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香港中區
花園道 3 號
萬國寶通銀行大廈 3 樓
立法會秘書處
林培生先生

林先生：

《防止兒童色情物品條例草案》委員會

現按條例草案委員會的要求，附上下述的一宗有關電腦內兒童色情物品的英國案件資料以作參考(文件只具英文本)：

Atkins v. Director of Public Prosecutions

隨函附上的資料也提及 Goodland v. Director of Public Prosecutions 一案，但該案件與上述事項並不直接相關。

保安局局長
(尤桂莊 代行)

二零零三年一月二十日

副本送：
警務處處長 (經辦人：朱明寶女士) 2528 2284
律政司 (經辦人：張月華女士 2845 2215
單蘭得女士) 2180 8689

A [QUEEN'S BENCH DIVISION]

*ATKINS v. DIRECTOR OF PUBLIC PROSECUTIONS

DIRECTOR OF PUBLIC PROSECUTIONS v. ATKINS

GOODLAND v. DIRECTOR OF PUBLIC PROSECUTIONS

B 2000 Feb. 18; March 8

Simon Brown L.J. and Blofeld J.

Crime—Child, indecent photograph of—Data on computer—Indecent pictures of children downloaded from Internet—Defendant purportedly engaged in academic research—Defendant deliberately saving some pictures—Other pictures saved in computer cache without defendant's knowledge—Whether defendant having legitimate reason for possession of pictures—Whether in possession of pictures stored without his knowledge—Protection of Children Act 1978 (c. 37), s. 1(1)(a)(4)(a) (as amended by Criminal Justice and Public Order Act 1994 (c. 33), s. 84)—Criminal Justice Act 1988 (c. 33), s. 160(1)(2)(a) (as amended by Criminal Justice and Public Order Act 1994, s. 84)

C

Crime—Child, indecent photograph of—Pseudo-photograph—Two photographs taped together—Whether "pseudo-photograph"—Protection of Children Act 1978, s. 7(7) (as inserted by Criminal Justice and Public Order Act 1994, s. 84)

D

The defendant in the first case, a university lecturer who browsed the Internet for indecent photographs of children which he said was for academic research purposes, deliberately saved some of the pictures which he viewed onto a directory on his computer. Unknown to him the computer automatically saved other pictures he viewed but did not deliberately save into a temporary information store, known as a "cache." In respect of the pictures in the cache the defendant was charged with 10 counts of possessing an indecent photograph of a child, contrary to section 160(1) of the Criminal Justice Act 1988, as amended,[1] and 10 counts of making an indecent photograph of a child, contrary to section 1(1)(*a*) of the Protection of Children Act 1978, as amended.[2] In respect of the pictures which he had deliberately saved the defendant was charged with 14 counts of making an indecent photograph of a child. At his trial the stipendiary magistrate found that there was no case to answer in relation to any of the charges of making an indecent photograph, on the basis that the offence could not be committed by copying or storing an image, but convicted the defendant of possessing the indecent photographs in the cache, finding that knowledge was not an essential element of the offence. The magistrate also held that possession for the purposes of legitimate academic research could not amount to a "legitimate reason" within section 160(2)(*a*) of the Act of 1988 for possessing indecent photographs, and that in any event the defendant had not possessed the pictures solely for the purpose of academic research. The defendant appealed by way of case stated against his convictions, and the prosecutor cross-appealed against the findings of no case to answer in respect of 11 of the charges of making an indecent photograph.

E F G H

In the second case the defendant possessed an item made up of a photograph of a girl onto which a second photograph of part of the naked body of a woman was fixed by a hinge made of tape so

[1] Criminal Justice Act 1988, as amended, s. 160(1)(2): see post, p. 1433A-B.
[2] Protection of Children Act 1978, as amended, s. 1(1)(4): see post, p. 1432B-D. S. 7(7): see post, p. 1432G.

that it could be superimposed over the image of the girl's body. The justices convicted the defendant of possessing an indecent pseudo-photograph of a child, contrary to section 160(1) of the Act of 1988, as amended. The defendant appealed by way of case stated.

On the appeals and the cross-appeal:—

Held, (1) that whether the defence of "legitimate reason," for the purposes of both section 160(2)(*a*) of the Criminal Justice Act 1988 and section 1(4)(*a*) of the Protection of Children Act 1978, was made out was a question of fact; that, where academic research was put forward as a legitimate reason, the question was whether the defendant was a genuine researcher with no alternative but to have indecent photographs in his possession; that courts were entitled to be sceptical and should not too readily conclude that the defence had been established; and that, accordingly, since the magistrate had found that the defendant in the first case did not possess the pictures solely for the purpose of academic research, the defence was not made out (post, p. 1435E-H).

(2) Allowing the prosecutor's cross-appeal in part, that "making" within section 1(1)(*a*) of the Act of 1978, as amended, included the intentional copying or storing of an image or document on a computer; that the defendant should therefore have been convicted of making the pictures which he deliberately saved, but was not guilty of making the pictures which the computer had automatically saved without his knowledge; and that, accordingly, the case would be remitted to the magistrate with a direction to convict in respect of 11 charges of making an indecent photograph (post, p. 1438E, G-H).

Reg. v. Bowden (Jonathan) [2000] 2 W.L.R. 1083, C.A. applied.

(3) Allowing the defendant's appeal against his convictions on the possession charges, that knowledge was an essential element of the offence of possessing an indecent photograph of a child contrary to section 160(1) of the Act of 1988, as amended; that a defendant could not be guilty of the offence unless he knew that he had photographs in his possession, or knew that he once had them in his possession, or knew that he possessed something with contents which in fact were indecent photographs; and that, accordingly, since the defendant had been unaware of the existence of the cache which contained the unsaved photographs, he was not guilty of possessing those photographs (post, p. 1440D-F).

Reg. v. Buswell [1972] 1 W.L.R. 64, C.A. considered.

(4) Allowing the defendant's appeal in the second case, that an item consisting of parts of two different photographs taped together could not be said to be an image which appeared to be a photograph and, therefore, although a photocopy of such an item might constitute a pseudo-photograph, the item itself could not constitute a pseudo-photograph within section 7(7) of the Act of 1978; and that, accordingly, the item in the defendant's possession was not a pseudo-photograph and he should not have been convicted (post, p. 1442A-C).

The following cases are referred to in the judgment of Simon Brown L.J.:

Morelle Ltd. v. Wakeling [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708, C.A.

Pepper v. Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42, H.L.(E.)

Reg. v. Bowden (Jonathan) [2000] 2 W.L.R. 1083; [2000] 2 All E.R. 418, C.A.

Reg. v. Buswell [1972] 1 W.L.R. 64; [1972] 1 All E.R. 75, C.A.

Reg. v. Fellows [1997] 2 All E.R. 548, C.A.

Reg. v. Hussain (Iftikhar) [1981] 1 W.L.R. 416; [1981] 2 All E.R. 287, C.A.

Reg. v. Steele [1993] Crim.L.R. 298, C.A.

Tuck & Sons v. Priester (1887) 19 Q.B.D. 629, C.A.

The following additional cases were cited in argument:

Reg. v. Bristol Justices, Ex parte E. [1999] 1 W.L.R. 390; [1998] 3 All E.R. 798, D.C.

Reg. v. Brown (Gregory) [1996] A.C. 543; [1996] 2 W.L.R. 203; [1996] 1 All E.R. 545, H.L.(E.)

Reg. v. E.T. (1999) 163 J.P. 349, C.A.

Reg. v. Graham-Kerr [1988] 1 W.L.R. 1098, C.A.

Atkins v. Director of Public Prosecutions
Director of Public Prosecutions v. Atkins

Case Stated by Mr. William Kennedy, metropolitan stipendiary magistrate acting in and for the Avon commission area sitting at Bristol.

The defendant, Anthony Rowan Atkins, was convicted on 27 May 1999 on 10 summonses that, between 2 October 1997 and 23 October 1997 at the University of Bristol, Department of English, Bristol, he had in his possession an indecent photograph of a child, contrary to section 160(1) of the Criminal Justice Act 1988. He was fined £300 on each charge together with total costs of £350. An order was made that he should register with the police under the Sex Offenders Act 1997 for five years. In respect of 24 summonses that, between 2 October 1997 and 23 October 1997 at the University of Bristol, Department of English, Bristol, he made an indecent photograph of a child, contrary to section 1(1)(*a*) of the Protection of Children Act 1978, the stipendiary magistrate found no evidence and dismissed the case in respect of three of the charges and found there was no case to answer in respect of the remaining charges. The defendant appealed in respect of his convictions of possessing an indecent photograph of a child and the prosecutor cross-appealed in respect of 11 of the charges against the defendant of making an indecent photograph of a child.

The questions for the opinion of the High Court were: (i) in respect of a charge of possession of an indecent photograph of a child under section 160(1) of the Act of 1988, was the magistrate right to hold that it was an offence of strict liability, mitigated only by the three available statutory defences in subsections (2)(*a*), (*b*) and (*c*); (ii) in respect of the defence of legitimate reason under section 160(2)(*a*) of the Act of 1988, was the magistrate right to hold that the defence was limited to specified anti-pornographic campaigners, defined medical researchers and those within the criminal justice system, namely magistrates, judges, jurors, lawyers and forensic psychiatrists whose duties in the enforcement of the law necessitated the handling of the material in each particular case, and that the defence was not capable of including research into child pornography even if "honest and straightforward;" (iii) in respect of a charge of making an indecent photograph of a child under section 1(1)(*a*) of the Act of 1978, was the magistrate right to hold that it required some act of manufacture, namely "creation, novation or fabrication" and that making did not mean "stored, isolated or reserved in whatever form," or copying an image or document whether knowingly or not.

The facts are stated in the judgment of Simon Brown L.J.

Goodland v. Director of Public Prosecutions

Case Stated by Avon justices sitting at Bristol.

On 11 December 1998 an information was preferred by the prosecutor against the defendant, Peter John Goodland, that on 5 November 1998 he had in his possession an indecent pseudo-photograph of a child, contrary to section 160(1) of the Criminal Justice Act 1988. The justices

heard the information on 21 April 1999. The justices convicted the defendant, sentenced him to a conditional discharge for a period of two years, and ordered him to pay prosecution costs of £50 and that he be registered under the Sexual Offenders Act 1997 for five years. The defendant appealed against his conviction.

The question for the opinion of the High Court was whether in coming to the conclusion that the item was a pseudo-photograph the justices were wrong in law.

The facts are stated in the judgment of Simon Brown L.J.

Helen Malcolm for the defendant Atkins.
Peter Blair for the defendant Goodland.
Robert Davies for the prosecutor.

Cur. adv. vult.

8 March. The following judgments were handed down.

SIMON BROWN L.J. These two appeals by way of case stated raise a number of interesting and difficult questions as to the proper construction and application of the Protection of Children Act 1978, as amended, and section 160 of the Criminal Justice Act 1988, as amended, provisions concerned with indecent photographs of children.

Dr. Antony Rowan Atkins was convicted by the metropolitan stipendiary magistrate acting in and for the Avon commission area sitting at the Bristol Magistrates' Court on 27 May 1999 of 10 offences of having in his possession indecent photographs of children between specified dates in October 1997, contrary to section 160(1) of the Act of 1988. On 25 May 1999 the magistrate had upheld a submission that Dr. Atkins had no case to answer in respect of 24 additional counts of making indecent photographs of children between the same dates, contrary to section 1(1)(*a*) of the Act of 1978, as amended by sections 84(1) and (2) and 168(3) of, and Schedule 11 to, the Criminal Justice and Public Order Act 1994. Dr. Atkins appeals against his conviction on the 10 possession counts; the prosecutor appeals against Dr. Atkins's acquittal on 21 of the "making" counts.

Mr. Peter John Goodland was convicted by the Avon justices at Bristol Magistrates' Court on 21 April 1999 on one count of having in his possession on 5 November 1998 an indecent pseudo-photograph of a child, contrary to section 160(1) of the Act of 1988, as amended by sections 84(4)(*a*) and 168(3) of, and Schedule 11 to, the Criminal Justice and Public Order Act 1994. He now appeals against that conviction.

Although the two appeals raise entirely different points, both coming by sheer chance from the Bristol Magistrates' Court, it has seemed to us convenient to make them the subject of a single judgment, if only to avoid the need to set out the legislation twice over.

The Atkins appeal

The stipendiary magistrate is much to be commended for the great care he took in the conduct of this trial and the preparation of the case stated, which extends to no fewer than 38 pages. The facts he found can, I think, fairly and sufficiently be summarised as follows. Dr. Atkins was appointed to a lectureship in the Department of English at Bristol University on 1 October 1997. He had available to him there both a Viglen

A computer set up in his office and also a departmental computer mostly used by others in the department's main office. On 16 October 1997 another member of the department logged into the departmental computer and was immediately concerned by the menu of Internet addresses recently called up. To cut a long story short a Mrs. Dunderdale, executive assistant, was amongst those consulted and she in turn called in her husband, who for a number of years had run an information technology B centre. Mr. Dunderdale checked the computer's cache file and found there pictures of naked young girls in crude postures. The history of computer use pointed to Dr. Atkins. On 18 October 1997 Mr. and Mrs. Dunderdale decided to examine Dr. Atkins's Viglen computer. Similar pictures were found in the Viglen cache and Mr. Dunderdale was also able to locate within that computer a directory, the "J" directory, in the drive which had C a number of files of similarly indecent material. Mr. and Mrs. Dunderdale made copies of the material in the two caches and in the "J" directory onto floppy discs. Dr. Atkins was shortly afterwards suspended. The expert evidence before the magistrate was:

> "The Internet is a medium to publish and obtain information using computers. A browser program, for example the Netscape D browser, can be used to access the Internet. The browser is able to locate servers and in doing so the user is able to download information, or 'documents.' A user can deliberately choose to download or save documents, but it is not commonly known by users that the browser automatically creates a temporary information store, a 'cache,' of recently viewed documents. The reason for this is that when the user revisits the documents the browser may use the locally E stored cache, provided that it is not too old and does not need updating, which saves time in fetching the documents . . . The cache is automatically emptied of documents as it becomes full, but even then it is possible to retrieve information forensically. Expert computer users can access the cache directly . . . The 'J' directory does not form part of the cache and must have been created separately."

F The position in short is this. The photographs in the "J" directory were there because Dr. Atkins had deliberately chosen to store them there. The photographs found in the caches, however, although voluntarily called up onto the screen when initially Dr. Atkins was browsing the Netscape program, were deliberately not saved. The magistrate concluded that he could not be sure that Dr. Atkins knew of the operation of the computer's cache, knew in other words that the computer would automatically retain G upon its hard disc information sent to it at the user's request.

Paradoxically as at first blush it appears, the 10 counts of which Dr. Atkins was convicted related to photographs recovered from the caches, nine from his Viglen computer and one from the departmental computer, photographs he had deliberately *not* saved, whereas the 11 further counts relating to the "J" directory photographs, those which he *had* H deliberately saved, were dismissed. The main reason for this, I should make plain, is that the prosecution had been out of time to charge Dr. Atkins with possession of the "J" directory material and it was only offences of possession of which the magistrate ultimately found Dr. Atkins guilty.

Put at this stage at its simplest it is Dr. Atkins's argument that he ought not to have been convicted of possession given that knowledge of the existence of the caches could not be proved against him: it is the prosecutor's argument that Dr. Atkins should have been convicted on the

"making" counts in relation both to the "J" directory material and also the material in the caches irrespective of whether he knew of their existence. I must at this point refer to the main legislative provisions in play. I shall set them out in their amended form, although it will be necessary to return later to indicate something of when and how those amendments came about. Section 1 of the Protection of Children Act 1978, as amended, provides:

> "(1) It is an offence for a person—(*a*) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child; or (*b*) to distribute or show such indecent photographs or pseudo-photographs; or (*c*) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or (*d*) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so . . . (3) Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions. (4) Where a person is charged with an offence under subsection (1)(*b*) or (*c*), it shall be a defence for him to prove—(*a*) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or (*b*) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent."

Section 2 of the Act of 1978, as inserted by section 168(2) of, and paragraph 37(1) and (2) of Schedule 10 to, the Criminal Justice and Public Order Act 1994, provides:

> "(3) In proceedings under this Act relating to indecent photographs of children a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16."

Section 7 of the Act of 1978, as amended by section 84(1) and (3) of the Criminal Justice and Public Order Act 1994, provides:

> "(1) The following subsections apply for the interpretation of this Act. (2) References to an indecent photograph include . . . a copy of an indecent photograph . . . (4) References to a photograph include—(*a*) the negative as well as the positive version; and (*b*) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph . . . (6) 'Child,' subject to subsection (8), means a person under the age of 16. (7) 'Pseudo-photograph' means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph. (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult. (9) References to an indecent pseudo-photograph include—(*a*) a copy of an indecent pseudo-photograph; and (*b*) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph."

Section 160 of the Criminal Justice Act 1988, as amended by sections 84(4)(*a*) and (*b*), 86(1), and 168(3) of, and Schedule 11 to, the Criminal Justice and Public Order Act 1994, provides:

> "(1) It is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession. (2) Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove—(*a*) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or (*b*) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or (*c*) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time. (3) A person shall be liable on summary conviction of an offence under this section to imprisonment for a term not exceeding six months or a fine . . . or both. (4) Sections 1(3), 2(3), 3 and 7 of the Protection of Children Act 1978 shall have effect as if any reference in them to that Act included a reference to this section."

I come next to the magistrate's rulings (a) that there was no case for Dr. Atkins to answer on the "making" charges, and (b) that Dr. Atkins was guilty of possession in respect of the photographs held in the caches. As to "making" the case stated reads:

> "Mr. Davies"—counsel for the prosecutor both below and before us—"urges upon me two views in relation to 'making.' First, he says that in relation to those [photographs] found [in the] 'J' directory, they were 'made' by the positive act of the defendant in choosing to store them in that separate directory. Secondly, he says that, as in his submission these items are clearly 'data stored within a computer hard disc,' and arrived there as a result of the defendant's choice to access them for perusal from the Internet, even those found in the cache are 'made.' He urges upon me that the Act of 1978 creates in section 1(1)(*a*) an offence of strict liability—i.e. that 'making' occurs with or without the knowledge of the maker. I must say that I can accede to neither of these submissions. Since biblical times, the Maker has been the Creator, that is he has fashioned something new. I have read Hansard and the Reports of the Committee Stages and I accept that Parliament has tried steadfastly to counter a rising tide of child pornography. It has, first, added the concept of 'making' to prohibited activities, and has later defined the pseudo-photograph. It has sought to extend the possible net of manufacture as wide as is possible. All that has, to an extent, been achieved. There is no doubt that indecent pictures 'made' in any creative way are caught. It has not however in my judgment altered the basic principle of manufacture. 'Made' still means 'created,' 'novated,' 'fabricated'—all definitions from the *Oxford English Dictionary*. It does not mean 'stored,' 'isolated,' or 'reserved' in whatever form. For those reasons I say now that I find the concept of 'making' in this case difficult in relation to [the 'making' charges] and I say that there is no case to answer in respect of them."

The magistrate's eventual ruling on possession was:

> "I have said that I am not sure, upon the evidence, that the defendant knew of the nature of the operation of the Netscape cache. I am urged by the defence to say that any de facto possession was thus

unknowing, and that possession within the meaning of section 160(1) [of the Act of 1988] by this defendant is not made out. I deal with that submission in the alternative. First, it is my view that the offence created by section 160(1) is an offence of strict liability, the effect of which is mitigated only by the three statutory defences set out in subsection (2). If that is right, then once the fact of de facto possession is established, the existence or not of knowledge of that fact by the defendant is irrelevant. My view that this is an offence of strict liability is strengthened by the fact that the lack of knowledge which amounts to the defence is precisely restricted by subsection (2)(*b*), namely that the defendant was not only unaware of the indecent nature of the photograph but had not himself seen it. Both limbs of that subsection must be established by the defendant on the balance of probabilities. He has established neither. The fact is that the defendant by his own act put himself in the position whereby, by the press of a button, transient prohibited material could become stored upon his hard disc. Due to his mistake as to the consequences of his initial act, the prohibited material did indeed transmute to his hard disc, albeit to a different part of it. As I have said, if this is an offence of strict liability, the defendant's mistake is irrelevant. If, however, my view as to strict liability is incorrect in law, my conclusion of fact that the eventual possession of this material upon the hard disc of the computer arose as the direct and sole result of the defendant's initial voluntary act satisfies me that he is in possession of the material for the purposes of section 160(1)."

The magistrate then turned to consider a particular defence which Dr. Atkins had raised under section 160(2)(*a*) of the Act of 1988, namely that he had a legitimate reason for having the photographs in his possession, the purpose of legitimate academic research. The magistrate in the case stated deals with this defence:

"I have read the reports of the committee stage of this Bill, and indeed those of the Protection of Children Bill in Hansard. I am satisfied that Parliament intended to take whatever steps were necessary to eliminate such material and to restrict as far as was possible any lawful possibility of possession. Those who work to those ends must, as a matter of common sense, have to handle such material. Specified anti-pornography campaigners or precisely defined medical researchers were mentioned by the standing committee. I add to those, in common sense, those within the criminal justice system—magistrates, judges, jurors, lawyers and forensic psychiatrists whose duties in the enforcement of the law necessitate the handling of the material in each particular case. I find however not the slightest evidence of any intention of Parliament to extend those categories to those with any other agendas, however cerebral or esoteric. It follows therefore that I find that, even were I satisfied that there was indeed no other explanation for the possession of these images save that of an honest and straightforward desire to research the subject of child pornography, such research does not fulfil the criteria which could properly be regarded as 'legitimate.'"

The case stated indicates, however, that the magistrate would in any event have rejected this defence on the facts:

"I am satisfied that at least a very significant purpose of [Dr. Atkins's] viewing these images was for either the satisfaction of his curiosity, or

A a more prurient interest, neither of which can amount to 'legitimate reason.' Were it possible for the defence of legitimate reason to extend beyond the barrier that I have mentioned to purely sociological research, I find as a fact that such reason could not justify the possession of the particular images in this case."

I can now set out the three questions posed in the case stated for the B opinion of the High Court:

"(1) In respect of a charge of 'possession' of an indecent photograph of a child under section 160(1) of the Criminal Justice Act 1988, was I right to hold that it is an offence of strict liability, mitigated only by the three available statutory defences in subsection (2)(*a*), (*b*) and (*c*)? (2) In respect of the defence of 'legitimate reason' C under section 160(2)(*a*) was I right to hold that the defence is limited to specified anti-pornographic campaigners, defined medical researchers and those within the criminal justice system, namely magistrates, judges, jurors, lawyers and forensic psychiatrists whose duties in the enforcement of the law necessitate the handling of the material in each particular case, and that the defence is not capable of including research into child pornography even if 'honest and D straightforward?' (3) In respect of a charge of 'making' an indecent photograph of a child under section 1(1)(*a*) of the Protection of Children Act 1978 was I right to hold that it requires some act of manufacture namely: 'creation, novation or fabrication' and that 'making' does not mean 'stored, isolated or reserved in whatever form,' or copying an image or document whether knowingly or not."

E I shall address these questions in a different order.

Legitimate reason

As already indicated, however this question falls to be answered, the answer cannot avail Dr. Atkins because the magistrate found that in any event he was not conducting "honest and straightforward research into F child pornography." We are nevertheless invited to consider the question so that courts may have some guidance on the point. The answer seems to me plain. The question of what constitutes "a legitimate reason," for the purposes of both section 160(2)(*a*) of the Act of 1988 and section 1(4)(*a*) of the Act of 1978, is a pure question of fact, for the magistrate or jury, in each case. The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests G in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of "legitimate reason" advanced. They will each have to be considered on their own facts. Courts are plainly entitled to bring a measure of scepticism to bear upon such an inquiry: they should H not too readily conclude that the defence has been made out. I should add only that, in my judgment, it is not appropriate here to consult the parliamentary discussions on the point: the conditions specified by the House of Lords in *Pepper v. Hart* [1993] A.C. 593 are not satisfied.

Making

In considering this question it is necessary to bear in mind how the legislation stood before section 1(1)(*a*) of the Act of 1978 and

section 160(1) of the Act of 1988 simultaneously came to be amended by section 84 of the Criminal Justice and Public Order Act 1994. Section 1(1) of the Act of 1978 as originally enacted read: "It is an offence for a person—(*a*) to take, or permit to be taken, any indecent photograph of a child (meaning in this Act a person under the age of 16) . . ." Section 160(1) of the Act of 1988 as originally enacted read: "It is an offence for a person to have any indecent photograph of a child (meaning in this section a person under the age of 16) in his possession."

Until 1994, therefore, there was no offence of "making" indecent photographs, nor was there any reference in the legislation to pseudo-photographs. Similarly I may add, until the 1994 amendments, photographs were not defined to include "data stored on a computer disc or by other electronic means which is capable of conversion into a photograph," although the Court of Appeal (Criminal Division) held in *Reg. v. Fellows* [1997] 2 All E.R. 548 that the scope of the original definition was wide enough to include such data. Another amendment introduced in 1994 was that possession contrary to section 160(1) of the Act of 1988, although remaining a summary offence, became imprisonable (six months maximum) rather than merely fineable as previously it had been. Section 1(1) of the Act of 1978 remained an either way offence, imprisonable for up to three years.

Miss Malcolm submitted on behalf of Dr. Atkins that the magistrate was correct in ruling that "making" requires an act of creation and is not satisfied either by copying or storing an image or document, whether knowingly or not. True, she recognised, "an indecent photograph" is defined by section 7(2) of the Act of 1978 to include "a copy of an indecent photograph," and section 1(1)(*a*) as amended makes it an offence "to make any indecent photograph," so that prima facie the offence would appear to be committed by anyone making a copy of an indecent photograph. She nevertheless argued that this is not the case; rather, she submitted, the word "make" was introduced into section 1(1)(*a*) of the Act of 1978 solely to deal with pseudo-photographs, the real problem which Parliament was addressing in 1994. In other words the amended section 1(1)(*a*) should be construed as if it read: "It is an offence for a person to take, or permit to be taken, any indecent photograph of a child, or to make any pseudo-photograph of a child." What paragraph (*a*) is aimed at is the creation of indecent child pornography, not its proliferation.

Not the least difficulty with this argument, as indeed with the magistrate's ruling on the meaning of "making" in this legislation, is that it flies directly in the face of *Reg. v. Bowden (Jonathan)* [2000] 2 W.L.R. 1083 where the Court of Appeal (Criminal Division) (Otton L.J., Smith and Collins JJ.) expressly rejected a similar argument and came to the contrary conclusion. The court in *Reg. v. Bowden* was concerned with printouts made (a) by the defendant copying photographs which he had called up onto his computer screen via the Internet, and (b) by the police of photographs, and in one instance a pseudo-photograph, stored in data files downloaded by the defendant from the Internet and deliberately stored by him on his own computer discs. Essentially, therefore, the material in *Reg. v. Bowden* was equivalent to the "J" directory material in the present case. Having outlined much the same argument as Miss Malcolm advanced before us, save for one of her main submissions which she suggests was unfortunately not made there, the court in *Reg. v. Bowden* said, at p. 1089:

A "We are unable to accede to this interesting argument. In our judgment section 1 of the Act of 1978 as amended is clear and unambiguous in its true construction. Quite simply, it renders unlawful the making of a photograph or a pseudo-photograph. There is no definition section. Accordingly the words 'to make' must be given their natural and ordinary meaning. In this context this is 'to cause to exist; to produce by action, to bring about:' *Oxford English* B *Dictionary*. As a matter of construction such a meaning applies not only to original photographs but, by virtue of section 7 of the Act of 1978, also to negatives, copies of photographs and data stored on computer disc. We do not accept that section 1 of the Act of 1978 in its present form is either ambiguous or obscure. We are certainly not persuaded that in some way the draftsman nodded and produced an C ambiguous, obscure or illogical result. Nor do we accept that the natural interpretation leads to any absurdity suggested by counsel. We prefer the submission . . . of the Crown: 'A person who either downloads images onto disc or who prints them off is making them. The Act is not only concerned with the original creation of images, but also their proliferation.'"

D I may perhaps observe that it was because of the court's decision in *Reg. v. Bowden*, so we were told, that Gary Glitter shortly afterwards pleaded guilty to similar offences. It was Miss Malcolm's submission, however, that *Reg. v. Bowden* was wrongly decided and, moreover, that we, although an inferior court, are entitled to disregard it on the footing that it was decided per incuriam of a crucially important submission. That submission is this. Section 1(1) of the Act of 1978, as originally enacted, created a hierarchy of E offences in descending order both geographically and in terms of moral culpability. Paragraph (*a*) criminalised the taking of indecent child photographs, or permitting them to be taken, an activity involving the direct exploitation of children in their actual presence; paragraph (*b*) involved the distribution or showing of such photographs; paragraph (*c*) the possession of such photographs with a view to their distribution or F showing; and paragraph (*d*) the advertising of such distribution or showing. Importantly, by section 1(4) the statutory defences are made available only to those charged with offences under paragraph (*b*) or (*c*). There can be no defence whatever to an offence under section 1(1)(*a*), or indeed under paragraph (*d*), since there could never be any excuse for such activities.

If in 1994, as the Crown contended, making a copy of an indecent child photograph became a criminal offence under section 1(1)(*a*) of the G Act of 1978 as amended, then this can only have been on the basis that Parliament intended not merely to criminalise this activity for the first time but to make it an absolute offence. That, submitted Miss Malcolm, is highly unlikely. It would indeed necessarily follow, and Mr. Davies for the prosecutor accepted this, that all sorts of innocent people could fall foul of its provisions. In this very case, for example, Mr. and Mrs. Dunderdale H committed the offence when making copies of the material they found in Dr. Atkins's computer, and had they been prosecuted they would have had no defence whatever. True, they could not have been prosecuted save with the prosecutor's consent. But the decision whether to grant consent, we were told, is routinely devolved to Grade 5 officials in the Crown Prosecution Service so that the safeguard may not invariably be effective.

For my part I see the force of this argument and would accept that section 1(1)(*a*) of the Act of 1978 should be construed as narrowly as it

reasonably can be to avoid the unwelcome consequences to which Miss Malcolm referred. In any event as Lord Esher M.R. said in *Tuck & Sons v. Priester* (1887) 19 Q.B.D. 629, 638: A

> "If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." B

But, that said, I am wholly unpersuaded that we should regard *Reg. v. Bowden* [2000] 2 W.L.R. 1083 as wrongly decided, let alone as decided in the strict sense per incuriam. In the first place, there remains the apparently unambiguous language of the subsection. Secondly, it may be that this further argument was in any event addressed to the court in *Reg. v. Bowden*: there is after all a reference in the judgment, albeit unparticularised, to the "absurdity suggested by counsel." Thirdly, the per incuriam exception to the principle of stare decisis is a notably narrow one. As Lord Evershed M.R. said in *Morelle Ltd. v. Wakeling* [1955] 2 Q.B. 379, 406: C

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential part of our law, be . . . of the rarest occurrence." D E

It follows that, in my judgment, we are bound by *Reg. v. Bowden* and the magistrate here ought properly to have convicted Dr. Atkins of "making," at least in respect of the 11 "J" directory counts. But what of the other 10 counts of "making," those relating to the material unknowingly stored in, and recoverable from, the caches? *Reg. v. Bowden*, it is clear, says nothing as to these: it was simply not concerned with data inadvertently stored on a computer disc. Mr. Davies, however, argued that this material too is caught by section 1(1)(*a*) of the Act of 1978. The plain fact is, he said, that Dr. Atkins caused these indecent photographs to be stored in the cache of the hard disc whether he knew it or not. Anyone who accesses child pornography on their computer screen necessarily there and then commits two offences: he is both in possession of the image and, whether knowingly or not, copying it onto the disc. F G

I would unhesitatingly reject this argument. For the reasons already given, it seems to me problematic enough to construe section 1(1)(*a*), an offence to which no defence whatever is available, as encompassing the intentional making of copies. To construe it as creating an absolute offence in the sense contended for by the prosecutor, i.e. to encompass also the unintentional making of copies, in my judgment would go altogether too far. It would, moreover, as Miss Malcolm pointed out, represent a striking oddity in our criminal law: a situation where the selfsame set of facts involves the commission of two quite distinct offences, possession under section 160(1) of the Act of 1988 and "making" under section 1(1)(*a*) of the Act of 1978, no additional ingredient being required for proof of the more serious offence. In short it is my conclusion that, whilst "making" includes intentional copying: *Reg. v. Bowden*, it does not include unintentional copying. H

Possession

As already indicated in respect of the "J" directory material Dr. Atkins could and, but for the delay, would have been prosecuted for possession under section 160 of the Act of 1988. Nevertheless, as stated in my judgment, he was also properly prosecuted for, and should have been convicted of, "making" in respect of those particular counts.

So far as the cache material is concerned, it was also common ground before us that Dr. Atkins would have had no defence to charges of possession had the prosecution case been put simply on the basis of the transient downloading of the image onto the screen rather than on the basis of its subsequent inadvertent storage in the cache. As Mr. Davies made plain in argument, however, ordinarily it might be difficult to establish when the initial transient viewing occurred and a prosecution on that basis might well be out of time. True, that was not the situation here but, he said, the Director of Public Prosecutions is anxious to establish a precedent with regard to material stored in the cache and it was his case that the user is in continuous possession of this material from the moment of downloading it.

The central question, therefore, arising in this part of the case is whether or not knowledge of the existence and effect of the cache is an essential ingredient of the offence of possession under section 160 of the Act of 1988. Miss Malcolm submitted that it is and that the possession counts against Dr. Atkins should accordingly have been dismissed. Mr. Davies argued that knowledge is immaterial and therefore that the magistrate was correct to rule that this is "an offence of strict liability." Before addressing counsel's main arguments I should make just two brief comments on the magistrate's ruling quoted above. First, I cannot accept that the relevance or otherwise of the defendant's knowledge is to be dictated, "precisely restricted," by section 160(2)(*b*): that defence goes only to the defendant's knowledge of the indecent nature of photographs in his possession, not to the question whether he is in possession of photographs of any sort. Secondly, the difficulty with the magistrate's alternative basis of ruling is that it appears to be founded on the transient viewing on the screen when the image was first downloaded, the very basis of prosecution which the Crown here have disavowed.

In my judgment, therefore, the relevance of knowledge of possession falls to be decided in accordance with general principle and in this regard Mr. Davies invited our attention to three authorities in particular: *Reg. v. Hussain (Iftikhar)* [1981] 1 W.L.R. 416; *Reg. v. Steele* [1993] Crim.L.R. 298 and *Reg. v. Buswell* [1972] 1 W.L.R. 64. *Reg. v. Hussain* and *Reg. v. Steele* both concerned the possession of firearms without a certificate which the court decided was an absolute offence, in the sense that the defendant in *Reg. v. Hussain* was guilty because he knew he had the relevant article even though he did not know it was a firearm, and the defendant in *Reg. v. Steele* was guilty because he knew he had a holdall with contents even though he did not know what those contents were. *Reg. v. Buswell* [1972] 1 W.L.R. 64 was a very different case and concerned the possession of drugs. The drugs in question had been medically prescribed by the defendant's doctor. After he had taken them home he genuinely thought that they had been accidentally destroyed by his mother when washing his jeans. Thereafter he discovered them still in his bedroom drawer where later still they were found by the police. Allowing his appeal against conviction the Court of Appeal held, at p. 64:

"where a person mislaid an article or thought erroneously that it had been destroyed or disposed of, if in fact it remained in his care and control he did not lose possession and that accordingly the defendant remained in possession of the tablets by virtue of the original prescription, his possession was lawful and the conviction wrong."

In my judgment, none of those authorities make good the prosecutor's argument. On the contrary I accept Miss Malcolm's submission that the firearms cases are readily distinguishable on the footing that the holdall in *Reg. v. Steele* [1993] Crim.L.R. 298 is to be equated to the cache here and Dr. Atkins was not proved to know even that he had the cache. *Reg. v. Buswell* [1972] 1 W.L.R. 64 too is to my mind distinguishable: nothing in the present case equated to the defendant's undoubted initial storage of the tablets in his drawer. *Reg. v. Buswell* might well have been in point had Dr. Atkins sought, and unknowingly failed, to cancel the material stored in the "J" directory and then been prosecuted for possession of it. That, however, is not the present case. Once again, therefore, I prefer Miss Malcolm's argument that knowledge is an essential element in the offence of possession under section 160 of the Act of 1988 so that a defendant cannot be convicted where, as here, he cannot be shown to be aware of the existence of a cache of photographs in the first place.

Returning to section 160(2)(*b*) of the Act of 1988, it seems to me indeed that the very fact that Parliament created a defence for those possessing photographs reasonably not known to be indecent, strongly suggests that there was no intention to criminalise unknowing possession of photographs in the first place. I would therefore answer the three questions raised in the Atkins appeal as follows. (1) No: the offence of possession under section 160 is not committed unless the defendant knows he has photographs in his possession, or knows he once had them: *Reg. v. Buswell* [1972] 1 W.L.R. 64. (2) No: it is a question of fact in each case whether honest research into child pornography constitutes a "legitimate reason" for possessing, or distributing or showing, it. (3) No: "making" includes copying photographs providing that it is done knowingly. In the result both parties succeed in their appeals.

Miss Malcolm invited us to exercise our discretion not to remit the case to the magistrate for conviction on the 11 counts of "making," contrary to section 1(1)(*a*) of the Act of 1978, in respect of the "J" directory material bearing in mind the lapse of time since the offence was committed and the fact that but for the initial delay the prosecution would have been for possession rather than "making." For my part I would decline the invitation: I really think this case calls for a conviction.

The Goodland appeal

The sole issue before the justices was whether a particular item, which I shall shortly describe and which for convenience I shall call the exhibit, is a pseudo-photograph within the meaning of section 7(7) of the Protection of Children Act 1978. The case was decided by the justices on the basis of the following admitted facts:

"(a) . . . on 5 November 1998 police officers attended . . . the home address of the defendant and seized [the exhibit] from a secure and locked cabinet at that address . . . (b) . . . prior to [that] seizure . . . the [exhibit] was in possession of the defendant with his full knowledge . . . [It] had been made by him by Sellotaping two separate

A pieces of paper together, which are individually photographs. (c) . . . the defendant had no legitimate reason for having the item in his possession."

It was further undisputed that the person pictured in the exhibit was a child and that the exhibit is indecent. Before turning to the argument it is, I think, necessary to explain rather more clearly just what the exhibit B consists of. The main photograph is of a girl aged perhaps 10 in a gymnastic outfit standing with her arms upstretched facing the camera. The second photograph, a small piece plainly cut from a larger photograph, is of the naked abdomen, genital area and upper thighs of a girl or young woman. A corner of the second photograph has been affixed to the main photograph by Sellotape so that, as if on a hinge, it can either C be turned away from the clothed girl or superimposed over the lower section of the girl's outfit. The case for the prosecution below is summarised in the case stated:

"The item was a photograph. It is made up of two separate items and was two photographs put together. The act of putting them together didn't destroy the fact that it was a photograph . . . The D question was 'does the Sellotaping of two photographs together destroy the fact that it was a photograph?'"

The case for the defence was:

"The item made up of two photographs Sellotaped together did not appear to be a photograph. On a common sense interpretation the item could not be a photograph. It is a collage, two pictures stuck E together . . . As a matter of law the item does not appear to be a photograph and is not a photograph. If it was photocopied or photographed it may have been an image."

The justices' central conclusion was:

"The [exhibit] made up of two photographs Sellotaped together F appears to be a photograph. We accepted the prosecutor's contention that two photographs Sellotaped together does not destroy the fact that it is a photograph. Both parts of the photograph are in proportion. The image is not distorted. We did not accept the defence contention that two photographs Sellotaped together is a collage, not a photograph. It does not matter how it is produced because of the G words 'or otherwise howsoever.'"

The single question posed for the High Court's opinion is whether in coming to that conclusion the justices were wrong in law. In seeking to uphold this conviction Mr. Davies makes two main submissions. First, he argued that the phrase "which appears to be a photograph" in section 7(7) of the Act of 1978 is a qualitative requirement, not a numerical H requirement. The exhibit must appear to be a product of photography rather than, for example, a cartoon, sketch, painting or other indecent representation of a child. Secondly, he contended that the exhibit is a single image which appears to be photographic in nature, given that it is created by combining two photographic sources into one image. Mr. Blair for the defendant submitted that these arguments, although ingenious, are fundamentally flawed as a method of statutory interpretation. The question is not whether the exhibit is "a product of photography" or

"photographic in nature." Rather it is whether the exhibit is "an image . . . which appears to be a photograph."

In my judgment, Mr. Blair's argument is clearly correct. The justices' own conclusion that "two photographs Sellotaped together appears to be a photograph" seems to me self-contradictory. I recognise, of course, that were the exhibit itself to be photocopied the result could well be said to constitute a pseudo-photograph. The mere fact that in this particular case it would plainly appear not to be a genuine photograph, there being several features of this combination of images which give the lie to that, would not be inconsistent with such a conclusion: see particularly section 7(8) of the Act of 1978. That, however, cannot decide this appeal. In my judgment, an image made by an exhibit which obviously consists, as this one does, of parts of two different photographs Sellotaped together cannot be said to "appear to be a photograph." I would accordingly answer the question posed in the case stated: Yes, the justices were wrong in law. Mr. Goodland's appeal accordingly succeeds.

I add this footnote. The exhibit in the *Goodland* appeal is pitifully crude in both senses. It is hardly surprising that the penalty imposed was only a two-year conditional discharge with an order to pay £50 costs. The sting, however, lies in the requirement to register with the police under the Sex Offenders Act 1997 for a period of five years. I seriously question whether a prosecution with that result is appropriate in a case of this character. It seems to me that the Director of Public Prosecutions may wish to instruct those exercising his devolved discretion in future to be rather more fastidious in giving their consent to prosecutions.

BLOFELD J. I agree.

First defendant's appeal in respect of convictions contrary to section 160(1) of the Act of 1988 allowed with costs.

Cross-appeal of prosecutor allowed.

Case remitted with direction to convict in respect of 11 offences contrary to section 1(1)(a) of the Act of 1978.

Certificate pursuant to section 1(2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved in the decision, namely: "Whether the offence of making an indecent photograph or pseudo-photograph of a child was committed by a person if he/she knowingly or unknowingly copies a photograph or pseudo-photograph of a child."

Leave to appeal refused.

Appeal of second defendant allowed with costs.

Solicitors: Offenbach & Co.; Nile Arnall, Bristol; Crown Prosecution Service, Bristol.

[Reported by BRENDAN WRIGHT ESQ., Barrister]