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

GENERAL OPTICAL COUNCIL

AND

JOHN DAVID GILL (D-11251)

Monday, 15 February 2010

REVIEW OF INTERIM ORDER

**REVIEW OF INTERIM ORDER: JOHN DAVID GILL (D-11251)
Monday, 15 February 2010**

Committee Members: Ms M Jeyasingham (Lay) (Chair)
Dr D Azubike (Lay)
Miss R Plahay (Dispensing Optician)

Legal Adviser: Mr N Levisaur

For the GOC: Mr B Albuery

Hearings Manager: Mr D Henley BEM

[Proceedings commenced at 09:30]

Ms Jeyasingham: Good morning. I am Mercy Jeyasingham and I have been elected to Chair today's Review of the current Interim Suspension Order regarding John David Gill. The Committee today is made up of one dispensing optician and two lay members. I will ask the members to introduce themselves and the capacity in which they sit. *[Introductions]*

To my right is Mr Levisaur, 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 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 proceedings to be displayed on the Council's website for public viewing.

Could I ask if an application is to be made, other than the proceeding in the absence of the registrant?

Mr Albuery: No, Madam, not by me.

Ms Jeyasingham: In case, shall we proceed on to that?

Mr Albuery: Madam, as you have rightly hinted, the first application must be my application on behalf of the Council that you proceed in the absence of Mr Gill. Your power to do so is found in Rule 21(1) of the Fitness to Practise Rules and may be found by you and your colleagues on page 96. That Rule states this:

“Where the registrant is neither present nor represented at a hearing, the Fitness to Practise Committee may nevertheless proceed if –

- (a) they are satisfied that all reasonable efforts had been made to notify the registrant of the hearing; and
- (b) having regard to any reasons for absence which have been provided by the registrant, they are satisfied that it is in the public interest to proceed”.

Madam, that Rule applies even though these are interim order proceedings rather than substantive ones, by virtue of Rule 19 which you can find at page 95, which incorporates a number of rules into the procedure for applications for interim orders.

So Madam, the first thing I must do is satisfy you, because Mr Gill is not here, that all reasonable efforts have been made to notify him. Thereafter, if you are satisfied of that, I still have to persuade you that you should exercise your discretion to proceed.

So dealing with that first point, then, have all reasonable efforts been made to notify him of today’s date, I rely on documents which Mr Henley, your Hearings Manager, has put kindly into a service pack. Do you and your colleagues have that, Madam; the Service of Notice of Hearing?

Ms Jeyasingham: Yes.

Mr Albuery: Thank you. Madam, the first page is a copy of what appears on the Register which shows Mr Gill’s registered address as the address in the top right hand corner in Selby. Madam, you will then find on page 2 a copy of a letter to him sent by Special Delivery dated 4 January 2010, and you will see that has been sent to him at the registered address. It notifies him of today’s hearing, gives him clearly much more than the seven days required under your Rules, and tells him the location of the hearing and the purpose of it. It also tells him in the third paragraph that by virtue of Rule 21 you can proceed in his absence.

Madam, at that time on 4 January when the letter was sent, although we know when we look at later documents he didn’t get it, he was on bail and I can say that because on 4 February 2010 Sarita Khaira of the General Optical Council spoke to Leeds Crown Court and asked them whether or not they were aware if Mr Gill was kept in custody between his conviction in November 2009 and the sentencing hearing on 21 January 2010. They confirmed that he was on conditional bail during that time.

Madam, that isn't proof, of course, that he received the letter and we know later that he did not. There is a copy of that telephone note dated 4 February if you or your colleagues feel that you should see it at some stage.

Madam, if we carry on, then, with the service pack, you will see at page 5 that the letter sent by the Council never got to Mr Gill and that it was returned to sender. You will see that at the top right hand corner.

Then, doing more than is required under the Rules, Mr Henley on 9 February, and I am on page 6 now, sent to Mr Gill at an email address he had for him a further copy of the letter dated 4 January. I think it is probably fair to say we can all properly infer that he wouldn't have received that email because by then he was in custody, but I draw these things to your attention because you have to be satisfied that all reasonable efforts have been made.

Madam, perhaps more importantly than any of that, the Council, understanding that since the sentence Mr Gill has been in custody – that is 26 January not the 21st as I wrongly said earlier – contacted Prisoner Location Services to ascertain in which prison he was held, and Sarita Khaira emailed that service on 5 February. She received no response so she called them by telephone on 10 February, which was just last Thursday, and she was told that without a Court Order that service could not expedite her request to be told where he was, and clearly in the time available there has been no time to obtain a Court Order.

So in terms of the Rules all the notifications were properly served because they were served on his registered address. The Council has gone further by sending it to an email address – admittedly one which he would not have had on the day it was sent access to, and they have attempted to find him by using the only means available which is Prisoner Location Services, but to no avail; perhaps unsurprising bearing in mind the fact that he was only sentenced on 26 January 2010. But it is fair and right that I remind you that certainly when the original notice was sent he was on bail and at liberty and the Council can do no more than it has done which is send notifications to the last known address, which happens on this occasion also to be the registered address.

Madam, I pause there to answer any questions that you may have, but also because it would be wrong of me to go into what might be the second limb in the way that you should exercise your discretion, unless you are satisfied that all reasonable efforts have been made.

If you are not, perhaps you can engage me in a conversation as to what more you feel the Council could have done.

Dr Azubike: I have a question either for Mr Albuery or for the Legal Adviser. It is to do with Rule 19(2) on page 95. It says,

“An interim order hearing shall for the purposes of this Rule be treated as a substantive hearing”.

It doesn't refer to a review of an IO, so I am not sure whether this Rule applies to a review of an IO.

Mr Albuery: That is a good point, if I may say so, because also Rule 17 is clearly designed to refer to the first application for an interim order than a review, because of what it sets out, but in fairness to Mr Gill who isn't here, clearly I have taken the view that he is entitled to some notice – seven days is put there, unless that is waived – of the hearing.

I think the Council has always assumed that this Rule would apply, but whether it applies or not, clearly he is entitled to be told about the hearing and to be given reasonable notice of it.

Perhaps is there a point that you are making more subtly than I have realised that I need to deal with?

Dr Azubike: It is actually in your favour, because I am saying that the Rule doesn't apply so you don't have to go through that. That is the way I understand that Rule.

Mr Albuery: It is a fair point for you to say that Rule may or may not apply, but even if it doesn't apply, clearly every person has a right to be told of a hearing at which their livelihood may be affected, and even if it was not for that, bearing in mind his right to have a fair trial under Article 6 which would enable him to attend, he can't have a fair trial unless he is told of the hearing and when it is going to take place.

I am grateful for any points that any Committee member wants to take in my favour but we must proceed on the basis he is entitled to know of the hearing.

Mr Levisaur: Not only do I agree with that, but it seems to me impossible to argue that under Article 6 a seven-day notice period, absence of provision to that effect, would be in all cases reasonable. In other words, you are almost certainly right, and the requirement would probably be longer than seven days.

I have a question which is a practical question. The practical question is this; do you happen to know what the bail conditions were, because there is every possibility in a child sexual case of this sort that one of the conditions is, 'Thou shalt not be at your home address but either in a bail hostel or somewhere else'? You will understand why that is often the case.

Mr Albuery: Yes, of course. I don't know what the conditions were. I could try to find them out by taking instructions, but perhaps it would be more important to know that if you did not know in any event that the letter had been returned.

Mr Levisaur: That I accept, of course.

Mr Albuery: Because the fact is whatever the conditions were we would have to accept that by virtue of the letter of 4 January he does not know about today's hearing. I have to concede, I think it unlikely he knows about today's hearing.

Mr Levisaur: It is clear he can't know about it. The chances of him knowing about the email are so low as to be fanciful.

Mr Albuery: Yes, I agree. Of course, fortunately the Rules don't require you to be satisfied that he knows about today's hearing, only that the Council has made all reasonable efforts.

That is the first limb and, as I mentioned earlier, I won't say any more because you haven't yet found that first limb met by me.

Dr Azubike: Is it possible to clear the room so that we can have a short discussion?

Mr Levisaur: I am going to have some legal advice before anyone clears the room, and I am busy thinking about it, because I, as Mr Albuery is, am concerned about this.

For these purposes, you may take it that my advice is that the effect of Part 5, Rule 17-19, is quite clearly the advice I am giving you - that they apply Rule 21 to interim orders as well as to final hearings.

Rule 21, the first limb, provides that where the registrant is neither present nor represented, and that clearly applies, although Mr Henley has not strictly walked outside to check that the gentleman is not here, we may take it he is not here.

You may nevertheless proceed if you are satisfied that all reasonable efforts have been made to notify the registrant of the hearing. 'All reasonable efforts' is not a term of art; that is to say the words must be construed as they appear on the page. The difficulty that you face is that 'all reasonable efforts' must have been made to notify this registrant and in the facts and in the light of the circumstances either known or which ought to have been known to the Council.

It is perfectly true that each registrant is required to have a registered address. You know what that is; it is somewhere in Selby, and we know that Mr Henley sent a letter to that address. The difficulty is that it is quite clear that that letter was not received and you now know, first of all, that this gentleman was on bail.

Secondly, it is highly unlikely that he received that letter. He cannot have received notification after the date he was sent to prison on 26 January, and the question is whether you are satisfied that all reasonable efforts have been made in the particular circumstances which apply to this person to serve him. You now know, of course, that he is in prison. We can guess where he is likely to be in prison, but it frankly is a guess, and that is simply we know he

was sentenced by the Crown Court sitting at Leeds, he is likely either to be in prison in Leeds or in Wakefield, but that is not much assistance when one is trying to serve a person.

It is a matter for you, but you must be satisfied that all, and I stress all reasonable efforts have been made to serve this particular registrant in the light of the facts which are known about him.

I make it clear I am troubled by this case. That is not in any way to provide you with a steer as to what you should find, but there are unusual facts about this case which deserve careful consideration, not the least of which is the dangerous position of assuming that the facts, clear as they are in the light of the Crown Court conviction, could only lead to one conclusion. In those circumstances, there must be a fairly heavy duty on all parties to see that this man is protected so far as it possible.

Mr Albuery: Yes, I think that becomes more relevant, may I say, if you decide to proceed.

I reiterate that in my submission the Council could do no more than it has done and all efforts you have to be satisfied it should take, or have taken, have to be reasonable ones. I am obviously ready and able to address you on how you should exercise your discretion, if you agree all efforts have been made.

Ms Jeyasingham: In which case, if there are no further questions at this stage –

Dr Azubike: I just wondered, could the Council have sent a letter to the courts or to the Prison Service itself serving the notice?

Mr Albuery: No. Well, it could have done, yes, but that wouldn't be a proper or effective service.

Mr Levisaur: That would be wholly ineffective; I agree.

Mr Albuery: This Council has done all, and more, than any regulator would do, certainly in the healthcare sector where my knowledge is greater than others.

Ms Jeyasingham: Thank you for that, Mr Albuery. Can we have a few minutes while we make a decision?

Mr Albuery: Thank you very much.

[Hearing adjourned at 09:48]

[Hearing reconvened at 10:10]

Ms Jeyasingham: Mr Albuery, the Panel has decided to reserve our position on the matter of have all reasonable efforts been made to notify the registrant, and we would like to hear your submissions in relation to (b) public interest.

Mr Albery: Madam, may I ask why that is, because I am very clear that you must consider the matters quite separately?

Ms Jeyasingham: We are aware of that and that we had to make a conclusion on (a) and (b), but we would like to hear your submissions before talking about what our decision might be.

Mr Albery: I see. Thank you. Madam, if you are satisfied, when eventually you consider it, that all reasonable efforts have been made to notify Mr Gill of today's hearing, then obviously you would have to go on to consider whether, despite that, it would be appropriate to proceed in his absence. Madam you will be aware of the criteria helpfully set out by the Court of Appeal and then the House of Lords in the case of *R v Jones* [2002] UKHL 5.

Madam, I wonder if you and your colleagues have had an opportunity to consider the transcript of the Application for an Interim Order that was made on 19 August.

Ms Jeyasingham: In bundle C1.

Mr Albery: Thank you, Madam, yes, because in that transcript you will find reference to the *Jones* criteria having been relied upon then by my colleague Mr Leale, and Madam, it may be helpful if I remind you of them.

Madam, I should say one thing. Wrongly in my view, reference was made to the seriousness of the allegations and the House of Lords did make clear that though they approved most of the criteria, that was one that they did not, because however serious or unserious a matter is somebody has a right to a fair hearing and to be present, so when I go through it I will ignore that. Madam, I would also ask you and your colleagues to ignore it as I think your Legal Adviser is indicating you should.

Madam, the preamble, of course, is that it was made clear in the case of *Jones* and subsequent cases which have incorporated these criteria into the professional regulatory regime, that you should only ever proceed in the absence of a registrant with utmost caution, and I should remind you of that straightaway. I am not sure that that was particularly highlighted at the last hearing, but I do so here.

The first criterion is that you consider the nature and circumstances of the registrant's behaviour in absenting himself; I am reading from page 8 in the transcript. Well, you know why he is not here today – there can be no criticism of him for not being here; he could hardly be here. He would be in more serious problems if he were here and not where he should be, so I cannot say that he has waived his right to appear. Clearly, he hasn't unless you say, perhaps harshly, that that is a waiver as a result of having received a criminal sentence, but I don't think that is what is meant by that criterion.

Madam, the second criterion I think is important and relevant; whether an adjournment might result in him being, as it says here, caught or attending voluntarily and/or not disrupting the proceedings.

Madam, we know that he is in custody and these criteria were considered within a criminal court where a judge had the power with a defendant who had not voluntarily attended to issue a warrant, not that for bail or back for bail.

Here, if you adjourn the proceedings I think it unlikely that he would or could come in the time periods that the hearing would need to be set down. I say that for two reasons. First, this interim order imposed for public protection and having been determined otherwise in the public interest necessary, will otherwise lapse on 18 or 19 February and, Madam, the chance of getting him here, bearing in mind today is 15 February, is I would say, nil.

In any event, and I do rely on this, even when he could have come when this interim order was first applied for in August, he did not come and he chose not to come voluntarily, having said in terms, 'Well, I have sold my business and I am not involved in dispensing any more. Thank you very much – get on with it', and that is what your colleagues did on the last occasion. So I think it not unreasonable to infer, bearing in mind that he didn't come when he could have come, that he would not come now even if circumstances allowed it.

Madam, the criterion then referred to on page 8 is whether the registrant, though absent, is or wishes to be legally represented. At no stage in these proceedings, even when he was in a position to do so, did he indicate that he wanted to come, or in his absence be legally represented.

Madam, other factors include the risk of you reaching an improper conclusion about matters if he isn't here. That is unlikely for these reasons; one, you will be independently advised by your Legal Adviser; two, I will try to be fair in how I put the case; and thirdly, and perhaps more importantly, the evidence upon which the Council relies to obtain the order are matters of public record. We are not asking you to make inferences about any of them. We rely on a conviction behind which you should not go as a matter of public policy, the judge's summing up to the jury, which would have been in the presence of Mr Gill obviously, and the judge's sentencing remarks which were obtained late but if we proceed I will seek to rely upon.

Madam, balanced against all of that and any other criteria that your Legal Adviser says that you should properly take into account are these, I say. It is in the interest of Mr Gill and the public that this hearing take place within a reasonable time, and when you are considering an interim order and balancing risk both to the registrant in relation to his livelihood, but also to the public, bear this in mind. Mr Gill has already informed us that he is no longer in dispensing optics and in any event he is currently in custody, so the sort of concerns you would have about reputation or risk pre-conviction and risk to livelihood, you may feel are not present in this case.

However, it is still important that the public be protected, because firstly at any stage he could appeal or be released early under the early release provisions, and we don't know when that might be, but in any event it is in the public interest that the public have confidence in the profession and that people who have been convicted of such serious offences and who are on the Sex Offenders Register be not allowed to go about their practice if circumstances were to allow that to happen.

Madam, for all those reasons I ask you to say if you find that all reasonable efforts have been made, that it would be right for you to exercise your discretion in favour of proceeding.

Mr Levisaur: You have a discretion, which of course you must exercise judicially; that is to say, fairly, taking into account all the factors and balancing the three-fold interests, the interests of this particular respondent, the interests of the general public and what is sometimes referred to as the interests of justice, although quite how that differs from the interests of both the public and the respondent is difficult to identify.

You have been referred to the case of *Jones* and you are very familiar with it. You should only proceed in the absence of a respondent with the utmost caution, great circumspection, a great deal of care – put it how you will.

You must, of course, consider the nature and the circumstances of his behaviour in absenting himself. In this case it is probably extremely unfair to describe him as 'absenting himself'; there is a higher authority which prevents him from attending, but of course you must consider that.

You must consider whether he has deliberately absented himself today, but not in a sense of cocking a snook, but whether he has just decided he doesn't want to take any further part in it.

Mr Albuery very rightly draws your attention to the fact that on a previous occasion, admittedly before he was convicted, but on a previous occasion he made it clear he wasn't attending, he wasn't dispensing any longer, and so in a sense he was not entirely concerned whether the interim order hearing continued.

You must pay particular attention in this case to concerns that you may or may not have about whether or not you would in any sense be misled or whether justice might not be done because this man was absent and therefore was not able to explain things to you.

There are of course certain balances built into the process, but nevertheless you must consider this because he cannot put his own side of the story and cannot explain certain things to you. No matter how fair Mr Albuery is, and indeed no matter how vigilant I am, we cannot stand in his place, at least not to the extent he himself could.

Although not on this occasion specifically referred to, you must of course be aware of his so-called Article 6 rights to a fair trial, a fair legal process, judicial process. There is always a balancing act in cases of interim orders between the need to protect the public and the concern about risk to a man's livelihood.

There is a need for public protection and you have been told this interim order will probably lapse on or about 19 February. You may think that that is undesirable in a case of this sort. To be set against that is the obvious submission which would undoubtedly be made if he was represented, namely he is unlikely to be doing a great deal of dispensing while he is in prison for the next X months.

These are all matters for you. You must give each of those factors such weight as you think appropriate, but you must consider them, and in the end, of course, you will only proceed if in the words of Rule 21(b), 'having regard to any reasons for absence which have been provided by the registrant', and none have been, 'you are satisfied that it is in the public interest to proceed'.

Ms Jeyasingham: Thank you.

[Hearing adjourned at 10:21]

[Hearing reconvened at 11:21]

Ms Jeyasingham: I will read out our decision.

The Committee has heard representations from the GOC and has accepted the legal advice given to it. The registrant, John David Gill, has not been served with notice of this hearing. In the circumstances the Council has made an application under Rule 21 for the proceedings to continue in the absence of the registrant. Put shortly, a letter was sent to Mr Gill on 2 January 2010 at his registered address that was returned, not served. On 9 February 2010 the Hearings Manager sent Mr Gill an email telling him of today's hearing. It is highly unlikely that the registrant received that email because he was sentenced to 21 months in prison by the Crown Court at Leeds on 26 January 2010. The Council made enquiries of the Prisoner Location Service on 5 February by email. That was not successful. A telephone call was made by the Council on 10 February 2010 to the Service. The upshot of that was that no information would be provided about the whereabouts of a prisoner without an order from the Court. No such order was sought; presumably because the time between the 10th and the 15th was too short for anything to be done even if the necessary information was provided. Rule 21(a) requires the Committee to be satisfied that all reasonable efforts have been made to notify the registrant of the hearing. The Council has written a letter to the registrant's address. It has been returned. The Council knew that Mr Gill was due to stand trial and to stand trial for an offence, if proved, was likely to result in a sentence of imprisonment. Does this constitute taking all reasonable efforts? The Committee is concerned about this;

it accepts that there are practical constraints on the Council but the question in every case is not whether the Council has a general policy of notifying in a particular way but whether in a particular case all reasonable efforts have been made in the particular circumstances applying to a particular registrant.

Having considered all the matters the Committee is satisfied that all reasonable efforts have been made to notify the registrant of the hearing.

Public Interest

The Committee is required by Rule 21(b) to satisfy itself that it is in the public interest to proceed; no reasons for absence have been provided by the registrant.

The Committee has considered the case of *Jones*. It bears in mind the need to protect the public as well as the interests of the registrant and the need to uphold public confidence in the profession. Mr Gill made it clear at the initial interim order hearing that he did not intend to practise and did not intend to take part in that hearing. He is in prison. It is highly unlikely that any adjournment would result in him engaging in the process. The Committee proceeds with great caution but is satisfied that it would be in the public interest for the hearing to proceed in the registrant's absence.

Mr Albuery: Madam, thank you for that. I would like to make the Application, if I may, in two stages; one to remind you what I believe the legal position is and the legal framework, and then to tell you something about the facts of the case; what has happened since the interim order was granted in August 2009, and then lastly to comment upon why the Council says that the order should continue.

Madam, first though a brief chronology which I hope will help you. Mr Gill was first registered as a dispensing optician on 1 April 1998. In the autumn of 2008 information came to the attention of the Council that he had committed the offences of which he has now been convicted, and an unsuccessful application for an interim order was made by the Council in November 2008 at a time when very little information was known about the circumstances of what were then only allegations.

Once Mr Gill had been charged and more evidence came to light, a further application was made on 19 August 2009 and on that occasion, as you know your colleagues deemed it necessary to impose an interim order of suspension. Madam, a transcript of that hearing can be found by you in the bundle C1 between pages 1 and 18.

On that occasion, there were two limbs found by your colleagues justifying the imposition of an interim order. First, it was necessary in terms of public

protection and secondly, it was otherwise in the public interest and Madam, I rely on both those limbs again in this review for the order to continue.

Madam just sticking, though, with the chronology for the moment, that order was imposed in August 2009. In November 2009 Mr Gill appeared at Leeds Crown Court and pleaded not guilty to two offences; the first was committing an act outraging public decency, and the second was engaging in sexual activity in the presence of a child under 16, and more about those offences later.

He was convicted after trial on 11 November 2009 and the hearing was adjourned for sentence to take place, I assume, though it is not clear from the documents I have, for the preparation, amongst other things perhaps, of the pre-sentence report. He appeared back at Leeds Crown Court on 26 January and on that day he was sentenced to a total of 21 months' custody and to be on the Sex Offenders Register for a period of 10 years.

Madam, I will come back to all of that in slightly more detail, but that I hope is a summary.

Madam, under Section 13L of the Opticians Act which you will find on page 34 of your Handbook, orders once made must be reviewed within a period of six months. Reading now from Section 13L(3) on page 34 it says this:

“Subject to subsection (9) below, if the Fitness to Practise Committee make an order under subsection (1) above”, - and Madam, that is the order that was made in August last year - “the Committee

(a) must review that order within the period of six months beginning on the date on which the order was made.”

Then it lists various other review mechanisms which I don't seek to rely upon, or I think are very relevant today. So, Madam, this is a review of the original order, but it seems to me that I still have to satisfy you why there should be an order at all.

Section 13L(1) at the top of page 34 reminds you as follows:

“Where the Fitness to Practise Committee are satisfied that it is necessary for the protection of members of the public, or is otherwise in the public interest, or is in the interest of a registrant for,

(a) his registration to be suspended or to be made subject to conditions”,

- leaving out (b) which isn't relevant, -

“the Committee may make an order specified in subsection (2) below.”

And Madam, as you and your colleagues well know that is an order of suspension or an order that his registration be conditional upon his compliance with conditions that you would set out.

Madam, in this case the Council seeks an interim suspension order to continue and it relies on two of the three limbs set out in Section 13L(1): public protection and it being otherwise in the public interest.

I will tell you now something about the facts, if I may, and then why the Council believes that those two limbs may properly be made out.

Madam, before I do, can I formally submit into the record two documents in addition to those which you had prior to today by email? The first is a Certificate of Conviction to replace the certificate which appears at page 56. Madam, when I received this certificate from the Council I guessed that it must be wrong, because it talks in the preamble about him being convicted upon his own confession, and we knew that was wrong because we had seen the trial transcript.

And so Madam, the Certificate of Conviction which I think has now been handed to you by your Hearings Manager is the correct Certificate of Conviction because it confirms more correctly that he was convicted on indictment. So, Madam, that I hope is relatively straightforward.

Madam, the only other document I think you may have been given, or I hope so, is a copy of the sentencing remarks of the judge. They were only obtained by the Council, received by the Council, on Friday and so they were not able to be in the original pack.

Madam, in relation to both documents - and I suggest if you agree to admit them, that the sentencing remarks become C2 and the amended Certificate of Conviction be C3 - I considered whether there is any prejudice to Mr Gill in seeking to rely on documents which were not forwarded to him in advance because he only had the original bundle.

Madam, I ask you to say, if indeed you need to adjudicate upon it, and perhaps you do, that there is no prejudice because obviously he was in court and would have heard the judge's sentencing remarks so there is nothing new in there, and of course the Certificate of Conviction, again he was there and he knew the terms of his conviction and sentencing remarks. But Madam, since I think I formally have to ask that those additional documents be admitted by you perhaps I should pause.

Ms Jeyasingham: Thank you, Mr Albuery.

Mr Levisaur: I am concerned about one matter, and that is the name which appears in the middle of page 1 of C2. I strongly suspect there was a publicity order in force - strongly suspect.

Mr Albuery: Yes. If one was needed – you will know this better than me – but I think some offences don't require them because they are automatic.

Mr Levisaur: They are automatic, but I am very concerned – well, you know what I am concerned about, but I am not going to say it because -

Mr Albuery: Indeed. Madam, I would like, then, to read extracts out. I have already crossed out that person's name and I have written 'she' and this document is not going to get in the public domain.

Mr Levisaur: That was the other question. This document must not in these circumstances go in to the public domain without the name of the victim being removed.

Mr Albuery: Yes, thank you. Madam, subject to that, are you and your colleagues to receive these additional documents?

Ms Jeyasingham: Yes.

Mr Albuery: Thank you. Madam, can I then take you, please, because therein we find the facts that lie behind the conviction, to the transcript of the judge's summing up which starts in your bundle at page 19; the summing up of His Honour Judge Grant.

Madam, I intend to read extracts of the summing up because this is a review of the evidence which the jury heard. I was going to do that only in relation to the more serious offence relating to engaging in sexual activity in the presence of what was a 14-year-old girl. In relation to the second offence mentioned on the Certificate of Conviction, though the first in time, that is the committing an act outraging public decency, as you have already read, that occurred when two female people who were walking past his premises saw the defendant masturbate in his shop window. Although there was no report by them of it at the time, when they came to hear about the other more serious matter a decision was made to go to the police. Mr Gill denied that offence.

You will see the jury was directed as to identification evidence and other legal matters, and notwithstanding his plea, he was convicted. I think it is fair to say that when that occurred, certainly one and possibly both females had a child in a buggy with them, and you have read about the effect on them, or what they thought at the time and the reason for not reporting at the time. Those matters perhaps are all irrelevant now that he has been convicted of the offence.

Madam, I want to spend a bit more time if I may considering with you the judge's summing up in relation to the evidence which the jury heard about the more serious matter.

Madam, that starts really on page 41 – page 22 of the transcript but page 41 of the bundle. The 14 year old female gave her evidence by video recording, or her evidence-in-chief by video recording and then by television link.

Madam, reading then from line seven, this is the judge speaking to the jury:

“What you know and what is not in dispute is that she has been going to the opticians, and indeed to this defendant’s practice, for many years. She has an eye condition which meant that she had to wear spectacles from a very early age, and indeed the prescription for those spectacles was quite high - in other words the lenses were quite thick that she had to wear. She had attended this defendant’s practice when he had a shop in Pontefract, and had stayed with him when he opened the shop or had the shop in Knottingley.

On 7 August, during the school holidays apparently, she was 14 years of age at the time - she was 15 later that month if you work it out - but she had had contact lenses, it would appear, in the past, then there had been some question about how she had worn them, and so on, but she was telephoned, she said, on 7 August to say that the lenses which she had been waiting for were at the opticians, and this is what she said:

‘John rang’ – Madam, that is John Gill – ‘and he said, ‘Your contact lenses are ready’, so I was really, really excited and said to my mum, ‘Mum, I am off to get my contacts’, and she said she was out of the door, even though her mother had said, ‘Well, I’ll come with you’, she didn’t wait, she was out of the door and on her way to pick up her contact lenses. Her mother said she was very excited, she wanted contact lenses because she thought that she would look better in contact lenses rather than having to wear the rather heavy spectacles that she had been wearing.

So she said that, ‘I went down to the shop’, it would not take her long to get there. ‘He was sat in the window at the front of the shop and I walked in, just usual chat, and then he asked me how dad was and how his contacts were doing, and I said, ‘Oh, he is fine with them’. Then he just said, ‘Are you doing anything today?’, and I said, ‘No, not really. I’ve been that excited to get my contact lenses, I’ve come down. I haven’t done my hair, I haven’t done my make-up’, and he went, ‘Oh well, you still look nice anyway’, and I thought he was just being nice.

And then he gave me my contacts and I said, ‘Thanks’ and I were gonna walk out and he said, ‘Well, you have got to try ‘em first’, and she said that she did in fact put in the contact lenses that were provided, and she had used the mirror on the wall and I think if we look at the photographs we can see that there is a mirror which she described as a large mirror, a body mirror I think she said, on the wall, and he then refers to photograph 4. Then, she said, when she had done that he had asked, ‘Do you want to keep them in or leave them

out?', and she said, 'Well, I'll keep them in because I can show my Mum what I look like with 'em in'. And then, she said, he said, 'Alright then', so I says, 'goodbye' or 'bye', and then he said, 'Well, you are going to have to have a field test. Can I check your eyes first?', and I said, 'But I came from eye thingy last week', and he says, 'Well, we need to check your eyes to see if they are alright with your contact lenses in', and I thought, 'Fine.'

And then she said that he checked her eyes, that she was sitting in a chair, and she was thinking to herself, 'I hope he doesn't ask to do a field test because I don't like doing them with him', and she said that, you put your hand out, and she gestured, in fact, on the video, and she said, 'There has normally been summat on my hand, like summat warm, but I never knew what it was and so I never liked doing 'em with him' and he said, 'Well, you are gonna have to do a field test' and I says, 'With my contact lenses or with my glasses on?' He said, 'With your contact lenses', and I said, 'But I did one of them last week', and he goes, 'Well, we'll do another one just to make sure'. So I walked in and sat down on the chair; we were just going through all the normal stuff."

Now, Madam, I then read from line 23 on page 44.

"She said she sat down, and then he told me all the stuff, 'Right, you have got to follow the green dot', and stuff'. I looked at the side like that' -and again you may recall, she turned her head, 'but because he was stood there and I was sat really low I were like this, his trousers area, like his crotch area", so he is standing and she is sitting down and turns. 'I looked like that, just so he knew I was listening to what he was saying and he had his hands in his zipper, like about to there, all in", and she was to say it was up to the wrist, in fact, that he had his hand inside his trousers. His eyes were, like, really, really wide. I turned my head, looked back, put it back in the field test, and he said, 'Don't look away, keep looking at this thing or else you will have to do it again and it might go wrong.'" She said that it is like a dish that you put your head in, and she was later to say that the clicker that she had to use was Velcro-ed to the table.

And then she described what she heard after that and what she could see. She said 'Although you put your head in this machine it doesn't cover the corner of your eyes, just the front of your eyes, you've got to follow green dots, and then I start clicking the buttons like normally, and then', she said, 'I heard like ruffling, his clothes, like, you know, when you go into the toilet and pull your trousers it ruffles like that, so I thought 'it will be nowt.' She said, 'And then I heard a zipper noise and that is when I thought, 'What's that?' and I got a bit scared then so I wasn't following any of my dots or owt like that. Then I heard like ruffling of clothes again and it were like not a tapping noise but more of a slapping noise, like that, and then straight away I knew what he were doing then and then he got heavy breathing like, like panting kind of, so

I was sat there thinking like, 'Oh my God, what should I do, should I just keep doing the field test or if I look away, what else would happen, would summat worse happen?', so I just kept doing it."

And, Madam, in the next paragraph she refers to the fact that he then went to a tissue box and took a tissue out; that his face was bright red, 'Really, really red', she says at line 20.

"And then he smiled, not one of those smiles of the sort that you are happy, but a sly smile."

Madam, what happened thereafter was eventually she left; she went home to her mother who gave evidence that she looked really pale. Dad came home, Mum and Dad talked about it and the police were notified and obviously Mr Gill was arrested.

Now, Madam, the reason I spent some time going through that, knowing that you had already read it, was because I hope it reminds you of what this 14 year old girl had to endure when, without her parents, she went down to the opticians, and Mr Gill in a most flagrant breach of trust, masturbated in front of her.

Madam, it is fair to say, of course, that you must read the whole record, including that which was said on behalf of Mr Gill, particularly bearing in mind he wasn't here, but bear in mind that the jury convicted him and you will not, I know, go behind the conviction.

Madam, as a result of those things the judge sentenced him on 26 January, and C2 is a copy of the judge's sentencing remarks which I read from because they helpfully set out the aggravating features which caused him to receive a custodial sentence, and I think probably I should read all this out, starting from line 4 – it is not very long:

"John Gill, stand up. You are a man of previous good character, an intelligent man, a man who had built up a business by hard work, but you stand before the court now convicted by the Jury of two offences, both of them sexual offences. One of them committing an act outraging public decency, and that was an offence committed in 2007, and involved you masturbating yourself on view in the shop from which you conducted your business. The second count on the indictment was one of engaging in sexual activity in the presence of a child, and that of course is a serious matter. It involved you masturbating in your shop in the presence of a 14 year old girl which caused her considerable distress.

There has been publicity about you in the local Press, and I accept that your reputation has been destroyed, and that the impact that these matters have had upon your business has been, in one sense, catastrophic – you no longer have that business - and difficulties have been caused in your personal life and in your marriage. I take all those

matters into account, but the offence of engaging in sexual activity in the presence of a child was, in my view, one which was serious. It was aggravated, in my view, by the fact that you betrayed the trust that she placed in you. She had been a patient of yours for a considerable time, and she trusted you to the extent that when she received a telephone call to tell her that her contact lenses were available for collection, she ran down to your shop, which was within walking distance of her home, and it was whilst she was there that you committed the offence of which you were found guilty, and that, for a young child, is a considerable breach of trust. She was entitled to be protected by you and not subjected to the behaviour that you indulged in. That was the second offence in time which you committed, the first being the act of outraging public decency that I have already referred to.

I have had regard to the Sentencing Guidelines, which are before the court and have been referred to by both Counsel in this case, and I have come to the conclusion that the only proper sentence in your case is one of immediate imprisonment. I cannot accede to the submissions made by your Counsel. I have had regard to the fact that you are a man of hitherto good character, that you reached the age of 36 without conviction. I also take into account the principle of totality, and should that be one which is not familiar to you then Mr Elvidge will be able to explain it to you.

But the least sentence I can pass upon you is one of 21 months imprisonment, and that will be made up as follows. 18 months on Count 2 on the indictment, that being the more serious, the engaging in sexual activity in the presence of a child, and on Count 1 there will be a sentence of three months imprisonment, that will be served consecutive to the 18 months, making 21 months in all.”

And, Madam, there was some discussion about the length of the Sex Offenders Register aspect of the sentence, but that was confirmed and is recorded in the Certificate of Conviction as being for 10 years, and in addition a Sexual Offences Prevention Order was made in these terms, preventing:

- “1) Approaching, seeking to approach or communicating by whatever means, directly or indirectly with the complainant in the case, and
- 2) Having any unsupervised contact with any young person under the age of 16 years, except in the presence of that child’s parent or guardian or other appropriate adult (save for inadvertent or unavoidable contact with a child under 16 years).”

Madam, the position was in August when the Interim Order was first granted that at that stage Mr Gill had only been accused of these matters. He has now been convicted of them by a jury.

In relation to the limb of public protection, I do say that even though he is currently in custody, because you don’t know how long he is going to be there

for, there is a real risk of significant harm if there were not to be an order of suspension. In relation to the public interest limb, I say that you can be satisfied that it is necessary to impose the order because you uphold the reputation of the profession and you ensure that public confidence is maintained in the profession. These things demand that a man convicted of such serious sexual offences who is currently in prison in relation to them and who will remain on the Sex Offenders Register, even when he is released for a period of 10 years, or 10 years starting from the date of sentence, should not be able to remain on the register, and there are no conditions which can properly deal with the mischief raised by these matters. For those reasons, conceding as I do that it must be not just desirable but necessary, I ask you to continue the order made by your colleagues in August last year.

Madam, in terms of the substantive hearing, I don't know when that will be heard, but I imagine this case will be put before the next Investigation Committee and thereafter assuming, as I think we reasonably can, that it will be referred to a hearing, I would anticipate that hearing then subject to hearing space moving on quite quickly. Certainly from my point of view all the evidence I would need if I was instructed to present it, I have.

Madam, those are my submissions.

Ms Jeyasingham: Thank you, Mr Albuery.

Dr Azubike: Just one question. On the second page of the sentencing remarks, something about the principle of totality – what does that mean, precisely?

Mr Albuery: Well, my background is as a criminal lawyer so I could make an attempt at answering that, but I suspect your Legal Adviser, as in all things, is better able, independently of me, to tell you what that means if he doesn't mind me putting it like that.

Mr Levisaur: It means simply – at least I think what the judge meant was - you have to look in the round at the whole of the sentence: 21 months is absolutely bang on for behaviour of this type. I am quite sure the learned judge would not have used those words, but that is what Counsel would have told him and that is what the judge was semaphoring to Counsel and to this man.

Mr Albuery: Thank you.

Ms Jeyasingham: Are there any other questions? [*No questions*]

Mr Levisaur: You have a comparatively straightforward but nevertheless anxious task to undertake. Under Section 13L(1) of the Opticians Act you are required to be

“satisfied that it is necessary for the protection of members of the public or it is otherwise in the public interest, or is in the interests of a registrant, for -

- (a) his registration to be suspended or to be made subject to conditions.”

This is so because of the operation of Section 13L(3) of the Act which provides that if a Fitness to Practise Committee makes an order, any order must be reviewed within the period of six months beginning on the date on which the order was made.

You have heard that an order was indeed made in this case on 19 August last year in respect of information which had been received by the Council. As a result an order of suspension was made and you must now review it.

The principal facts which you are not permitted to go behind are these. This registrant was convicted of two counts of sexual misconduct for which he was sentenced to 21 months imprisonment. You have had the benefit, of course, of seeing that Certificate of Conviction, you have had read to you the relevant part of the judge’s summing up of the facts to the jury and you have seen the judge’s sentencing remarks.

You must be satisfied that this registrant was convicted of those serious sexual offences. The question now is whether on those facts you consider that it is necessary to protect members of the public or that it is otherwise in the public interest for the suspension order already made to be considered. It is a matter entirely for you which you must consider afresh.

Nevertheless, given the fact, the undoubted fact, that this registrant has been convicted following a trial of masturbating in his place of work in the presence of a 14-year old child who was his patient whilst he was purporting to administer a field test to her, you may take the view that it is clearly necessary in the public interest for this order of suspension to be continued.

Whether you consider it to be necessary for the protection of members of the public is a matter for you to consider. Given that this defendant is in prison that may not be at the forefront of your mind, although you must, of course, bear in mind what has been put to you, that it is possible that this man, indeed it is certain, that this man will be released. What is not known, and cannot be known, is precisely when that will be.

In the absence of any interim order, he of course remains free once released to continue working in his chosen profession.

I have considered whether there is any advice that I can give you given his absence today, but I have some considerable difficulties myself formulating any matters which might be put on his behalf, save only, I suppose, that he might advance the argument that he cannot be a risk whilst he is in prison.

There is nothing further that I would wish to say to you.

Ms Jeyasingham: Thank you, Mr Levisur. In which case, can we clear the room while we deliberate? We are coming into lunch time, so if we come back by one o'clock.

Mr Albuery: Madam, that is very helpful. Thank you.

[Hearing adjourned at 12:05]

[Hearing reconvened at 13:00]

Ms Jeyasingham: I will read out the Determination.

Determination

The Committee has heard representations from the GOC and has accepted the legal advice given to it.

On 11 November 2009 the registrant was convicted of 2 counts of sexual misconduct for which he was sentenced to 21 months imprisonment. On 19 August 2009 an interim order committee suspended the registrant's registration pursuant to section 13L(2) of the Opticians Act 1989. This review is undertaken pursuant to section 13L(3)(a) of the Act.

The Committee has had the benefit of seeing a certificate of conviction, the Judge's sentencing remarks and the Judge's summing up of the facts to the Jury. The Committee notes that the registrant was found guilty of masturbating in the presence of a 14-year old girl who was his patient and did so in his consulting room whilst ostensibly administering a field test.

Under section 13L(1) of the Act this Committee is required to be satisfied that any order is necessary for the protection of members of the public or is otherwise in the public interest or is in the interests of the registrant.

Whilst the registrant is in prison the Committee cannot know when he may be released. The public must be protected from this registrant. Even were that not so, the Committee is satisfied that public confidence in the profession requires it to continue the interim order suspending this registrant made on 19 August 2009.

The order will again be reviewed within 6 months from today unless all matters are resolved within that time, or earlier should new evidence be made available, or if the registrant, at any time after three months from today's date, requests an early review.

Thank you.

[The hearing concluded at 13:02]