

National Appeal Panel

Constituted under

THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)

(SCOTLAND) REGULATIONS 2009 (AS AMENDED)

(“THE REGULATIONS”)

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

Gleneden Court, Kirkintilloch Road,

Lenzie, Glasgow. G66 4LQ.

Applicant and Appellant: Aidan Connolly

Health Board: NHS Greater Glasgow and Clyde (“the Board”)

PPC Decision Issued: 8 February 2023

Panel case number: NAP 113 (2023)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 8 February 2023 in relation to the application of Aidan Connolly (then “the Applicant”, now “the Appellant”).
- 1.2. The application was originally made on 19 April 2022. The application was considered at a meeting of the PPC on 18 January 2023. At that meeting the application was refused. The Appellant lodged an Appeal against the decision of the PPC on 1 March 2023.

2. Grounds of Appeal

- 2.1. At the outset of the Appeal document the Appellant has referred to the grounds of appeal permitted in terms of the Regulation. Some of the arguments then advanced are with reference to those grounds and some are not. None of the grounds are numbered. I have, therefore, attempted to number these grounds and with reference to the grounds permitted where possible.
- 2.2. Ground of Appeal 1. This ground relates to the time taken by the Board to compile the CAR (“Consultation Analysis Report) and share it with the then Applicant. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.3. Ground of Appeal 2. This relates to, amongst other things, a request to allow the then Applicant to submit further evidence or information in support of the application, what was allowed to be submitted by an interested party, and the request for the then Applicant to share his finalised statement or presentation in advance of the hearing. Again I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 2.4. Ground of Appeal 3. This relates to an argument in terms of the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3.
- 2.5. Ground of Appeal 4. These are contained in the final page of the appeal and are headed “General Comments of particular relevance”. These relate to the overall fairness of the proceedings. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:
- 3.1.1. A procedural defect in the way the application has been considered by the Board;
- 3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or
- 3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

- 3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:
- 3.2.1. To dismiss the appeal if I consider that it discloses no reasonable grounds or is otherwise frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 above have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions, the Board is to grant the application.

3.4. The Regulations provide, at paragraph 3(1) of Schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the Consultation Analysis Report (the “CAR”), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

4.1. Ground of Appeal 1. This grounds relates to the time taken by the Board to compile the CAR (“Consultation Analysis Report) and share it with the then Applicant. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

4.2. Regulation 5A governs the procedure to be followed around the “Pre-application and joint consultation” - the output of which is the CAR. The CAR is then one of the sources of information the Board has regard to in its determination of the application. Provision is also made around the CAR when providing reasons. There is a time limit

(90 days) for the requirements in the Regulation to be complied with before the application is made.

- 4.3. The Appellant considers that he was disadvantaged, to the extent of it breaching natural justice, having only received the CAR from the Board with two weeks remaining until the Application was required to be made. The Appellant is of the view that the CAR was not compiled “as soon as reasonably practicable” as required in terms of Regulation 5A(5).
- 4.4. “As soon as reasonably practicable” can be taken to mean as soon as is reasonably possible and practical taking into account relevant circumstances in any given case. The approach of taking into account a number of factors is well established (*Edwards v National Coal Board* [1949] 1 All ER 743 CA) but it can’t be taken to mean “when convenient” for the obliged party (*Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2018] EWHC 118 (Ch). The Inner House noted, when looking at the word “practicable”, that it is not a straightforward term. It can be seen as having a narrow or a more extended meaning depending on the circumstances of its use and that the court’s function when interpreting a statute goes beyond the application of the day to day usage of a word or phrase. The aim is to ascertain the intention of Parliament, which requires the passage in question to be set in its context, not only in respect of the surrounding provisions, but also with regard to its purpose. (*M v C* [2021] CSIH 14)
- 4.5. With this in mind and noting the size of the CAR, I do not consider it unreasonable, in terms of practicality, for the Board to have taken the time it took to compile it. The then Applicant still had 14 days or so to complete the application with reference to the CAR thereafter. It was not, therefore, procedurally defective in any way.
- 4.6. Ground of Appeal 2. This relates to, amongst other things, a request to allow the then Applicant to submit further evidence or information in support of the application, what was allowed to be submitted by an interested party and the request for the then Applicant to share his finalised statement or presentation in advance of the hearing.

Again I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 4.7. In terms of the procedure that was then followed, the Regulations are straightforward insofar as that an Applicant lodges the Application in Form A. In accordance with Regulation 5, this contains 9 heads of required information. A number of interested parties then have the opportunity to respond. The Board is required to determine the application as submitted and this includes having regard to representations received. Any further submissions or changes to those submissions are, as was the case here, at the discretion of the Chair. If any further submissions or changes are permitted other participants will, normally, have the opportunity to respond, or at the very least have notice of them, but this back and forth does not and cannot continue in perpetuity.
- 4.8. Where the Board hears oral representations the procedure is again, broadly, at the discretion of the Chair, but an applicant and interested party will be notified and, generally, have the opportunity to speak to and amplify what it said in their application or submissions, and respond to questions put to them in that regard.
- 4.9. Though more informal than a Court, an administrative decision-making body must have some form of consistency as to its procedure. This serves the interests of justice by ensuring that cases are dealt with expeditiously, without undue expense, and without undue demands on the resources of that body. In this instance, I consider that the approach of the Board was fair and clearly explained to the Appellant at numerous times in correspondence. This was to the credit of the administrator involved who employed great courtesy, professionalism and patience in that regard. It was not, therefore, defective in any way.
- 4.10. Ground of Appeal 3. This relates to an argument in terms of the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3.

- 4.11. This argument is advanced with reference to the Board's reasoning regarding neighbourhood and adequacy and which runs for 35 paragraphs at section 10. It is clear that the Appellant disagrees with the reasoning that is provided for here.
- 4.12. However, simply disagreeing with the conclusions of the PPC is not a valid ground of appeal. The PPC is a specialist tribunal and as such is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it in reaching a reasoned decision.
- 4.13. This is recognised in the Regulations with the limited rights of appeal available. A successful appeal which related to reasoning would need to disclose, therefore, some sort of procedural defect, error in fact or, most commonly, an error in law in applying the relevant legal test. (Whether the PPC has properly applied the legal test procedurally speaking or with reference to the facts of the case, would be grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively).
- 4.14. In my view the reasons given properly narrate the decision of the PPC as to the neighbourhood and adequacy of existing services. As a result this ground discloses no reasonable grounds.
- 4.15. Ground of Appeal 4. These are contained in the final page of the appeal and are headed "General Comments of particular relevance". These relate to the overall fairness of the proceedings. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.16. These general comments include complaints regarding: overall fairness, negative lines of questioning, unconstructive and aggressive questioning, an allegation regarding a member of the PPC falling asleep, that the same member's hearing aids were not functioning properly, that the same member only asked one question, the physical setup of the room and being told to be quiet by one member on three occasions when conferring with the person accompanying him to provide him with assistance.

4.17. Having reviewed these complaints, in particular against the minutes of the meeting of the PPC, I can find no evidence that the hearing was conducted in anything other than a courteous and professional manner. I therefore consider the ground not to be a reasonable ground in terms of the Regulations.

5. Disposal

5.1. For the reasons set out above I consider that the appeal is dismissed in its entirety as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

1 May 2024