. I have already indicated that his adult pornography aspect should be put to one side.

Reference has been made to the limitations on his involvement even with the four images involved. It will be for the Committee to balance the way in which his explanations have been advanced before you today, and to balance that, and put it into the frame together with the way in which the mitigation was advanced and the case was dealt with at the Crown Court on the transcript which you have read and will digest.

Those are all the matters that I seek to put before you unless there are any other features which the representatives would wish me to deal with.

Sir Alistair Graham: Right. Can I ask if there are any points about the advice that has been given to the Committee? [No] I think that brings this stage to a conclusion. The Committee needs to sit apart now to come to its own conclusion.

[Hearing adjourned at 12.25]

[Hearing reconvened at 14.22]

Sir Alistair Graham: The Committee has come to a conclusion on sanction.

Sanction

The Committee accepted the advice of the Legal Adviser.

The Committee has taken into account the submissions of both representatives and in particular the arguments in mitigation as set out by Mr Leach. These submissions were:-

- a. the Registrant was hitherto of good character and had not committed any previous offences;
- b. the Registrant had not actively sought child pornography on the internet though he acknowledged had had been involved in what he described as “reckless browsing” and he was aware that this may lead to accessing child pornography sites;

- c. there were only four moving relevant files on his computer which were saved under 'My Documents' on his computer hard drive and this storage may have happened through the use of "LimeWire" software;
- d. he had never paid through his credit card for any child pornographic images;
- e. he had cooperated with the police and had never sought to argue, as he could have done so, that other members of his household may have downloaded such illegal material;
- f. he had suffered considerable shame as a result of what had taken place;
- g. there was no suggestion that he had been involved in any impropriety at his workplace;
- h. the Court had accepted that he had no contact with children and that there had been no distribution to any other party of the downloaded images.

Ms Steele, on behalf of the Council, drew attention to the general principles set out in the *Fleischmann* case as outlined in paragraph 54 of the case judgment together with the further guidance given in paragraph 56.

She also drew attention to the General Optical Council Fitness to Practise Panel's Hearing Guidance and Indicative Sanctions. The latest version of this document dated 31 December 2010 also highlights the principles of the *Fleischmann* case.

The Committee went on to consider whether no sanction was appropriate and to each sanction in an escalating order.

Given the seriousness of the criminal offence the Committee was clear that a sanction was appropriate and that a financial penalty was not appropriate in the circumstances of this case.

The Registrant's representative submitted that Mr Kimberley, having been subject to an interim order for suspension, had already suffered a penalty which had had severe financial consequences on him and his family. Therefore the Committee could consider applying a conditional registration order which provided that Mr Kimberley had no contact with patients under the age of 18 years.

The Committee rejected this approach because of the practical difficulties which may arise and concluded that it was inappropriate for somebody still in the early stages of their sentence to be allowed to continue to practise.

The Committee went on to consider whether suspension from the register was the appropriate sanction in the circumstances of this case.

The Committee was conscious that it could only suspend Mr Kimberley for a period of up to 12 months and it believed the seriousness of the offence, and the length of the sentence imposed by the Court, made this an inappropriate sanction.

The Committee concluded that the appropriate and proportionate sanction was one of erasure. The Committee has borne the public interest in the forefront of its mind including the maintenance of public confidence in the profession and the associated need to declare and uphold proper standards of conduct and behaviour.

The Committee was satisfied that the Registrant's conduct was a serious departure from the relevant professional standards as set out in the Code of Conduct for registrants, particularly as the offences involved child pornography. The Committee was also conscious that erasure was the appropriate sanction because the Registrant is involved in the early stages of a Community Rehabilitation Order. The Committee has also noted that His Honour Judge Glenn, in his sentencing remarks, had said the following: "I take the view you are continuing to minimise your responsibility despite your plea. You are trying to put the best gloss on the events that you can. You need to acknowledge reality. The probation officer's view – and I share it - is that you are preoccupied with sex and you have some form of sexual attraction to young children..." The Committee was not shown the Pre-Sentence Report or any other documentary evidence which demonstrated that anything had changed since this sentence was given.

In these circumstances, the Committee orders that Mr Kimberley's name be erased from the register.

Now the point that is outstanding, we are minded to issue an immediate erasure from the register of Mr Kimberley, but we didn't feel it was appropriate for us to come to that conclusion until both parties had a chance to make representations on that matter.

Ms Steele: I'm grateful. In light of the determination that you have made this afternoon I would indeed invite you to consider very carefully making an immediate order of suspension under Section 13I of the Act. I don't know whether it is of assistance to turn to it. It is on page 41 of the bundle that you have before you, and it provides that on giving a direction for erasure as in this case, the Committee may, if it is satisfied that it is "necessary for the protection of the public; otherwise in the public interest; or in the interest of the registrant concerned", make a further order that the registrant be suspended forthwith.

Sir, one thing I would clarify at this stage, and members of Committee will appreciate this already I am sure, you heard reference earlier to an interim suspension order that was imposed prior to today's proceedings. One of the effects of the decision that you have made today in accordance with Section 13L(11) of your Act is that the interim suspension order will fall away. It is clearly a matter for you whether you consider that you want to invoke the powers that you have here under Section 13I of the Act to impose an immediate suspension order, but in light of the seriousness of this case and the determination that you have reached today, I would invite you to consider that very carefully, in particular the parts that relate to the fact that is necessary for the protection of the public, in other words in the public interest, that such an order be imposed.

Sir Alistair Graham: Thank you. Mr Leach?

Mr Leach: I wonder, sir, whether I may retire with Mr Kimberley very briefly to discuss this.

[Hearing adjourned at 14.30]

[Hearing reconvened at 14.32]

Mr Leach: Thank you, sir, I have no instructions regarding the immediate order.

Sir Alistair Graham: Okay. Thank you very much. I will ask the Legal Adviser to advise us now.

Mr Watson: I can be brief. Your attention has been drawn to two parts of your rules starting with page 47 which is Section 13L(11). This provision, in effect, requires that this Committee having dealt with the substantive allegation and having passed its judgment as to the appropriate sanction, must revoke any interim suspension order that is in place immediately after it has determined the allegation. That does mean, as Ms Steele has submitted to you, that the interim order which suspends Mr Kimberley from practice as from 25 August, must now be revoked. There is then a period of 28 days which must pass before the order for erasure, which you have determined as by way of sanction, comes into force. It is that period of 28 days to which your discretion should be directed under Section 13L on page 41, and the question for you and your judgment is whether you are satisfied that an immediate suspension should be applied during that period on one of three grounds, either necessary for the protection of members of the public or otherwise in the public interest. The third provision probably does not apply in the circumstances of this case, but the discretion is your's.

Sir Alistair Graham: Any comments on the Legal Adviser's advice? *[No]*

[Hearing adjourned at 14.35]

[Hearing reconvened at 14.40]

Sir Alistair Graham: In view of the issue of an immediate order and the revocation of the interim order:

Immediate order

The Committee invited representations from the parties regarding the imposition of an immediate suspension order. Having heard such representations the Committee concluded that it was necessary both for the protection of members of the public and in the public interest that an immediate suspension order be imposed.

Revocation of interim order

The Committee hereby revokes the interim order for suspension of registration that was made on 25 August 2010.

That concludes the hearing.

[Hearing concluded at 14.41]