

**GENERAL PHARMACEUTICAL COUNCIL**

**FITNESS TO PRACTISE COMMITTEE**

129 Lambeth Road, London SE1 7BT

Friday 20 January 2012

Chairman: Mr Patrick Milmo QC

Committee Members: Mrs Hilary Anderson  
Mrs Ros Gardner

Committee Secretary: Ms Mark Mallinson

CASE OF:

**MELVILLE, Jennifer Elizabeth**  
**(Registration Number: 2055865)**

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MS NIRUPAR UDDIN, Case Manager, appeared on behalf of the General  
Pharmaceutical Council

MR PHILIP GAISFORD, Counsel, instructed by Richard Nelson Solicitors,  
appeared on behalf of Ms Melville, who was present.

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Transcript of the shorthand notes of T A Reed & Co Ltd  
Tel No: 01992 465900

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I N D E X

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DETERMINATION ON IMPAIRMENT

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## DETERMINATION

THE CHAIRMAN: The Registrant, Jennifer Melville, has admitted, as she had to, that on 8 October 2010 she received a police caution for the offence of being in possession of Class A and Class C controlled drugs. She denies, however, that by reason of that caution her fitness to practise is impaired. That is the issue we now have to determine.

The circumstances leading to the caution were that Miss Melville, with friends, was attending the Notting Hill carnival when she was seen by police officers apparently about to ingest some white powder. She was arrested and taken to the police station. There there was found on her a wrap containing some cocaine and a tablet containing Class C controlled drugs. Miss Melville told us that she was sold these substances by a stranger at the carnival. The tablet was represented to be an ecstasy tablet, a well-known amphetamine, but the police on testing found it was not actually ecstasy but some other drug which fell under the classification of Class C drugs.

It must be stated that the Particulars of Allegation only cited the caution as giving rise to impairment. Impairment has not been defined in any pharmacy Order, but the term has been the subject of a number of High Court decisions which have made it clear that it is a broad concept which covers a much wider bracket of situations than just competence or lack of required skills on the part of the pharmacist. These decisions have been codified; it might be said, in the 2010 Fitness to Practise Rules made under the 2010 Pharmacy Order, which in Rule 5 set out what are the fitness to practise criteria. The Rule, ( Rule 5(2)), if I might to some extent paraphrase the introduction, states that in considering whether the requirements of fitness to practise are met, regard must be had as to whether the conduct of the registrant,

“(a) presents an actual or potential risk to patients or to the public; (b) has brought or might bring the profession of pharmacy into disrepute; (c) has breached one of the fundamental principles of the profession of pharmacy;

or (d) shows that the integrity of the registrant can no longer be relied upon”.

It is said on behalf of Miss Melville that (a) and (d) are not engaged and with that we agree. The fact of the caution does not involve any actual or potential risk to patients or the public. It is not an offence of dishonesty so it does not show that the integrity of the registrant can no longer be relied upon. The registrant accepts that (b) does apply; namely, that she has brought or might bring the profession of pharmacy into disrepute, but it is maintained on her behalf that (c) is not engaged as she has not breached one of the fundamental principles of the profession of pharmacy. With that contention we are not in agreement with the registrant’s representative.

He has stated that the fundamental principles are set out in the Code of Ethics and they are seven in number, and we are prepared to accept that that is right. Rule 6 is in these terms, that the registrant, “must be honest and trustworthy”. What does that involve? To answer that question we must look at eight subparagraphs setting out what is required of a pharmacist to comply with Rule 6. Rule 6(5) states that the pharmacist must,

“Adhere to accepted standards of personal and professional conduct”.

The commission of a criminal offence must be a breach of that part of the code. Indeed, perhaps that analysis is not strictly necessary as it may be no more than common sense that a pharmacist unlawfully in possession of illicit drugs for her own personal use must be a breach of a fundamental principle of the profession. Thus we cannot accept that our considerations must be confined to whether and to what extent Miss Melville brought the profession into disrepute.

Mr Gaisford, on behalf of the registrant, in a well presented argument has made a number of what might be described as reasonable points. He has endeavoured to draw attention to the mitigating circumstances relating to the offence. He pointed out Miss Melville’s comparatively young age. He said that this was not the most serious offence that could be committed in relation to drug abuse. She was not

addicted or dealing in drugs. He emphasised Miss Melville's character and record. As to the latter, it has to be said that she has had an impressive career so far as a pharmacist, and that perhaps is indicated by her very recent appointment as a lead pharmacist in the Borough of Hackney. There are testimonials to the effect that she is a pharmacist of exceptional ability. As to her character, there are no disciplinary blemishes on her record and she has been quite open in describing what has been her practice in relation to recreational drug use. To repeat a phrase used by Mr Gaisford, she has "come clean" about that aspect of her life and he says that that is cogent evidence of her overall integrity.

The other limb of Mr Gaisford's submissions has focused on the issue whether Miss Melville's fitness to practise is currently impaired, which is what the law requires. We are not concerned with whether it had been impaired by her conduct in the past. This submission is based upon the concept of impairment or matters giving rise to impairment being susceptible to remedy. Thus, for example, an incompetent pharmacist can remedy that impairment by becoming and showing herself to be a competent pharmacist. Mr Gaisford thus argued that by the general conduct of his client since her caution, her recognition articulated before us that using prohibited drugs is wholly unacceptable conduct for a pharmacist, the fact that tests have confirmed that she has not taken any drugs for over a year, and that she has turned over what is described as a "new leaf" in relation to her private behaviour in the context of drugs, we can confidently find that there is no current impairment.

These arguments in our view fail principally on two grounds. If as is conceded by her she has brought the profession into disrepute by her behaviour, that cannot be cured by exemplary conduct in the period thereafter. A finding of impairment may be necessary to restore public confidence and the reputation of the profession. That was the effect of the High Court decision in a case called *Yeong v GMC* decided in 2009 which was concerned with a doctor's misconduct in having a relationship with a patient.

Adapting the judgment at paragraph 48 to the circumstances of this case, the judge stated that where a fitness to practise panel considers that the case is one where

the misconduct consists of violating a fundamental rule of the profession, thereby undermining public confidence in the profession, a finding of impairment to fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the practitioner to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence. We think that that proposition applies in Miss Melville's case.

The second ground which in our view undermines Mr Gaisford's submissions is that he has not taken into account sufficiently or perhaps at all the public interest, and on that aspect we would quote a recent decision of Mrs Justice Cox in a case called *CHRE v NMC and Grant* where the judge said this:

“In determining whether a practitioner's fitness to practise is impaired by reason of misconduct” –

we would add by reason of her conviction or caution –

“the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances”.

Applying those observations, we believe that pharmacists are in a special and perhaps onerous position when it comes to the prohibited use of drugs. It was said that pharmacists are gatekeepers in relation to drugs. They are certainly custodians. We believe that their general duty must be not only strict and vigilant observance of the law as regards possession of drugs, but also the setting of an example to the rest of the community in the context of drug use or abuse as the public will expect a pharmacist above all to appreciate the risk and dangers of drug abuse and to act accordingly.

Reverting to Mrs Justice Cox in the case of *Grant*, the Committee whose decision on impairment was subject to review, were criticised by the failure to give sufficient or any attention to the public interest. The Committee referred to the seriousness of the allegations but that was said by Mrs Justice Cox as to be not the same thing as having regard to the wider public interest and to whether public confidence in the profession would be undermined if a finding of impairment were not made in the circumstances of the case. That applies in our judgment in this matter and public confidence would be undermined - public confidence in the pharmacy profession - if, having regard to the caution or unlawful possession of controlled drugs, a finding of impairment was not made. That is our finding.

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I N D E X

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DETERMINATION ON SANCTION

1

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DETERMINATION

A THE CHAIRMAN: In our determination on impairment in this case, we recounted the  
background to the administration of the police caution in October 2010 to the registrant,  
Jennifer Melville, for unlawful possession of controlled drugs. Having determined that  
B the registrant's fitness to practise is impaired by reason of the police caution referred to in  
the Particulars of Allegation, we now have to determine the appropriate sanction. The  
background to the administration of the caution has been sufficiently described in our  
determination on impairment and that should be read in conjunction with this  
C determination on sanction.

It is necessary, first of all, to state some well known principles which apply to sanction.  
D First of all, the purpose of sanctions. The purpose is three-fold: the protection of the  
public; the maintenance of public confidence in the profession and the maintenance of  
proper standards within the profession. Next, what must be the approach of this  
Committee in exercising its discretion, and it is a wide discretion? That discretion must  
E be exercised in a fair and reasonable manner, giving due attention to the doctrine of  
proportionality. The doctrine of proportionality in this context requires us to impose a  
sanction which does not place any greater restriction on the registrant's right to practise  
her profession than is necessary to achieve its objectives. Overall, we must balance the  
interests of the registrant against the public interest, which is made up of those purposes  
which I have already mentioned.

F We must take account of aggravating and mitigating features. As for aggravating  
features, only one has been put forward by the Council's advocate, namely blatant  
disregard of the standards of conduct set out in the Code of Ethics. That there was such a  
disregard is self-evident. It has also been tentatively suggested on behalf of the Council  
G that there was a lack of insight. This is a matter which we have considered.

The registrant has explained that at the time of her offence, in August 2010, she had a  
H compartmentalised attitude to her behaviour as a pharmacist whilst on duty and her  
conduct in her social and private life. How she behaved when not at work she felt should  
not be governed by the principles which applied when practising as a pharmacist. It was  
with that mind-set that she was prepared occasionally to use recreational drugs. She now

A recognises and appreciates that this perception of some boundary between her conduct as  
a pharmacist and her conduct socially or in private was fundamentally at fault, and that  
her conduct outside her practice as a pharmacist will impinge on the reputation of her  
profession and public attitudes towards her profession. Putting it very shortly and not  
B using the registrant's own words, she recognises that she cannot divorce the two worlds  
of work and play.

That is what she told us in evidence and naturally we questioned whether we should  
believe what she said. There are three reasons for giving credibility to her evidence.  
C Generally she was remarkably open, candid and straightforward in the evidence that she  
gave. She admitted that this occasion when she was arrested and cautioned was not the  
sole occasion that she had acquired and used drugs like cocaine and amphetamine. There  
was no evidence that the Council could have produced about those occasions; no one, it  
would seem, who served on the Council knew anything about them. Even more  
D significantly, Miss Melville confessed in the course of her evidence that she had on one  
occasion after the administration of the caution again consumed prohibited drugs. It was  
at a 2010 New Year's Eve party. Again, nobody in authority knew about this and there is  
no reason to think that it would ever have come to light but for her admission to this  
E Committee.

She made those admissions because she decided she would come completely clean about  
her history of drug taking and, in our assessment, in so doing she has demonstrated the  
credibility of her evidence. We should perhaps also say at this juncture that we have  
F taken account of these further admitted incidents when considering sanction. Though the  
fact that the circumstances leading to the caution must now be regarded as not an isolated  
incident, that must be balanced against the credit that she deserves for making a clean  
breast of her conduct in this regard.

G The second reason why we give credibility to her statements is that she has undertaken  
testing for drugs by having hair tests which covered the period from the middle of April  
to the end of November 2011 and all those tests were negative.

H

A | The third reason arises from the testimonials that have been presented to us containing tributes to her as a person and a pharmacist, expressed in highly favourable terms. We will say more about that aspect a little later.

B | We should now come to mitigating features. There are quite a long list of mitigating features. There is no disciplinary history. She has, for the reasons I have endeavoured to explain, shown genuine insight. There have been open and frank admissions. There was no actual harm to any patient. She has made expressions of remorse for her behaviour which we accept as genuine, and she has taken steps to remedy her state of mind which  
C | allowed her to take recreational drugs when off duty, as it might be so put. That is described in paragraph 6 of the statement on page 20 of the Council's bundle in which this is stated:

D |        “She has developed her understanding and acceptance of the unacceptability of this kind of behaviour by fully reflecting on it, by researching it, by engaging with counseling and by discussing it with her employers; by changing her leisure time towards more healthy activities”.

E | Further details were given about matters which are referred to in that paragraph. Perhaps in this context we should mention that Miss Melville's home was or had been in New Zealand. That is where she was brought up and where her parents lived. She recognised  
F | that perhaps she lacked the support and comfort that a family can provide when she has been over here. She thought that a measure of substitution for such family support could be provided by talking with a counsellor.

G | I return to the subject of the testimonials which have been placed before us. We must say that looking at them as a whole, they are extremely impressive. For the past seven years Miss Melville has worked for the East London NHS Foundation Trust and many of the testimonials concern and talk about her work at the Trust. We comment that it is rare that one reads testimonials which convey so clearly a record of high achievement,

H | acknowledgement of her skills and abilities as a pharmacist and the respect which she has

A engendered amongst her working colleagues. I will read from one of those testimonials which is that of Miss Organ in a letter addressed to the Chairman of this Committee dated 23 November 2011. She states in the third paragraph,

B “Jennifer opened the medicines information department in April 2010”.

I should insert that this was with the East London NHS Foundation Trust.

C “...in response to clinical need within the trust, as Jennifer was one of our most experienced and knowledgeable specialist mental health pharmacists, Jennifer was the best candidate to take on this challenging task. As a result of this new position Jennifer had to quickly familiarise herself and train others to be able to answer medicines information queries to the UKMI standards. She manages not only the running of the department but also ensuring that the department produce regular medicines bulletins and send out trust wide medicines information to share expert knowledge and update our prescribers. She also manages a team of four 8a senior pharmacists to work within the department and again oversees the quality of the work they produce”.

E In the face of such reports about her work, it really comes as no surprise that in a competitive application procedure she has been appointed as a lead pharmacist in the City & Hackney to take effect from 30 January 2012. It is not to be ignored that this appointment was made at a time when the Trust had full knowledge of her appearance before this Committee and the reasons for such an appearance.

F  
G  
H Turning to the sanctions which we can impose, they are going from bottom to the most serious, a warning; the imposition of conditions; direction for suspension for a maximum period of 12 months and a direction for the removal of her name from the register. The Council accepts that a direction for removal would be disproportionate and we readily agree with that. But the Council submits that suspension for a period would be the appropriate sanction in the circumstances. We accept that a conviction or caution for unlawful use or possession of controlled drugs would in many and perhaps most instances attract the sanction of suspension. That would be the appropriate sanction if for no other

A | reason than the message needs to be sent to the profession and the public that such  
conduct is unacceptable and unbecoming a pharmacist and to maintain or restore public  
confidence in the profession.

B | We are prepared to take a different course in this case. Our reason for so doing is that we  
accept that Miss Melville has changed and permanently changed her attitude to the use of  
recreational drugs, and there is no realistic prospect of her lapsing from what she now  
accepts are the required standards of the profession in this area of activity. The second  
C | reason is public interest, which of course is a prime consideration when determining the  
appropriate sanction. In this case, in our view, perhaps unusually, the consideration of  
public interest operates in favour of the registrant. We feel that it would be contrary to  
the public interest to impose any sanction which interrupts her remarkably successful  
career working as a pharmacist in East London.

D | She gave us in the course of her evidence a detailed description of what she has done as a  
pharmacist since she came to this country in 2003. Within a relatively short period of  
time she developed an expertise in mental health pharmacy. After that she was  
responsible for the creation and development of a medical information service in the  
E | district of Homerton, which was of general benefit to doctors and others working in  
health within the Trust area. At the same time she was working as a clinical pharmacist  
for a psychiatric intensive care unit. This is referred to in the letter which I quoted from  
Miss Organ. In the fourth paragraph Miss Organ writes:

F |           “Jennifer is also the clinical pharmacist for a psychiatric intensive care unit and a  
          psychiatric specialist mother and baby unit within the City & Hackney Centre for  
          Mental Health. She has developed and maintained excellent clinical knowledge  
          within these specialist areas and as a result the consultants rely heavily on Jennifer  
G |           for her expert advice”.

H | It must be in the public interest that Miss Melville can continue work of that kind without  
interruption and still work without her energies and commitment to pharmacy being  
stifled or compromised by a suspension direction.

A | Mr Gaisford on behalf of the applicant has suggested that the appropriate sanction is the  
issue of a warning, which he maintains, together with a finding of impairment, will send a  
sufficient message to the profession and will demonstrate the Council have not  
overlooked this matter and are treating it with proper seriousness. There is merit in  
B | Mr Gaisford's submission, but we cannot issue a warning and impose a condition, and  
contrary to what both advocates have said, we believe that there is a condition we can  
impose which is appropriate and should act for the benefit of the registrant in providing  
her with support. The condition is that the registrant undertakes for the next two years  
C | hair tests for the detection of cocaine and amphetamines. The first such test shall be  
arranged before the end of February 2012 and thereafter at four-monthly intervals until  
the expiry of the two-year period. The results of such tests should be promptly forwarded  
to the Council. The costs of such tests are to be borne by the registrant.

D | The underlying thinking behind the imposition of this condition should be self-evident. It  
is not that we doubt the veracity of Miss Melville's assurance that she would not use  
recreational drugs in the future, but we feel that there would be benefit in a condition  
which will support that resolution. We are unable to issue a warning in conjunction with  
the imposition of this condition, but we shall certainly inform the registrant that should  
E | she repeat the conduct which has led to her appearance before us or there is any further  
occasion when she unlawfully ingests or is in possession of controlled drugs, there is  
every likelihood that this Committee will make a direction which will have the effect of  
depriving her of her right to practice, at least, for a significant period.

F | That concludes this determination unless anyone wishes to make any application. We  
also order a review at the end of the two-year period so that we are sure that the condition  
has been fully complied with. I thank both advocates for their help.

G | (The hearing concluded at 5.40 pm)

H |