



A(09)03

**BEFORE THE REGISTRATION APPEALS COMMITTEE
OF THE GENERAL OPTICAL COUNCIL**

GENERAL OPTICAL COUNCIL

AND

DONALD A MACKENZIE

Friday, 22 January 2010

REGISTRATION APPEAL HEARING

REGISTRATION APPEALS HEARING: DONALD A MACKENZIE
Friday, 22 January 2010

Committee: Lady Margaret Wall (Lay) (Chair)
Mr Alan Baldwin (Lay)
Ms Abigail Grute (Dispensing Optician)
Mr Richard Hensley (Dispensing Optician)
Mr Rod Varley (Lay)

Legal Adviser: Mr Nicholas Levisur

For the GOC: Mr Bradley Albuery

Hearings Manager: Mr David Henley BEM

The Appellant appeared in person but was not legally represented

[The hearing commenced at 09:54]

Lady Wall: Good morning. I am Margaret Wall, a lay member of the Appeals Committee, and I have been elected by the Committee to chair today's Registration Appeals Hearing.

The Committee today is made up to two dispensing opticians and three lay members. I will ask the members to introduce themselves and the capacity in which they sit. *[Members of the Committee introduce themselves]*

To my right is Mr Levisur, 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 person 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.

Now, before we go any further I am going to ask Mr Levisseur, our Legal Adviser, to deal with the matter of procedure.

Mr Levisseur: Mr Mackenzie, good morning. I don't know if you have a copy of the booklet, *The Opticians Handbook* to hand. If you do it might be helpful if you could look at page 78, 79 and page 80, and the reason I bring this to your attention is it will be necessary for me to say one or two matters now.

I first of all ought to tell you that it is my duty to advise the Committee about matters of law and procedure and I must do that to ensure that nothing irregular takes place and no unfairness to anybody takes place.

The rules are those which govern this Committee, this Tribunal and of course we can only step outside those rules for extremely good reasons and we can only do so if the parties – in this case you and the Council – both consent. What I need to bring to your attention, and indeed to everyone's attention, is the way in which the rules provide this Hearing should be conducted.

Because you are not a registrant; strictly speaking you are not a member of this Society, you are the appellant and you are the appellant against a decision of the Registrar not to put you on a register. The rules provide that the way things are to happen is that you are to begin and if you look at page 80, Rule 33 (i) right at the bottom of page 80, Order of Proceedings:

“The appellant or the applicant may address the Registration Appeals Committee” –

You may call witnesses and you may adduce documentary and any other evidence that you would like to put before the Committee. Then it provides that the Council goes next, and goes in the same order that you have gone. Then it provides that you begin by making your submissions and then the Council follows by making its submissions.

Now you should know that this is ordinarily exactly the reverse way round. Normally the Council begins, sets out its case, and then the appellant or the registrant.

Now, there have been, we understand, only two Registration Appeals and those appeals were conducted so far as the first appeal was concerned according to the rules, and it was found to be deeply unsatisfactory. It was found to be deeply unsatisfactory because in effect the burden was dumped on you and that was rather a difficult way to carry on.

It has been suggested that on this occasion it might be helpful to the Committee, and possibly to you, that if the rule was changed in this sense, and this sense alone, that the Council – that is to say advocates who appear

on behalf of the Council – begin by giving a short explanation of the rules, a short explanation of what this case is about to set the framework. That naturally frees you up from what is otherwise rather a difficult task.

Now, it was found to be helpful on the last time there was a Registrations Appeal, but – and this is a very big *but* – we can only do what the rules say unless both of you consent. Now, you must have a little time to think about this, and nobody can force you to consent but if you think that it would be helpful for the Council to begin with what I am quite sure will be a properly neutral opening setting the scene, then I will give some advice to the Committee but I will only do that if you consent and, of course, if the Council consent as well.

I hope that makes it entirely clear. Before you think about it, perhaps I should let the Council say something, because if they say, ‘No, that is certainly not going to happen’, that’s the end of it and you don’t need to spend any time thinking about it.

Mr Albuery: Sir, thank you. That is very helpful. Madam, I was going to suggest that you did depart from the rules to allow me not to say anything at this stage about the merits of the application but rather, simply, to just set it into a framework or a context and to remind you of the rules which govern the proceedings and the question which I think you have to ask yourself and keep in your minds when you consider the evidence that you will hear.

Perhaps the only place where we depart at all from that which your Legal Adviser has said, and it may just be a use of language – is that when reference is made to a burden ‘being dumped’ on the –

Mr Levisaur: I should never have used that word. It was quite wrong for me to do so.

Mr Albuery: It’s not so much the word, Madam, but you will hear me say in a moment that it is the Council’s submission that the burden of satisfying you that he is a fit person is obviously on him.

Mr Levisaur: That is absolutely right.

Mr Albuery: Thank you. If the burden relates to trying as an unrepresented appellant to put all this in a legal framework, then I agree with the sentiment that was expressed.

Mr Levisaur: That is what I was trying to say. I was not suggesting we shift the legal burden. Quite wrong.

Mr Albuery: Thank you.

Mr Levisaur: Might I make a suggestion? Pondering these matters when a dozen people are looking at you is not a good idea.

Mr Mackenzie: I am quite happy if the Council are happy to proceed in that manner. I am quite happy.

Lady Wall: Mr Mackenzie, the important thing is that you have brought this Appeal and it is really for you to make up your mind. I think we would actually prefer you to just have five minutes to think about it clearly because it is not easy in this kind of setting if the temptation is to say, 'Yes' to something.

We will all just adjourn for five minutes and give you time to think about it.

Mr Levisaur: Mr Mackenzie, may I say one thing? That is this – please do not feel that it would in any way be held against you if you said, 'No, I would prefer that the rules were stuck to'. This Tribunal will be directed by me very forcefully in those circumstances that that is absolutely your entitlement and they must not draw any inferences against you at all. I am quite sure they wouldn't in any event, but you need to know that. Don't feel under any pressure at all to say yea or nay.

Mr Albuery: Madam, you and your colleagues may take comfort perhaps from the fact that Mr Mackenzie will not have been taken by surprise by any of this, and that may be why he has already indicated to you he is happy to proceed on that basis. He and I spoke about this matter on the telephone a couple of weeks ago about that very point, and he has been thinking about it and agreed it would be sensible, and again we spoke about it this morning. But if you still feel, and your colleagues, that he should have more time –

Lady Wall: Yes.

Mr Albuery: You do. Then I wonder if I could then say you might be able to use that time wisely while we retire from the room by looking at a document called *A Protocol on the Handling of Criminal Convictions Disclosed by Registrants*.

Madam, it's not in your bundle because it is not evidence, but this is a protocol which was used by the Registrar in determining the criteria against which she considered the application. It was sent to Mr Mackenzie as part of the process by the Council, even when he first enquired about registration and before he formally applied.

Although your decision today in my submission is not a review as to whether the Registrar got it right or wrong, but rather afresh, it is a helpful framework. In fact, both Mr Mackenzie and I think it might be of benefit if you received it, if you are content to.

Mr Levisaur: I am very grateful, because I was concerned that I didn't know to what extent there had been disclosure pursuant to Rule 14 of the registration rules. That is to say not simply saying, 'I have refused to register you', but giving the reasons and the protocol quite clearly must inform the decision and reason-making process.

Mr Albuery: Yes, and both the reasoned letter from the Registrar which you have in your pack and the protocol was sent to Mr Mackenzie back in the autumn of 2009.

Mr Levisaur: You received that, Mr Mackenzie?

Mr Mackenzie: I did, yes.

Mr Levisaur: Thank you very much. Well then, in those circumstances, Madam, that is entirely an appropriate document for you to consider.

Mr Albuery: And more formally when they are exhibited when we properly start we will give them various letters and numbers, but I think that will become C2.

Lady Wall: Mr Mackenzie, we do think that even though you have had, obviously, quite a lot of time to think about it and this has not come to you fresh, that nevertheless you should be just given this opportunity in front of the Committee to change your mind if you so wish.

So we will ask everybody to retire so that you can think about it for about five minutes, and meanwhile we will read this.

[Hearing adjourned at 10:07]

[Hearing resumed at 10:23]

Lady Wall: Now, for the purposes of the transcript, we are resuming this case. Mr Mackenzie, can I ask you what your decision is?

Mr Mackenzie: My decision is I would be quite happy if the Counsel for the GOC was to give a quick submission.

Lady Wall: Thank you. Mr Albuery?

Mr Albuery: Madam, before I do that, can we then formally identify the various documents that you have and also, Madam, confirm what you have had an opportunity to read for the record?

Madam, firstly I hope you were sent before today, and then given today another copy of the bundle of agreed evidence which has 98 pages, and if the answer to that is yes, may we call that C1?

Lady Wall: We have been sent that, and we are happy for it to be designated C1.

Mr Albuery: Thank you. And, Madam, I think you have had an opportunity to read it before today?

Lady Wall: Yes.

Mr Albuery: Madam, there was an error in it which you will have seen and for which I apologise in that page 2 was a duplicate of page 1. That would have shown up on your electronic copy. That has been remedied today and you now have a proper set of documents.

Madam, I also handed in today a copy of the Council's Protocol. May that be called C2?

Lady Wall: It may.

Mr Albuery: Then, Madam, the other two additional documents you have were submitted this morning by Mr Mackenzie. The first is a letter from the Parole Board for Scotland dated 7 October 2009; perhaps that should be called 'A' for Appellant 1?

Lady Wall: Yes, A1.

Mr Albuery: Thank you, and then Mr Mackenzie's statement which I think he plans to read to you later which begins, 'I am pleased and grateful to have been ...' perhaps that should be A2?

Lady Wall: Yes, we have that. We have had the opportunity to read it, of course, and we are happy for it to be designated A2.

Mr Albuery: Madam, thank you. Madam, then, having been agreed by all parties that I should as it were go first, I restrict this very short opening to the procedure and your decision, but in terms of the factual context Mr Mackenzie made an application, first application, for registration as a student dispensing optician on a form of which you have a copy in your bundle, C1, at pages 1-4. On that application he disclosed criminal convictions.

As a result of investigations and consideration within the context of the protocol the Registrar refused his application and wrote to him on 7 October 2009 with that decision and the reasons for it, and a copy of that letter is in your bundle C1 at page 5.

Madam, her decision is an appealable decision under the Opticians Act and the appeal lies to you. Your powers and the procedure of this Committee is set out in Schedule 1A to the Opticians Act, which schedule appears in your handbook at page 56 and also by the General Optical Council Registration Appeals Rules 2005 which may be found starting at page 70 of your handbook. At various times it may be that both Mr Mackenzie and I refer to different parts of the Act and the Rules.

Madam, at page 57 in your handbook, and I would ask you all, please turn with me to it, you will see in Schedule 1A of the Act the way that you must approach today's Appeal. 4(6) says,

"The Registration Appeals Committee considering the appeal may make such inquiries as they consider appropriate".

Then at sub-paragraph (7):

“In disposing of an appeal under this paragraph, a Registration Appeals Committee may determine to -

- (a) dismiss the appeal;
- (b) allow the appeal and quash the decision appealed against;
- (c) substitute for the decision appealed against any other decision which could have been made by the person making the decision; or
- (d) remit the case to the person making the decision to dispose of in accordance with the directions of the Registration Appeals Committee”.

Madam, you have the power also to award costs against an unsuccessful appellant, but it may help you to know even at this stage that even if the Appeal is unsuccessful the Council does not seek costs from Mr Mackenzie.

Lady Wall: Thank you.

Mr Albuery: Madam, if I say more I think I stray into the merits of the application and the Council’s response to it, so other than to remind you of that which has already been agreed by everyone, that the burden is unusually, because this is an Appeal not on the Council, on Mr Mackenzie to satisfy you that he is a fit person to be allowed onto the Register of Student Dispensing Opticians, that is all I will say for the moment.

Mr Levisaur: The burden would lie on the applicant as standard? I know what I think, but it would be interesting –

Mr Albuery: I think it must be on the balance of probabilities.

Mr Levisaur: I agree. It must be on the balance of probabilities. One final matter which is probably appropriate simply so the Committee understands entirely where it is at, and that is unless they decide to allow this appeal, Mr Mackenzie has a right of appeal because his address is an address in Scotland, his right of appeal is not to the High Court, it is to the Court of Session in Scotland.

Mr Mackenzie, I am not trying to pre-judge anything, you understand, but if we are opening in the way that we are it is probably helpful if this Committee understands exactly what is happening and you will appreciate that most appeals heard by this Committee are determined ordinarily by the High Court sitting in London, but in this particular case it is of course the Court of Session that has jurisdiction, or would have jurisdiction.

Lady Wall: Thank you. Is there anything else you wish to direct us on at this moment?

Mr Levisaur: Not at all. Might I just make one point crystal clear to everybody? The burden of satisfying you does indeed lie on Mr Mackenzie and it is the

civil standard. That is to say you must be satisfied on the balance of probabilities, 50 per cent plus a scintilla or however one wishes to express it; something must be more likely than not. We will of course return to that issue.

May I make this enquiry? The bundle C1, called C1 because it was formally put together by the Council for which many thanks, is there anything in this bundle which is disputed, not in the sense as to its existence but disputed as to the veracity of the contents?

Mr Albuery: Madam, I don't believe so because it was put together with the assistance and agreement with Mr Mackenzie for which I am grateful, but he ought to confirm that.

Mr Levisaur: Mr Mackenzie, you understand there is a significant difference between agreeing that something exists and agreeing that it is right, so what I was asking Counsel was whether or not there is any document C1, the big bundle, C1, which contains anything with which you disagree with the contents of?

Mr Mackenzie: No, I don't disagree with the contents and I feel it right that they be put in front of the Appeals Committee.

Mr Levisaur: Thank you very much indeed. That is very helpful.

Lady Wall: Thank you. So now, Mr Mackenzie, we turn to you and as you have heard, the burden is on you to satisfy us.

Mr Mackenzie: What I propose today is just to give a short presentation which you already have a copy of, and to answer any queries or questions you may have.

I have already checked with the Council that it is not necessary to stand up and give my presentation.

Ms Wall: No.

Mr Mackenzie: [*Reads A2*]

"I am pleased and grateful to have been given an opportunity to present my position to the Committee today in terms of my appeal against registration.

If I am being candid, I cannot say that the initial rejection from the Registrar based on the best information available at the time came as a surprise, a terrible disappointment, yes, but surprise, no. I am, however, committed to pursuing a career in Optics and therefore felt the need to come here today to personally make you aware of the full details of my situation.

I have read in great detail all that the GOC has to say about standards, transparency, protecting the public and so on. May I say at the outset that I fully agree with these values of the GOC? I fully understand the need for the highest levels of professionalism and integrity that organisations like the GOC must have at the forefront of everything they do and say.

I have also noticed that on a fairly regular basis you are required to deal with situations involving members of the GOC whereby they have failed for whatever reason to meet these required levels of integrity and professionalism.

It is therefore a reasonable point to make that people in all walks of life make and take bad decisions that result in a variety of problems and issues in their lives and those of the people around them.

Having seen the work being done by your solicitors on your behalf in relation to my Appeal, and having read the various documents they have presented to you about me, it struck me that individually and collectively you have a considerable task at hand in sorting the chaff from the wheat, so to speak. As I make my submission today, and as you relate this to some of the papers before you, might I respectfully suggest that you do so by giving some consideration to the fact that I would not be putting myself and my family through this process if I did not believe that I am well placed to be a Dispensing Optician and to uphold all that is required of me as a potential future member of the GOC.

In this regard, I am aware that the GOC has a variety of measures at its disposal when it comes to dealing with situations involving members of the GOC, however, situations like mine are somewhat different. I will come back to them shortly, but in the meantime propose to tell you a little bit about myself and family.

I was born in St Andrews on 25 January 1961. My parents are Flight Lieutenant George Mackenzie DFC (and bar) (Deceased June 1993) and Christina Mackenzie (still residing in Anstruther, Fife). I have a younger sister, Morag, who is a primary school teacher, married to George who is a principal teacher of Geography. My cousins on my father's side are a Lawyer and Hotel General Manager. On my mother's side are a manager with British Gas and a retired Postmaster.

My schooling was at Cellardyke Primary School between 1967 and 1973 and Waid Academy, Anstruther between 1973 and 1979. During this time I acquired seven O grades and four Higher grades.

Subsequently I worked for the Royal Bank of Scotland Group from 1979 until my dismissal in 2004. My career started as a teller and, steadily I worked my way through a variety of positions until I was appointed to the role of Business Relationship Manager in 1995

overseeing a portfolio of some 500 clients. The culture of the bank at that time was primarily sales-driven and my role was therefore highly pressurised. On a daily basis, and sometimes more often I was asked for updates of the business done, e.g. services sold such as insurance/assurance, facilities drawn and fees charged. Initially I loved the job because I have always been a people person and enjoy customer contact. Latterly, however, it became increasingly more difficult to provide a professional and genuine level of service that was not influenced by sales targets.

In 1993 I met my wife, Margaret (who coincidentally still works for the Royal Bank of Scotland, and has done for the past 24 years). Her father is a retired chartered accountant and her mother is a retired Civil servant.

We have two young children, Caitlin who is 10, and Andrew who is seven. From the age of five Caitlin has required to wear glasses and consequently this has increased my interest in the world of Optics.

Essentially I am a family man and I have been fortunate to have, without exception all my family and my extended family stand by me over the last few years which has meant everything to me. In addition I received, and continue to receive tremendous support from school friends and neighbours within the small communities of Cellardyke and Anstruther where I grew up and also from friends, neighbours and other parents in Edinburgh where I now live. As a result I have integrated quietly back into everyday family life and my children are both happy, settled and doing well at school. I had never been in trouble before this offence and none of my family has ever been in trouble previously.

I have emerged from all of this a more well-rounded human being. I am caring, non-judgmental and open to all aspects of the human condition. I am passionate about helping others in a professional and appropriate way. I know that I could do a good job as a Dispensing Optician. I know that I can pass the course of study and be an exemplary member of the GOC in the process. However, I can only do this if you support my registration.

At the Open Estate in Scotland opportunities arise to undertake work placements.

For me it was a great opportunity on a variety of fronts, but most importantly to enter Optics. As I have already said, I have long held an interest in Optics and events unfolded to allow me to pursue this, albeit in a manner that I could never have anticipated.

I have known my employer for over 30 years. He visited me and was happy to offer me a work placement as an Optical receptionist on 21 days out of every 28 (I was on home leave for the other seven). Since

my release from Parole Licence I have been fortunate to secure a full-time position initially as an Optical receptionist, and subject to registration an opportunity to embark on the Dispensing Optician's course of study. He was and is fully aware of my situation and believes it to be totally out of character. During my time at the Opticians practice I have undertaken all aspects of Optical Receptionist work. This includes up-dating his computer records system, welcoming patients, completing paperwork, dispensing appropriate glasses to an Optometrist's prescription, taking photographs when required, writing orders, checking completed spectacles, learning from an in-house technician how lenses are made and spectacles completed, and ensuring that spectacles are fitted appropriately when collected. I would like to add here that at no time during my time at the Opticians has a member of the Public voiced concerns about my work or professionalism and whilst it is true to say that the majority of customers are probably unaware of my history, I am confident to deal with such enquiries should they arise in the future. I feel that having worked in the Opticians and having built up a good working relationship with the customers they would be able to accept me for who I am today.

I would also like to mention that I believe, as I am sure many of you do, that the future of Optics looks set to be exciting and challenging. Quite apart from the ever-increasing improvements and developments in Optical technology processes, future Government Policy of potential changes of primary eye care needs and funding will present the Optical profession in the UK with ongoing issues to be brought to the fore and dealt with. All of this at a time when people can buy an app for their iPhone allowing them to test their own eyes. I find all of this intriguing and it is something I would dearly like to be a part of now and in the future.

I have looked at your website and reviewed the number of cases that have come before you, and although there are some similarities I recognise that my situation is somewhat unique. I am therefore willing and able to agree to adhere to whatever caveats you require should you decide upon offering me a registration. I am willing to work with you in whatever way or method satisfies your need in this regard. I give you my unequivocal guarantee that I will not let the GOC, my family or myself down.

At the moment I am commuting between Dundee and Edinburgh which is a 12-hour day and a round trip of 120 miles in a bid to show to all that I am wholly committed to a career in Optics and that I am prepared to do whatever it takes to ensure that this continues. I also require to support my wife and family, and it must be said that the travelling is costly and I cannot see myself being able to afford to continue in this appointment if I cannot progress any further as a dispensing optician.

What am I asking?

I am asking that you acknowledge my past for what it was, and, in so doing accept that at this moment in time I have done nothing to impugn the good name of the GOC. I sit before you as a man who has made mistakes over six years ago and by the time I would hopefully qualify, this would be over ten years ago.

I would hope that in this age of equality, diversity and transparency there would be a facility to include someone in my position to show their potential and in so doing secure a better future for my family. As well as perpetuating the future of the GOC.

May I also take this opportunity to thank both the GOC registration team and the solicitors acting for the GOC for their respect and courtesy in all dealings that I have had with them in my attempt to secure registration.

Thank you for listening, and now I invite you to comment or ask me any questions you feel need answered.”

Mr Levisour: Mr Mackenzie, excuse me. I just need to say something to the Chairman and there may need to be a discussion after that, but would you forgive me while I mutter to her? [Yes]

Lady Wall: Mr Mackenzie, what we have been discussing is the fact that you have now opened your case sitting as you are, and that is quite right. However, now you are going to be asked questions and that means that what you tell us is evidence and for those purposes you become a witness. Therefore, we are going to invite you to go and sit there and also ask you to take the oath before you answer any questions. Do you understand?

Mr Mackenzie: Yes.

Mr Levisour: Mr Mackenzie, I should just say you don't have to take an oath. You may of course affirm. It is well understood here that some people have religious scruples about taking oaths and would affirm. Whichever you wish, it will be the appropriate way.

Mr Albuery: Madam, may I just raise one issue, and I only do it in the hope that it is helpful to you and to Mr Mackenzie? Of course, although he has invited questions of you and therefore he must give evidence, because he is unrepresented, would it be perhaps appropriate to remind him that he doesn't have to give evidence?

Mr Levisour: It would be entirely appropriate. Thank you very much. That is a scrupulous and fine point which is well taken.

Mr Mackenzie, I have been rebuked in the nicest possible way quite rightly so. I should have said to you that you don't have to give evidence. You can point-blank so, 'No, thank you' and you can sit there and of course answer such

questions as the Committee chooses, but you can't be made to give evidence and no inference could be taken against you if you decide not to give evidence.

I should also remind you, although I don't think it is appropriate at all, that nobody can be obliged to answer any questions if it would tend to incriminate them in criminal proceedings. So I give you that warning. I should have given to you before and I am very grateful for being reminded.

Whether you do or don't give evidence now is absolutely a matter for you.

Mr Mackenzie: Okay, I am quite prepared to give evidence. I don't think it is going to benefit my case by not doing so.

Lady Wall: Then in that case, as long as you understand, please take the seat there. Do you wish to take the oath or affirm?

Mr Mackenzie: Take the oath.

Mr Levisur: Mr Mackenzie, if you want to take the oath in the Scottish form; that is to say with your hand up-raised, please do so. You may do it in whichever form is convenient to you.

MR DONALD MACKENZIE, called and sworn

Mr Levisur: I think probably given the unrepresented nature of the witness it would be appropriate if I led him. Mr Mackenzie, forgive me; this is as always a discussion between lawyers which is very interesting for the lawyers and not interesting for anyone else. Because you are unrepresented I am going to do the job that your own advocate would ordinarily do, so I am going to ask you some blindingly obvious questions which anyone would get right, and the first question is what is your full name?

A. My name is Donald Alexander Mackenzie.

Q. What is your home address, Mr Mackenzie?

A. It is 14 Belgrave Gardens, Edinburgh.

Q. Thank you very much. Are you the person who brings this appeal against the decision of the Registrar not to allow you to register as a student?

A. I am.

Q. You have handed to the Tribunal a document that we have marked 'A2' which is the statement that you have just read out. Did you prepare that statement yourself?

A. I did.

Q. And at the time you prepared it and at the time that you read it, are the contents of it true to the best of your knowledge and belief?

A. They are.

Q. Thank you very much indeed. You will now be asked some questions, beginning first of all with the Council and you may then be asked questions by the members of the Committee and if necessary, and with the Committee's permission, I may ask you some questions but if I do so it will only be to clear up any ambiguities.

There is one matter that I think is appropriate that I ask you. I have looked at the Chairman and she has just given me permission by nodding. The question is as follows.

You are presently under the terms of a parole licence released from prison. Do you know what the date of the end of your sentence is; that is to say on the licence letter, did it give you a date which was a different date from the calculation that we can all do by adding six years and eight months to the date of 6 June when sentence was pronounced in the High Court?

A. No, that is the same day.

Q. It is the same date?

A. By my reckoning it should be February 2013.

Q. By my calculation it should be 5 February, being the day before the date of sentence pronouncement; 5 February 2013.

A. That is correct.

Q. Thank you very much indeed.

Lady Wall: Thank you. Mr Albuery, do you have any questions?

Mr Albuery: No, I don't, but on that last point, Madam, and the hope that it assists you, if you look at page 79 in the bundle you will also see that that is the date from the Parole Board – 5 February 2013.

Lady Wall: Yes, I see it.

Mr Albuery: I don't have any questions for Mr Mackenzie.

Mr Levisaur: What I propose doing now, Chairman, is allowing any member of the Committee in whatever order you think fit to ask questions, but might I remind the Committee that they will of course be particularly concerned to address with this witness such notions as insight, repentance, Metanoia; that is to say putting life back together, and of course it is not appropriate necessarily – indeed it is not appropriate – the questions to be addressed which seek to go behind that which helpfully appears in the transcript of the proceedings before the High Court.

In other words, it is not appropriate for this Committee to ask specific questions about the sentencing procedure or the basis upon which sentence was pronounced. That is clear from the record.

If anybody needs any assistance, then of course I can help by pointing to relevant pages, but I am sure the Committee have well in mind the sorts of questions and the sorts of matters that can properly be put to this witness.

Lady Wall: Thank you for that advice. Mr Baldwin, do you have any questions?

Mr Baldwin: I have one. If I could take you to the pre-penultimate paragraph in your statement, please, I would like to give you the opportunity if you would to clarify precisely what you mean by that paragraph?

Lady Wall: Can you just give us the first sentence, so that we all know?

Mr Baldwin: It begins, "I would hope that in this age of equality, diversity" and so on.

Lady Wall: Yes – thank you.

A. I think what I was trying to say there is basically that I am extremely sorry for what I did previously. I have paid a penalty by having a custodial sentence. It made me realise how much I missed the important things in life; my family, and what I would be hopefully looking for would be the Appeals Committee to see me for what I am now and try and provide me with an opportunity of a better future for myself and my family.

Mr Baldwin: Thank you.

Mr Hensley: If we could just elaborate a little on the issue, please Mr Mackenzie, of the travelling and your expectations about progressing further as a dispensing optician?

A. Sure.

Q. At the moment you are in some difficulty with this travelling, but if your career is allowed to progress as a dispensing optician, do you see that that will become easier in the short term or the medium term?

A. I would think probably the medium to long term. I can't see it getting any easier in the short term. It is quite costly to undertake a 120-mile round trip but my assumption is that I would only be paid a dispensing optician's salary upon qualification, but it is something that if I could see that there was something at the end of a three-year course that I am quite prepared to try and go along with at the moment, albeit somewhat difficult.

Q. And forgive me if this is elsewhere, but I haven't found it. Have you actually been accepted into the ABDO College if this appeal were successful for you?

A. Well, yes, I did apply and I was accepted. However, part of the condition of the ABDO College is that you must have GOC registration.

Q. So it is subject to this Appeal?

A. Yes. Well, no, that was for last year. Just to clarify, my application for the ABDO College would be for the year coming from 2010 onwards, which gives us a six-month window to clarify anything that needs to be clarified.

But previously I was applying and I was accepted subject to the registration which obviously was rejected.

Q. Thank you.

Lady Wall: Thank you. Mr Varley.

Mr Varley: Yes, just one question. On the amount that actually went to your own bank account, £37,000, and I realise £25,000 went to the rugby club, has any restitution for this amount been made?

A. Yes, I have had to pay that back.

Q. So all of that has now been paid back?

A. Yes.

Ms Grute: May I ask you, in part of your statement that you read to us you described that the culture of the bank became more sales orientated and that you perceived this to be a pressure, and I think you actually say at one point that it became difficult to provide a professional and genuine level of service for your clients that wasn't influenced by sales targets.

How would you cope with that pressure if you worked in an optical environment that was driven by sales targets?

A. That's a good question. I will go back. I have now learnt that the important aspect is to see clearly. I will be pretty candid to you – I probably lost sight of what was important when I was in that environment but now, having committed the offence and had my punishment, I now realise that it was wrong and I wouldn't envisage seeing myself ever again being in a position that I was going to have to cope with such pressures again.

I don't know if that makes sense, but I give you my categorical assurance that I would never be in that position again.

Q. Thanks

Lady Wall: Mr Mackenzie, I wanted to ask you something about the past without going into the details of the actual offences, but how do you feel about your past customers who were put in the position in which they were by your actions, some of whom actually went bankrupt?

A. It is difficult being on oath and to provide what I would actually like to say, but if I can be candid, the part I played with these customers was probably part of our dysfunctional lending arrangement. It is difficult to say given what is in the narrative without incriminating myself, but the majority, or all of these customers were struggling at the time financially. My belief was that by propping them up that they would be able to trade themselves out of the situations they found themselves in.

Unfortunately, when I was suspended the bank decided to call in the facilities that I had advanced them. It is worth mentioning here that had I not supported them over a period of time their businesses would have failed

previously. However, I do feel great remorse that these customers were put in that position and had their businesses fail.

There is a lot more that could be said within that context that is difficult to say here, but I do feel genuine remorse for them.

Q. I think whatever you feel you can say here would be helpful, because really that is the nub of it.

A. Okay. I suppose what I am trying to say is that whilst I do feel great remorse for them all their businesses were genuinely struggling at the time. My mistaken belief was that by assisting them and propping them up to a certain extent that they were going to trade themselves out of difficulty. However, had I not previously their businesses would have failed anyway.

Q. As I don't have a banking background, what you are really saying is that these customers were refused loans officially by the bank, or would have been, but you actually supported them -

A. Absolutely.

Q. - in order to possibly prevent bankruptcies, but in the end some, all went bankrupt?

A. Are you talking about all customers or just a few that I mentioned within the narrative?

Q. Well, those particular four.

A. It is difficult because I am not in the banking environment now, but according to the narrative they all failed; the four we are talking about. However, it is fair to mention that – I don't know if you have had a sight of this; it is Plea in Mitigation by my QC at the time of sentencing?

Q. Yes, we have all the documents. Let's just find it.

Mr Levisaur: Is this the Plea in Mitigation on Appeal or before the High Court?

A. Before the High Court; before sentencing I believe.

Mr Levisaur: Could we have some cross-referencing?

Mr Albuery: The sentencing transcript begins at page 53, but I don't know what part of the Mitigation of his applicant Mr Mackenzie is now relying upon.

Mr Levisaur: This is Mr Burns's mitigation?

Mr Albuery: Yes. It maybe Mr Mackenzie has a number on the page he is referring to.

Mr Mackenzie: Well, I do, but the format that you sent me is slightly different to the format –

Mr Levisaur: Would it be helpful if I looked at this piece of paper? [*Document is passed to Mr Levisaur*]

I have seen this. This transcript is not exactly in the form of the printed report that we have, and it will take me a moment to find this.

Mr Albuery: If you could share, sir, with us that part, or read part of it, we might all assist in the finding of it.

Mr Levisaur:

“He has expressed remorse not only to the social worker but also to his minister. He has accepted his responsibility and given a detailed account to the police.”

These are the sentencing remarks of His Lordship. They may be reported speech expressing what Mr Burns was saying; they may not be, and I am sorry to be vague. What I am going to do, with your permission I am going to hand this over so that somebody else can have a quick look at this. If you don't want the Council to see it; there is no reason why you shouldn't –

Mr Mackenzie: No, I would prefer to be honest.

[Document passed to Mr Albuery]

Mr Levisaur: It is not clear to me whether that is reported speech; in other words it is somebody else, a solicitor making a note, which it may be.

Mr Mackenzie: I think that may have come from a copy of the judge's report to the Appeal.

Mr Levisaur: To the Court of Appeal. That might well be the case, which is why we don't have it. It is undoubtedly an extremely accurate analysis of what Mr Burns said and it is undoubtedly an extremely accurate analysis of relevant factors. In those circumstances, perhaps if I simply read it out.

Madam, if I just read this out, the relevant passage takes most of the page. It sets out that:

“The appellant expressed remorse not only to the social worker but to his Minister. He has accepted his responsibility and has given a detailed account to the police. There were, however, a number of circumstances which set the case apart from the fraud and make it a highly unusual case. It was not suggested that any of the money in Charge 1 found its way into Mr Mackenzie's hands – that's the substantial sum of money from the bank – the money was placed to genuine customers. The charge specifically relates to a scheme 'for the purposes of advancing loan facilities to the customers specified' (lines 11 and 12 of the indictment). Mr Mackenzie did not benefit, the sums were placed with customers. The fraud consists of the deception specified but Mr Mackenzie did not benefit and the payments went to customers.

It is not the case that customers will have to repay money which they did not receive. No customer has been placed in that position. The £21 million went to customers of the bank.

Mr Burns also highlighted” – Mr Burns was Counsel for the appellant – “various mitigating features under reference to the terms of the Social Inquiry Report and Mr Burns indicated that as a business manager Mr Mackenzie felt under substantial pressure and he responded to that pressure by drawing down funds and paying those funds to customers and Mr Mackenzie took no issue with the account of the current offences given in the Social Inquiry Report at pages 4 and 5.”

Madam, it is undoubtedly the case that that is an extremely accurate analysis and the suggestion that that may be from the judge at first instance seems to me to be a very strong possibility. If it is not, it has been prepared by Counsel for the appellant, but that in itself is unlikely because of the words “Mr Burns also highlighted various mitigating features”. This appears to me to be exactly the sort of report you would expect from the High Court to the Court of Session.

It would undoubtedly be page 20 because pages 1-18 or so would contain vast numbers of very extinct things like a copy of the indictment. It would also contain things like the finding of the Diet and all sorts of matters of that sort which you would expect.

Lady Wall: And page 29 is at the end?

Mr Levisaur: I don't know whether it is at the end or not, but –

A. That is one thing that I just picked out of a whole stack of paperwork that I have relating to the case.

Q. Mr Mackenzie, this in essence was your response, or part of your response to the question the Chairman posed to you about the feelings you had in respect of your customers, the bank's customers who 'became bankrupt' or were placed into difficulties.

A. Yes.

Q. I think probably it is better not to call this 'C anything' because it has been read into the record, but if anybody wants this to be A3 it can be.

Mr Albuery: I wouldn't have thought it should be exhibited, because it has been read from rather than it going to evidence, particularly since we are not really clear exactly what it is.

Mr Levisaur: No, I agree with you, but might I ask you this question, Mr Mackenzie? Did you prepare that document that I have just read?

A. No, I didn't, no.

Q. And your understanding is it is either prepared by the trial judge -?

- A. It is a page from the trial judge's report to the Court of Session for my appeal against the severity of sentence.
- Q. Mr Mackenzie, for what it is worth, I am as sure as I possibly can be that that is correct. It certainly appears to be that document.
- A. Thank you.
- Q. I am sorry I have said far too much. The Chairman was asking questions, particularly about your attitude to remorse and questions of your previous customers.

Lady Wall: Well, yes, thank you very much, and you have answered those. There is one further opportunity I would like to give you looking at the submission that you have made to us, and that is the last page, the fifth line down, you say, "I am asking that you acknowledge my past for what it was".

I am not quite sure what you mean by that – do you think you could elaborate?

- A. I think what I am trying to say there is that these crimes were committed over six years ago. I now have had to pay a penalty of being incarcerated for the last three years four months, albeit two years of that was in the open estate. I am on licence now and I might not be doing myself any favours here for the next three or four months.

However, I would like to be given the opportunity to show what I can do in the future whilst acknowledging this offence took place over six years ago, and by the time of completing an ABDO College degree in dispensing optician it would be over ten years ago.

That is basically what I am trying to say there. Whilst not condoning what I did, I have given genuine remorse for what happened and I am looking forward to trying to provide a better future for myself and my family.

- Q. Thank you. I have no further questions, but there may be further questions arising from other members of the Committee. Yes - Mr Hensley?

Mr Hensley: Mr Mackenzie could you just for the sake of clarity; your academic time at ABDO College would start, is it next September?

- A. This September; hopefully September 2010.

- Q. Thank you for that.

Mr Baldwin: Yes, Chairman, on page 73 if you could turn to that, the sentencing judge refers to your advocate, Mr Burns, describing your motivation as a misguided sense of service, almost like a Robin Hood figure. Is that still your perception of your offending behaviour, or would you put it somewhat differently?

- A. It is still my opinion – well, my opinion – that I was acting in a misguided sense of providing a service to these customers, but I now fully acknowledge that what I was doing was a criminal offence. Whilst not maybe

acknowledging that at the time I do fully appreciate that what I was doing was a criminal offence for which I am deeply sorry and regret having gone down that route.

Q. Thank you.

Lady Wall: Mr Varley, do you have any further questions? [No] Ms Grute? [No]

That means that there are no further questions from the Committee or indeed from the Council, so Mr Mackenzie you can resume your seat.

[Mr Mackenzie stands down]

We were just checking on the actual procedure, because of course with permission we have reversed what is in the Rules, and the next stage, Mr Mackenzie, is that I ask Mr Albuery whether there are any witnesses that he wishes to bring.

Mr Albuery: Madam, no witnesses, but I do want to, if I may, and now might be the right time, to direct you to the evidence which has been agreed in the bundle upon which I particularly rely. Would it be convenient if I do that now?

Lady Wall: I think it would, yes.

Mr Albuery: Thank you. Madam could you with your colleagues, and Mr Mackenzie then, have in front of you, please the Council's bundle 'C1'? I ask you to turn with me to page 5 where you will find a copy of the Registrar's letter refusing Mr Mackenzie registration on the Register of Student Dispensing Opticians, and it is dated 7 October 2009. She says this in the second paragraph:

"Having considered your convictions for Theft and Fraud and that you were sentenced to ten years in prison (upon appeal reduced to six years and eight months), to allow registration would damage public confidence in the profession."

Madam, that was the reason for her refusal. Of course, you must look at it and I know you will afresh.

Madam, if you turn to page 8 in the bundle you will find a copy of the extract of the sentence originally imposed in the High Court which confirms the period of imprisonment as being ten years in respect of Charge 1 which was the fraud and a two-year concurrent sentence in relation to Count 2 which was the theft of just over £37,000. Madam, of course that was reduced on appeal to six years and eight months.

Madam, you will then find, starting at page 9 what I know you have already read, but which is a transcript of the proceedings as they unfolded in the High Court on 6 June 2006, and there are aspects of the submissions which were made which I do need to remind you about if I may so that you can assess the seriousness of the original offences.

Madam, on page 12 the Court was told by the then prosecutor that Mr Mackenzie had been working for the Royal Bank of Scotland since 1980 and so he had been a long-standing member of that bank and he had reached the level of business manager and that allowed him to commit the offences he did, but also because of his status he clearly demonstrated a breach of trust, which as you have read was sustained over a period of five years.

I ask you to look also when you retire at page 13, because although I fully concede, as was conceded in the criminal proceedings, that Mr Mackenzie did not directly benefit from the fraud of £21 million or so, he did, as you will see, starting from line 5, have a salary which comprised performance-related bonuses (from line 5 on page 13), and as the advocate in those proceedings said, and I will read from the transcript from page 9:

“The performance-related bonus related to turnover and sales of bank-related products which included the accused’s illegal activities.”

Mr Mackenzie: Can I add something or do it at the end?

Mr Albuery: I don’t mind if you want to do it now.

Mr Mackenzie: Are you sure? [Yes]

This is a statement that I didn’t actually agree with in the Crown’s narrative and it may be helpful to just clear this up; I know it is difficult for Counsel. I am going to give you my recollection of what this relates to.

The illegal activity of the £21 million, the majority of it, the vast majority of it was done in personal lending. It is difficult to try and explain. The accounts that were drawn down were all personal in nature. My bonuses and my performance was monitored on a business relation, so I would only get benefit in income from business products or business accounts that were drawn. The vast majority of this was drawn on the personal facilities of which I had no benefit.

I am just trying to clarify exactly what it has been, so these bonuses and salary, whilst accepting that some of it was from illegal activity, a small portion from illegal activity, I didn’t get any benefit from personal lending that was done.

Lady Wall: Can I just clarify that you are agreeing that some of this included your illegal activities, but you are disputing the amount which related –

Mr Mackenzie: Absolutely. It is quite a false statement, or a misleading statement, and obviously the Crown are going to paint the blackest picture.

Lady Wall: Yes, we understand.

Mr Albuery: Madam, might I add? This has become a big issue. All that was said then and all I rely upon is that the performance-related bonus included illegal activities. I have made no reference to the proportion of them and I don't know it, and that seems to be accepted by Mr Mackenzie. Having clarified in his mind it was a very small percentage, perhaps I can just move on?

Lady Wall: I think we are not going to get any further with proportions and percentages, and after this period of time it may be that they aren't actually known because it was too difficult to actually establish the validity of proportions. But we do have the point both that it did include the illegal activities but we don't know what proportion the bonus is.

Mr Levisaur: In fairness to Mr Mackenzie, it is right to say that an analysis of the opening would appear to suggest that the way in which the fraud operated appears, indeed as he says, to have involved him opening a number of what I will for these purposes call 'private accounts' in the name of people rather than business accounts. So, insofar as Mr Mackenzie has explained to you that the benefit flows from the business account, there does indeed appear to be some support that the £21 million appears to have flowed both into business accounts and into private accounts, and you have heard his explanation of the effect that that would have.

It is also fair to say that you would need to be a mathematician of the highest order to look at this opening and try to work out anything like a percentage; it is very, very difficult, but there is some support in here. That is as far as one can say from what Mr Mackenzie has just said.

Lady Wall: Well, that is very helpful because clearly we are not mathematicians of this order. Please continue; I think we have the point.

Mr Albuery: Thank you, yes. Madam, at the top of page 21 in your bundle you will see also a reference to the investigations revealing, and I think this was in relation to Count 2, the theft, that for example, reading from line two:

"It was established that an amount of £8,124.27 had been paid from the Royal Bank of Scotland Managers' Expense Account to the personal bank account of the accused, Mackenzie, under the narrative of 'salary adjustment.'"

Madam, the total fraud in relation to the first Count, the embezzlement was £21 million. In terms of the loss to the bank, as you have read, the best scenario was thought to be £4 million lost.

But if I may just pause there, because it is easy to forget the impact on financial institutions of offending like this. That is, clearly even if the best scenario was reached, a massive sum of money for that bank to have lost - £4m - as a result of a fraud by a relatively senior employee who obviously had a duty of trust to his employer.

Madam, in relation to the second charge, the theft, can I take you to page 29 in your bundle, reading from page nine? This is the prosecution advocate addressing the court, so page 29 reading from line nine:

“Returning to Charge 2, my Lord, it also became apparent during the police investigation that having created false accounts and having obtained money from the bank, the accused, Mackenzie, had utilised a number of his false feeder accounts to abuse his position as bank manager within the Royal Bank, and paid monies from these accounts to pay his own personal bills and those of the Waid Academy Former Pupils Rugby Club of which the accused, Mackenzie, had been treasurer for a period of 15 years.’

Then if you go to the top of page 31, this point is developed by the advocate in relation to what he says were 56 withdrawals made for Mr Mackenzie’s personal gain – that appears at the bottom of page 30 – between 1999 and 2004, and says this, reading from line three:

‘The smallest of these payments was for £11.26 and was used to pay a household electricity bill, and the largest of these withdrawals was for the sum of £6,547.65 which was used to make a payment towards one of his credit cards.

The accused, Mackenzie, acquired in total £37,170 by this method. £25,222.23 was paid through Waid Academy Former Pupils Rugby Club, £4,027.17 of this was paid to the Inland Revenue on behalf of the Waid Academy Former Pupils Rugby Club in respect of fines for late submission of accounts that the accused, Mackenzie, was supposed to be dealing with. The rest was for personal spending on matters such as personal loans. During the interview under caution the accused, Mackenzie, admitted acquiring sums of money from his fictitious accounts for his own use.”

Madam, I ask you to ignore that which is said during these proceedings about the percentage of time spent by Mr Mackenzie on the legal activities because as you know the prosecution abandoned that suggestion about half his time being spent in that way later, so I pass over all of that in fairness to him.

Madam, I ask you in particular, bearing in mind matters I will refer to later, to consider the total impact of Mr Mackenzie’s offending. I have referred already to the bank, but from page 37 onwards there is a dialogue about the impact on others, and this has been touched on already because Mr Mackenzie has given you his account of the fact that perhaps these companies artificially kept trading by him having given them loans which they might not otherwise have got, went bust but they would have gone bust earlier or might never even have existed.

I ask you to treat that evidence with some caution because certainly that was not advanced on his behalf in the trial; certainly if it was, I found no reference to it. What is said, which is that these businesses and firms went out of

business as a result of the illegal trading by Mr Mackenzie, appeared not then to be disputed by his advocate, but I do with no apology, really, emphasise the impact. Reading from line 16, page 37:

“The accused Donald Mackenzie allowed loans to the value of just over £1,420,000 without any official paperwork to be paid to this property company. As a result, on discovery by the Royal Bank of Scotland, a demand of £140,000 was made. The developers were forced to sell all of the properties in their portfolio, with the exception of one, in order to meet the bank’s request.”

There would have been a witness called had the matter gone to trial and I am going on now, Madam, to another matter at the top of page 38:

“A Director of Ridgemont Limited and Ridgemont Vending Services. The accused, Mackenzie, financed Pringle” –

This is the second impact statement –

“to the tune of £2 million in authorised monies. Post discovery the bank issued a winding up petition to the Court and demanded immediate payment of monies due from the company”.

Then on the same page reference made to the firm of solicitors against whom a winding up notice was issued when the unlawful loan had been discovered by the bank which is said to have resulted in that partnership ceasing to trade.

Now, I can’t put it any higher, and I don’t seek to than that, but that is what the sentencing judge was told at the time.

Also, Madam, in terms of impact and cost not only was there a £4 million loss to the bank but as you have read on page 41 –

Mr Mackenzie: Excuse me – estimated loss.

Mr Albuery: Estimated loss. Yes, estimated best-case scenario loss of £4 million – Mr Mackenzie is quite right. But also you will see on the transcript at page 41 reference to the concern the bank had about the bank’s own reputation and also the fact that the bank had a team of 30-plus staff working on obtaining historic bank records in addition to managerial and legal costs which would have been involved.

In fairness to Mr Mackenzie, and you may think it is an important point, he did indicate a plea to the matters for which he was sentenced at a very early stage, and through his lawyers entered into dialogue with the prosecution as to the terms of that plea.

Madam, I want to take you lastly in relation to the transcript to the judge’s sentencing remarks which begin at page 72 in your bundle where he confirms that he has taken account of all that is advanced on Mr Mackenzie’s behalf

and has read the social inquiry reports and mitigation testimonial evidence that is put in, but then begins to talk about the offences from, on page 74, line 23:

“In relation to Charge 1 you have clearly acted in gross breach of trust, you have formed a fraudulent scheme to obtain loan monies for the purposes of advancing loan facilities to customers whilst employed as a Business Manager with the Royal Bank of Scotland, in a position of management and trust. Your illegal activities covered a lengthy period of almost five years from April 1999 to March 2004. You opened a large number of false accounts and you induced the bank to make a large number of payments into those false accounts, all as set out in the schedule to the indictment.

It is accepted that in total, by the means set out in the indictment, you did obtain loan monies amounting *in cumulo* to just over £21 million by fraud. In terms of the narrative, the bank has suffered substantial estimated losses which may be reduced to around £4 million, a figure which as an estimate is said to represent the best case scenario. The narrative also indicates that your offending has had a considerable impact on certain customers.

Charge 1 involves a prolonged and a systematic course of fraudulent conduct, deliberately pursued and involving substantial sums of money. Charge 2 –“

That’s the theft of £37,000 –

“also” - says the judge – “involves breach of trust, albeit on a much lower yet still significant level. During the period from May 2000 until April 2004, whilst employed as Business Manager you stole *in cumulo* just over £37,000-worth of monies.”

And then reading from line ten:

“In the whole circumstances of this case and having regard to the serious nature of the offences as well as the mitigating circumstances, it is clear that the Court requires to impose a significant custodial sentence. No other method of dealing with you is appropriate. Dishonesty on this scale is a serious matter. In the public interest the court requires to mark the gravity of your offences and the court’s disapproval.”

I won’t read out what he sentenced Mr Mackenzie to, partly because you know, but partly in fairness, the Appeal Court thought that he had got it wrong and had been rather excessive and reduced it quite substantially in fact.

Mr Levisaur: The starting point was clearly just entirely wrong.

Mr Albuery: Yes.

Mr Levisaur: Just magnificently wrong and the reduction on appeal was almost inevitable given the false premise, if I may put it like that.

Mr Albuery: I agree. What we are left with, however, is still a substantial sentence of six years and eight months.

Madam, that is all I wanted to say in terms of evidence. Obviously I rely on everything that is contained in the bundle, all of which is before you, and all I want to do at a time you indicate to me is my time, is to then make my representations as to why you should refuse the appeal.

I have just forgotten for a moment where we are in our diverted procedure, whether I do that now or you want Mr Mackenzie to say anything before I do.

[Panel confers]

Mr Levisaur: The difficulty we face, and thank you for bringing this to our attention, is that there may be some factual assertions which Mr Mackenzie would wish to dispute, although I suspect he has done the two main things that he wanted to do.

Perhaps it would be best if Mr Mackenzie were allowed to do that now and then you make your submission, as it were, on the appropriate course for the Committee to take and then allow Mr Mackenzie to make final submissions on that course.

Mr Albuery: Possibly. Certainly, Mr Mackenzie must be allowed to give evidence in rebuttal which is fine.

Mr Levisaur: Exactly, which is what I was concerned about.

Mr Albuery: But I just wonder whether it is correct for us to proceed on the basis that the last person from whom you would hear is Mr Mackenzie. Ordinarily in your proceedings that would be so, but I say what I have just said because of Rule 34. That seems to me to suggest that the last person from whom you hear is me.

Mr Levisaur: I am grateful to you for raising this because I was concerned about the ordinary interplay and I too am concerned about the effect of it. Probably for these purposes it doesn't, frankly, matter at all and if I were to say to Mr Mackenzie, 'Do you care, Mr Mackenzie?' I suspect he would say, 'No, I don't – do whatever you think is most convenient'. Well, you are nodding.

Lady Wall: Yes, but the Committee must make sure that it acts properly and we have already diverted from the set procedure and that is really why we are in this situation.

My concern is that you should have an opportunity of rebutting what Mr Albuery has said because that is part of any fair and just procedure.

We think that nobody could be accused of being partial or biased if we allowed you now to respond to Mr Albuery, and by that time our Legal Adviser will have decided the proper running order for the final submissions. But your opportunity to rebut what has been said to us by Mr Albuery is where we are now.

Mr Albuery: Absolutely, Madam, I agree. If we, though, look at the exact wording of Rule 35 I am not sure that allows Mr Mackenzie, unless he gives evidence, just to make further representations in rebuttal because it specifically refers to evidence.

Mr Levisaur: That is clearly so. He doesn't need to be re-affirmed.

Lady Wall: We have done all of that. We are just clear that the legal ground on which we are now moving to, Mr Mackenzie, is that you are giving evidence but we are not going to ask you to move and you are already under oath. But it is your opportunity to respond to what has been said and we shall listen carefully.

Mr Levisaur: So if there are any facts that you want to put right, or things that you want to add in order to make clear what has been said on behalf of the Council, please do so now. You don't need to make submissions; we come to that at a later stage, so it is just put right any facts or add any facts which deal with matters that have cropped up.

Mr Mackenzie: Okay. This is pretty alien territory to me.

Lady Wall: Yes, we appreciate that and that is why we are trying our very best to ensure that you are not disadvantaged by not being represented.

Mr Mackenzie: What I would say is that I can't dispute what is in the narrative the Council has already intimated. What I would say is that there were a few things that I wish to challenge at the time of my Counsel who advised against challenging or making amendments to the narrative.

Mr Levisaur: Certainly.

Mr Mackenzie: So that is one thing I would like to challenge.

Lady Wall: Our Legal Adviser has nodded, so we will read the nod into the transcript and you can go ahead.

Mr Mackenzie: The bits that I took issue with were certainly the bits about the customers which we have already alluded to in evidence. The £37,000, I would just like to clarify a bit about the personal nature of that. Part of my role as a Business Relationship Manager was to entertain clients and whilst I want to be candid to you and say that some of it did end up in my personal gains, a lot of it went on business entertaining of corporate clients, so just to clarify that bit. The way that it was done was it went through my personal credit card as

opposed to my corporate credit card and hence the reason that the payments found their way into my personal account.

I don't think I have issue with anything else and I have given you my recollection; I have given you a plea to look at.

What I may just go to here, the Council has intimated about the fact of the losses, or estimated losses to the bank, and again I might not be doing myself any favours here but whilst not condoning my actions what happened to me within the culture that I believed was within the Royal Bank at the time going back to 1999 and 2004 was perhaps a precursor to what we have seen within the banking industry over the last couple of years. It was evident to quite a number of people that the way that the bank was being driven was unsustainable. Again I am full of remorse, and don't get me wrong -

Mr Albuery: Madam, I don't wish to be discourteous to Mr Mackenzie, but I don't think this is anything about evidence in rebuttal; these are submissions now and that comes at a later stage, if indeed he wants to pursue this particular form of submission.

Lady Wall: Yes, I think you see the point, Mr Mackenzie. It is very hard when you are representing yourself and you are not a lawyer, but this opportunity has been given to you specifically to question what Mr Albuery has said. He has drawn our attention to some very serious points about your conduct in the whole sentencing remarks and the bundle, and if you disagree with any of that; or you think that some of it requires further mitigation and it would help us, this is your opportunity. If you want to say anything which we could say is more general, then he is right to say that is for submissions.

Mr Mackenzie: I will leave that until my submission. I have already intimated, given you an explanation, or I have given my feelings with regard to the aspect of the customers and the impact on the customers and also the second charge of theft. I will let it rest at that.

Lady Wall: So you don't want to say anything else?

Mr Mackenzie: No.

[Chairman takes advice from Mr Levisaur]

Mr Levisaur: Mr Mackenzie, I have just had a very quick word with the Chairman, and I ask you this question in order, I hope, to clarify what happened to the £37,000; that is to say the subject matter of Charge 2. The £37,000 and I take these facts and matters from the transcript of proceedings before the High Court, as I understand the position, but this is a question and please either confirm I have got it right or tell me I have got it wrong. The total amount of personal gain to you appears to be £37,000-odd less £25,000-odd to the rugby club. That is to say, the benefit to you, never mind to these purposes whether it went on corporate clients, but the benefit to you appears to be of the order of £11,850.

Mr Mackenzie: That's my understanding.

Mr Levisaur: Very well, and then you have said what you have said about the corporate entertainment. Are you able to provide any assistance to this Committee as to the rough percentages?

Mr Mackenzie: I can't. It is over a period of five years so it is difficult to give you any sort of figure.

Mr Levisaur: Thank you very much. I hope that clarifies matters. I know the Chairman has a question which relates to the rugby club money.

Lady Wall: Yes, perhaps you could help. There seems, on the face of it, £25,000, to be quite a large sum of money to be going to a rugby club of which you are the treasurer. What happened to this £25,000?

Mr Mackenzie: Again, it is something where I had lost a sense of reality to a certain extent. I felt under an obligation and I could see that the rugby club were struggling financially. I felt, as I say, an obligation or a duty to try and assist them and quite a lot did go to the Revenue because their accounts were behind and were accruing substantial fees for non-production of accounts but it was a surprising amount to me; I didn't realise it was as much as that until the Crown narrative, but it was just a misguided sense of duty and obligation to the rugby club, seeing how much they were struggling financially.

Lady Wall: Right, but you were treasurer during this period.

Mr Mackenzie: That's right.

Mr Levisaur: I wish to make it clear on your behalf – I wouldn't usually do this but you are unrepresented – there has never been, this is a question, but there has never been any suggestion you have benefited personally from the rugby club money?

Mr Mackenzie: Absolutely not.

Mr Levisaur: In other words, to use the vernacular, it is not teeming and lading where you were stealing from the rugby club and then paying the rugby club back later? There is no suggestion of that at all, and the Council I think wouldn't suggest that that is the case. There is no suggestion in the papers to that effect.

Mr Mackenzie: No, that's right.

Lady Wall: Do any of my colleagues have any further questions? [No]

Right, so we rely on our Legal Adviser to tell us which stage we have reached now that we have altered the Rules.

Mr Albuery: Before you get that legal advice, can I rely on Rule 37, which I think is perfectly clear? I am sorry – page 81, Rule 37 of the Registration Appeals Rules:

“(1) Following the presentation of evidence, including any evidence in rebuttal, the appellant or the applicant shall be entitled to address the Appeals Committee.”

Madam, that must be right because of course the Council is ‘the respondent’ – it can only respond to that which is said.

Mr Leviser: I think that is right. We have amended the procedure in order to provide for a dispassionate and sensible and very helpful opening, but there seems, to me at least, to be no reason to depart any further. In this respect, my advice would be that it is sensible that the Council responds, because apart from anything else it might well be, having heard submissions by an applicant that the Council wants to amend its position as it were by retreating from a position that it might otherwise be in.

You would expect, as has very fairly been put, the Council would respond as the respondent to that which the appellant or the applicant puts before it. So my advice would be that it is for Mr Mackenzie to make his submissions now, assisted as he will have to be to some extent, or helped in some extent to focus by me, but he must make his submissions and then it will be for the Council to respond.

Lady Wall: Right, thank you very much for that. That makes it very clear; we are back on the Rules, and Mr Mackenzie, it is your opportunity to make final submissions for your case.

Mr Mackenzie: Again, I will be very brief. I have giving you a presentation that sets out clearly what my background is. I know it is a serious offence; however, I have paid a penalty for it. I am full of remorse for what happened. All I would like to do is focus on my future and try to give my wife, the family and myself, a fresh start within a career that I believe I can do a good job.

May I just point you to the parole conditions, that if I was to commit anything further within the next three years four months on licence until February 2013 I would be immediately recalled to custody, so that is something to maybe perhaps bear in mind.

My intention is obviously not to do so, because I have given you my reasons for that.

Hopefully my course would start in September 2010, and I would just like to go back to my presentation and ask that you acknowledge my past for what it was and hopefully give me an opportunity for the future.

Lady Wall: Thank you very much, Mr Mackenzie.

Mr Levisaur: Mr Mackenzie, were you represented by a lawyer I have no doubt that he would make several representations on your behalf, and it is right in the peculiar circumstances of this case that I point to the Committee a number of factors, and those factors are these.

Any lawyer would say on your behalf that your Counsel, Mr Burns, put to the sentencing tribunal your remorse, the fact that that remorse had been publically stated and privately stated to your Minister, and that the judge himself accepted that was so.

He would also point out that you had shown insight into the offences and the effect of those offences on others, and the judge likewise accepted that that was the case.

A lawyer would undoubtedly also draw the attention of this Committee to the number of documents which appear in here, particularly the pre-release assessment forms and the documents which appear by way of social inquiry report and the reports from the estate; if I say from the prison governors you will understand what I am talking about.

All those matters are matters which any competent lawyer would put before the Committee, and I simply ask you having heard what I said, do you put those matters now before the Committee?

Mr Mackenzie: Yes, I would like to do that. Another thing I may point out just when you have reminded me is that in all the social inquiry reports and social work prepared reports intimates I have a low-risk of harm to the public and a low risk of re-offending, which will probably be brought out in the evidence before you.

Mr Levisaur: The other matter that would no doubt be put is that you perhaps unusually benefited from a period of imprisonment; that is to say you appear to have been both a model prisoner, but also have contributed to prison life I will simply say by assisting The Samaritans.

It is in the bundle and that is no doubt a matter you likewise wish to bring to the attention of the Committee.

Mr Albuery, forgive me, naturally you would otherwise have been in the extraordinarily invidious position of probably having to draw those matters to the Committee's attention.

Mr Albuery: Of course. I am very grateful – thank you.

Mr Levisaur: But it seems to me fairer if it was done by me so that you are not put into a difficult position.

Mr Albuery: Thank you.

Lady Wall: Mr Albuery?

Mr Albuery: Madam, thank you. Madam, all in this room, I am sure, will applaud Mr Mackenzie for the efforts he has made since committing these offences to turn his life around. He has done many good things and all will want to show compassion to him and support for that which he has already achieved and seeks to do.

However, you have a different function, which is as the regulator of the optical profession to do three things. Firstly, to uphold the proper professional standards of behaviour which can be expected of those on the Register and those who seek entry to it.

Secondly, to attract and maintain public confidence in this profession, and thirdly to protect the public from registrants and those who seek entry to the Registers. And notwithstanding the matters which Mr Mackenzie has articulately put before you, I submit that when you consider that remit and those functions, it is impossible for you to conclude that – and I say that I hope with respect to you – that Mr Mackenzie is a fit person to join the Register, particularly bearing in mind the fact that he is still serving his sentence and that he remains on licence and will do so for a period in excess of three years.

This is an experienced Committee, and I think you know that if somebody already on the Register came before you having been convicted of matters of such seriousness which demonstrated such a serious breach of trust over a sustained period that their registration would be unlikely to continue, you probably would conclude that such behaviour and criminality was incompatible with remaining a member of the profession.

If that is so, how can you adopt a lower threshold for those who seek to come into the profession, particularly bearing in mind the three limbs I ask you to remind yourself of in terms of the Council's functions.

Madam, it may be helpful, not because this is in one sense a review of her decision, but to remind you of the protocol which the Registrar would have taken account of and to go through that with you, because if nothing more, it seems to me just to relate good common sense things that you would obviously want to take into account in determining fitness. It is Exhibit C2, and Madam, I will just pause while everyone who wants to can find it. Madam, there is another copy if you would like one.

Madam, I should say this before I start reading. This doesn't in any sense fetter your discretion. This is not prescriptive. This is just guidance which you can adopt and embrace, or you can entirely reject, but it would have been things I was going to say in any event.

Madam, reading from paragraph 5:

- “(b) The applicant is responsible for persuading the Registrar”, and in this case you, “that he or she is a fit person despite their conviction.
- (c) The main issue for the Registrar when considering an application will be whether, despite a conviction, the applicant is suitable for registration. This will depend *inter alia* on:
 - the nature and seriousness of the offence.”

That is the first part. Madam, here you are dealing with one of the most serious offences of dishonesty this Committee may ever perhaps have come across, certainly in terms of the extent of the fraud, the loss to the bank and others, the impact on the victims of Mr Mackenzie’s criminality, and also the breach of trust which it demonstrated.

Secondly,

“The extent and nature of any risk to patients or the public entailed in the offending behaviour”.

Now, Madam, I accept, of course I must, that the risk of re-offending is put as low by those who can probably assess that better than me, but it is appropriate for you to bear in mind if you were to allow Mr Mackenzie on to the Register the environment in which he will be working. Questioning of him by the Panel has already teased out the fact that that can be a sales oriented profession. Certainly his part in it would partly be, and you have already heard the pressures on him which would remain certainly until he qualified with a very long commute and on a lower salary than he would be able to get later. That came out in evidence from him. And you will take account of the fact that as a dispensing optician he would be, or could be engaged, in the completion of forms against the public purse for the dispensing of optical appliances.

But, Madam, of the three limbs which I mentioned to you I do accept, and have to because of the evidence from the Parole Board, that I concentrate primarily on the requirement that you maintain proper professional standards and that you act in a way that encourages and promotes public confidence in the General Optical Council. I don’t abandon, I make clear the public protection point; I think it is a very real one for you to consider, but equally it is important as an advocate perhaps I make it clear what I emphasise particularly.

Madam, the third criterion of the criteria is the timeframe of the offending. This was over a five-year period so it was not a one-off error of judgement but a sustained act of dishonesty which appeared to continue until it was discovered as a result of the implementation of a new computer system.

Then over the page, the next criterion, the relevance of the offence to professional standards and conduct. Madam, integrity and honesty and trustworthiness are all key to the standards you expect of the profession and

as though you needed to have it written down anywhere, the Code of Conduct for individual registrants, page five in your bundle, refers to the need for registrants to be honest and trustworthy.

Madam, you are asked then to consider the applicant's character and conduct –

Mr Levisaur: I am sorry to interrupt. Does that apply to student registrants? It is a curious question and I ask it deliberately because of the wording on page 5.

Mr Albuery: Yes, it is a proper question. I have been given instructions and I am told it does.

Mr Levisaur: So the words,

“a registered optometrist or dispensing optician must
10. be honest and trustworthy”?

Mr Albuery: I am told it does apply to students.

Mr Levisaur: I know the test is applied by everyone, I don't think it crosses anyone's mind there should be different tests, but what concerns me, and I make it clear because of this gentleman's position, does it actually say so anywhere in respect of students?

Mr Albuery: Well, Madam, I hope I haven't done it too inelegantly but I have been taking instructions from Ms Punchihewa who sits next to me. She assures me it does apply. I can't take you to chapter and verse, I am afraid. If you want it, I am told she can, hopefully, but we would need a short adjournment. But I wonder if it adds much, because perhaps the better point, and I opened it almost in this way when I said, 'almost as though it needed to be written down anywhere'. Is anyone really going to suggest – the answer must be 'no', isn't it – that students have to be anything other than honest and trustworthy?

Perhaps that's the better point. If it is seen by anyone to be more than that, then due enquiries will be made, but I would rather hope they wouldn't be necessary. Perhaps you will tell us later if they are, Madam.

Lady Wall: I don't see a member of the Committee maintaining a different position, and we think probably continue.

Mr Albuery: Thank you. Madam, the applicant's character and conduct since the offence. Well, to all his credit, his character appears to have been very good and I don't therefore suggest that that can be a reason for you to find against his appeal.

In terms, though, of the amount of insight that he has shown, it is for you to determine whether you found everything that he has said on oath and in submissions today in terms of the impact both to the bank and the other victims to be particularly attractive.

Madam, you are then asked to consider the impact of such offences being committed by a registrant upon the public confidence in the profession and I would only repeat myself if I said why I rely on that ground; it is for all, as it were, of the above.

Madam, then each of those criterion is given a bit more flesh to the bones, and for example in relation to the nature and seriousness of the offence, it is suggested and would, I am sure in any event, take account of the sentencing remarks made by the court and the victim impact statements. Well, there were none which you have seen, but certainly the impact on the victims was relied upon by the prosecution and also the harm or loss suffered by any victim of the crime which of course includes business limited to the bank.

In terms of the pattern of offending you are asked to consider, amongst other things, whether this is a series of identical or related offences. Well, although there were only two, it was committed over a four and a half year period and amounted to a number of sample counts, I think. Certainly that was referred to in the transcript.

Madam, the timeframe of offending I have already dealt with, also the compatibility or otherwise on the top of page three on what has gone on with registration or continued registration, and Madam, the second point there encourages you to consider the risk of re-offending and the seriousness of the consequences of re-offending should that occur, particularly in respect of patient safety and security of patients' and public funds.

Madam, for all those reasons the Council asks you to dismiss the Appeal, and there is nothing else I would want to submit, although obviously I will answer any questions you have for me.

Lady Wall: Thank you, Mr Albuery. I don't have any questions, but my colleagues may. *[No further questions]*

Is there any further advice you wish to give us at this point, Mr Levisur?

Mr Levisur: I am afraid there is going to have to be some considerable advice and I will have to give it. May I just have a moment to get my thoughts in order and to make sure that I don't repeat myself unnecessarily, but more important, I don't miss something out?

Could I be very dull and suggest a five-minute break to allow people to have a cup of coffee; it would give me just a moment to put my house in order.

Mr Albuery: Madam, may we leave our papers here?

Lady Wall: Of course. My experience is it is probably going to be ten minutes for everyone to have their own comfort break.

Mr Albuery: Thank you, Madam.

[Hearing adjourned at 12:06]

[Hearing resumed at 12:30]

Mr Levisur: Chairman, thank you very much indeed for that opportunity to put my own intellectual house in order.

I begin by remarking, as I think is probably clear to everybody that it is important in a case of this sort that the issues are fairly and squarely put before this Committee, if only because – and I observe this by way of observation and not threat – any decision of this Committee is subject to an Appeal to the Court of Session and it is therefore very important that I clarify my own thoughts so that anybody sitting in a different jurisdiction is well able to understand what I say and I don't cloak any advice that I may have with common law principles which may not be so readily understood north of the border.

I am very grateful to the assistance that I have received from the Council. It has helped me to consider the submissions which were made on their behalf, and I should also, of course, pay tribute to Mr Mackenzie who has conducted himself exemplarily today, both in the way he gave his evidence and the submissions and the moderate way he made those submissions.

May I begin by reminding the members of this Committee that the framework which governs this appeal begins on page 66 of your booklet with Regulation 14, because had there not been a Notice of Refusal there would be no appeal today?

Regulation 14 provides that,

“Where the registrar determines to refuse an application under rule 3 or 4 the registrar shall send a notice to the applicant –

- (a) stating the application has been refused; and
- (b) giving the reasons for that refusal.”

Could I now ask you to turn to page 56 in your booklet, because at page 56 you will find paragraph 1A of Schedule 1A to the Opticians Act and that principally governs what we are doing today.

You will see at page 56 and 57 the following words:

“A person in respect of whom an appealable registration decision has been made may appeal against that decision to the Registration Appeals Committee.”

Mr Mackenzie has done so and so you sit as a Registration Appeals Committee, and you will see that at 4(6) you may make such inquiries as you consider appropriate, and (7):

“In disposing of an appeal under this paragraph, you may determine to

- (a) dismiss the appeal;
- (b) allow the appeal and quash the decision appealed against;
- (c) substitute for the decision appealed against any other decision which could have been made by the registrar; or
- (d) remit the case to the person making the decision to dispose of in accordance with the directions of the Registration Appeals Committee.”

It is, of course, not for me to tell you what to do, but there would seem to be no good purpose served at all by adopting the course set out in Regulation 4(7) (d), and I don't suppose the Council would for a single moment ask you to send it back to the Registrar, an utterly pointless activity in this case.

It likewise would appear to me not to be a case where a regulation at paragraph 4(7)(c), a substitution, is appropriate.

In reality this is a case in which you may well think you either dismiss the appeal or you allow the appeal and therefore quash the decision appealed against. In due course the Council will have a chance to correct anything that I have said, but I can see from the nodding that that is at least one suggestion which probably finds favour. This, in truth, is a case that requires you to make your mind up and it is either allow the appeal or not allow the appeal.

I should remind you of the burden on the standard of proof in this case. Mr Mackenzie brings this appeal and it is appropriate that the burden lies on Mr Mackenzie to satisfy you, satisfy you that the appeal should be allowed. Satisfy, as I said to you some while ago in this case, means that you are satisfied on the civil standard – something must be more likely than not, 50 per cent plus a feather - so satisfied on the balance of probabilities.

That of course is done by considering the evidence before you and paying such attention to the submissions that seem to you to be sensible or otherwise. The evidence before you includes the oral evidence that you have heard from Mr Mackenzie, and of course it includes all the documents; those in C1 and C2, and in A1 and A2. Please consider all of those documents and consider them carefully.

Please also bear in mind the difficulties of giving evidence, but that is something that I will always say to every committee; it is a stressful business appearing in a tribunal of this sort. How much more stressful is it if you are conducting your own advocacy as well? Please bear that in mind.

The appeal is of course against the following decision, and could I ask you now to go into Bundle C1 and could I ask you, please, to turn to page 5? I propose reading most of that letter. Some of it, of course, need not be read, but this is the letter from the Registrar, the Regulation 14 letter. It is dated 7 October 2009, and the crucial paragraph that you must consider is the paragraph which satisfies the Rules, that is to say, tells Mr Mackenzie not only

that application has not succeeded, but provides the reason for it, and it is that that this gentleman appeals against. She says this:

“I have considered your application with care and your application is refused.” (14(a))

(14(b):

“Having considered your convictions for Theft and Fraud and that you were sentenced to ten years in prison (upon appeal reduced to six years and eight months), to allow registration would damage public confidence in the profession.’

I want to make one thing very clear to you now. Although it is perfectly true that Mr Mackenzie was sentenced to ten years in prison, you are to pay absolutely no attention to that at all. The relevant sentence of imprisonment is the correct sentence of imprisonment and the Appeal Court made it quite clear the correct sentence of imprisonment was six years and eight months. That a judge at first instance imposed a sentence of ten years imprisonment is utterly irrelevant. For these purposes you may take it that he was wrong to do so, so that this sentence was one of six years and eight months and the Registrar concludes,

“to allow registration would damage public confidence in the profession.”

Thus it is that Mr Mackenzie has prepared his appeal, and of course Mr Mackenzie has prepared his appeal upon the basis of that which has been told to him pursuant to the regulations by the Registrar.

You will wish, therefore, to focus on the question of public confidence in the profession. It is perfectly correct that there are a number of matters which tribunals which sit in this and other councils consider. They consider, of course, safeguarding the public and they consider upholding public standards in those who are a member of a particular profession or a student member of the profession.

It is right that I give you some advice about the protocol. This is the document that was helpfully handed up to us at C2, and of course this was a protocol which was sent to Mr Mackenzie and he would have had it well in mind. This is the General Optical Council Protocol on the Handing of Criminal Convictions Disclosed by Registrants.

In order to avoid any misunderstanding, you are for these purposes please, to ignore paragraphs 2, 3 and 4 which have nothing whatsoever to do with Mr Mackenzie. I am able to tell you, to use an unpleasant shorthand that these are to do with offences which might touch on the protection of people who are a danger to children and a danger to vulnerable adults. There is no suggestion that the offences contained in Schedule 4 of the Criminal Justice and Court Service Act 2000 have any relevance whatsoever to this particular

applicant. So the protocol, so far as it applies, would start at paragraph 1 and would jump, very appropriately, to paragraph 5 which is where Mr Albuery took you to when he was making his submissions.

That protocol does not bind you. It does not fetter your hands and you must not allow it to do so. You bring a fresh eye to this matter. Of course you may have regard to the facts and matters which are set out there; that is not a statutory framework which binds you.

Of course, it would be very peculiar if you were not to pay attention to a number of the matters which are set out there, but as I say, this does not determine how you decide this appeal.

As I have already said, my advice is that you should bear in mind that this appellants represented himself and of course gave evidence. That is a very stressful matter in any circumstances. Mr Mackenzie is clearly not in the category of people who is a professional witness, a sort of expert who is well used to giving evidence, nor is he for instance a police officer or indeed an advocate. Please bear that in mind.

He has through me asked you to take into account important matters which you may think are central to the questions of insight, remorse and repentance. No criticism, of course, should attach to Mr Mackenzie for not deliberately focusing on those matters himself and I thought it right because he wasn't represented to bring to your attention all those matters which appear in the sentencing remarks.

You have heard how he responded to the clang of the prison door. You may see that from the many documents which appear towards the back of this bundle, and you have also heard and you will see how he helped others whilst he was in prison.

You know what the judge heard and most importantly what he and I suppose the Appeal Court accepted, about Mr Mackenzie's insight, remorse and repentance.

You will no doubt wish to think long and hard about the purposes of imprisonment and the opportunities that it may offer for returning to a life of industry and honesty, and you will wish to consider how it is that Mr Mackenzie began to consider life as an optician, and you will no doubt have in mind the reference at page 95 of the Bundle C1 which is from a member of this profession.

It may assist you simply to turn that up now so that you have it in mind. The reference at page 95 is of course from an optometrist. It is an optometrist, a name and an address of significance in this case because as you have heard from Mr Mackenzie this is the gentleman under whose auspices he has been employed, and was employed, as a condition of his incarceration in the Open Estate in Scotland, and you will see what this gentleman says. In the end you may conclude that the question you will wish to focus on is the question of

whether on the balance of probabilities it would indeed damage public confidence in the profession to allow the registration of Mr Mackenzie as a student.

You may well think that this is a difficult matter. You must of course keep in mind Mr Mackenzie's interests. You must also bear in mind the interests of the profession, and most importantly the interests of the general public.

There is always a balancing act to be carried out. There can be no rule that a conviction rules somebody out from membership of a profession. You have been referred, and referred if I may say so entirely properly, albeit I was a little difficult about the reference to the Code of Conduct, and you may well think it would be an extraordinary proposition that honesty and trustworthiness were not towards the heart of what it is to be the member of any profession.

The question, of course, is not whether this gentleman was in the past rank dishonest; clearly he was, and indeed his own plea at the High Court in Edinburgh is an admission that he was. The question is whether now, that is to say either today or I suppose in reality in September of next year, because the chances of beginning training would not be until September of next year, public confidence in this profession would be shaken such that it would not be appropriate to allow Mr Mackenzie entry to the Student Register.

Mr Mackenzie - that is the advice that I tender to the Committee. As a procedural matter, both you and the Council now have an opportunity to make submissions either correcting or adding to or asking me to add or explain anything I have said, and I appreciate you are in a very difficult position.

I think what I would propose doing is turning first to the Council and asking them if there is anything that they would wish me to clarify particularly by reference to the law, and I know that the Council will do their very best to protect your interests in the sense as *amicus* in this difficult task, but you too have a right to add, correct or make submissions.

Mr Albuery, would you in the circumstances, go first?

Mr Albuery: Yes, and there is nothing we would want to add to the advice you have very helpfully given. Thank you.

Mr Mackenzie: There is nothing.

Mr Levisaur: Very well. Mr Mackenzie, you should know this; that it is extremely unusual for a Legal Adviser to have had to have done what I have done today. There is no question of my or anybody else bending over backwards to help you. All we seek to do is to put you and the tribunal in the position they would have been in if there was somebody as competent as Mr Burns who was appearing for you as he appeared in the High Court.

You should also understand that whatever I say to the Committee, they pay attention to and if they decide to disagree or to depart from any legal advice I

have given them then they must say so, and bluntly must explain why that in due course they will do if they do not accept the advice that they have been given.

Lady Wall: Thank you very much. Now, I think that concludes the Hearing. We are very grateful for the legal advice.

It is ten to one and I would imagine that lunch is outside and that everybody else is going to need their lunch after really quite a busy morning. Let's aim for 2:30 and we see where we get to then, but if everybody comes back we will make it clear whether we need any further time to deliberate.

Mr Levisaur: Mr Albuery, may I mention one point, and that is this. In the event that I am asked for any legal advice which is not simply a repetition or clarification of that which I have already given, rather than leave matters to the end I will ask the Chairman to ensure that both parties are brought straight back so that I may repeat the advice that I have given so that in the circumstances it can be corrected instantly if I have got it wrong?

Mr Albuery: Thank you. I wonder how I reconcile that, though, with being released until 2:30?

Mr Levisaur: I can say this with considerable confidence; I will not be tendering any fresh or new advice until shortly before that time.

Mr Albuery: Thank you very much.

[Hearing adjourned at 12:49]

[Hearing resumed at 15:50]

Lady Wall: Mr Mackenzie we have come to our conclusion and we have drafted these reasons, and I am going to read them out to you but then you will get a copy.

The Registration Appeals Hearing of 22 January 2010.

On 21 January 2010 the Registration Appeals Committee met to consider an appeal against the decision of the Council not to register Donald Mackenzie in the register of student dispensing opticians.

That refusal was expressed as follows, 'To allow registration would damage public confidence in the profession'. The Committee has considered with considerable care the matters before it in the bundle (C1) and the documents A1 and A2. The Committee has also considered the submissions made by Mr Mackenzie on his own behalf. The Committee has accepted the careful advice given by the legal adviser.

The effect of that legal advice is that the burden of proof lies on the appellant to satisfy the Committee on the balance of probabilities that public confidence in the profession would be maintained were he permitted to register as a student dispensing optician. It reminded itself that the Committee hears the appeal today and that it is to consider the question of public confidence now and now as at the date of the offences or the conviction.

The papers before the Committee show offences of startling dishonesty involving sums which are barely credible over a period of some four and a half years. They also show unusual features which were very clearly set out in mitigation in the judge's sentencing remarks and in his report to the appellate court. The appellant has been a model prisoner who has been assessed as very unlikely to re-offend. Moreover, he has been supported in his aspiration by a member of this profession. The documents in support of his application at pages 79-98 in C1 are undoubtedly impressive.

The Committee is required to balance the interests of the profession, the interests of the public and the interests of this appellant.

Mr Mackenzie has made it clear that he would like to begin training in September 2010. He has told the Committee that his licence expires on 5 February 2013. It follows that Mr Mackenzie has not yet served the sentence imposed on him. He continues to be subject to conditions and to the possibility of recall to prison.

Taking all of these matters into account the Committee is struck by the fact that Mr Mackenzie was only released on licence in October 2009 and that since his initial admission to custody in June 2006 some three and a half years have elapsed; a period which is less than the period over which these offences were committed. Trustworthiness and honesty lie at the heart of what it is to be a professional, whether in this or any profession. The Committee is deeply troubled by what it thinks is the inevitable reaction of any honest member of the public confronted by these facts and indeed by the reaction of any honest patient. Whilst they and the Committee would, and do, applaud the attempts of Mr Mackenzie to turn round his life and to respond to imprisonment as he has done, they would be affronted by the notion that a man still on licence for such serious offences could embark on student membership of a profession.

The Committee is not in these circumstances satisfied that public confidence in the profession would be maintained if this appeal was allowed. The Committee, whilst not encouraging any further application, acknowledges that the position might be different were such an application to be made after 5 February 2013 when Mr Mackenzie is no longer subject to the terms of his parole licence.

For all these reasons the appeal is dismissed.

Mr Mackenzie: you have a right under section 23G(1)(c) of the Opticians Act 1989 to appeal against this decision within 28 days of today to the Court of Session in Scotland.

Is that all clear?

Mr Mackenzie: It is.

Lady Wall: Thank you, and now you will have a copy. Thank you everybody. The hearing has now ended.

[Hearing concluded at 15:50]