

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

1 SALTIRE SQUARE, EDINBURGH. EH5 1PR

Applicant & Appellant: Tick Pharmacy (“the Appellant”)

Health Board: NHS Lothian (“the Board”)

PPC Decision Issued: 20 August 2024

Panel case number: NAP 127A (2024)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against a reconsideration decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 20 August 2024 in relation to the application of Tick Pharmacy (“the Appellant”).
- 1.2. The application was originally made on 2 September 2022. The application was first considered at a meeting of the PPC on 23 February 2023. The PPC issued its decision to refuse the application on 10 March 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 17 March 2023. I issued my decision allowing the Appeal, in part, on 16 April 2024 (NAP 114 (2023)).
- 1.4. The PPC reconsidered the application on 6 May 2024 and issued its decision thereafter. The Appellant appealed that second decision of the PPC and did so on 3 June 2024. I issued my decision allowing the Appeal, in part, on 26 June 2024 (NAP 127 (2023)).
- 1.5. The PPC reconsidered the application on 20 August 2024 and issued its decision thereafter. The Appellant now appeals that third decision of PPC.

2. Grounds of Appeal

- 2.1. In relation to the first appeal (NAP 114 (2023)), I remitted the application back to the PPC for reconsideration in relation to what was then Ground of Appeal 3 and on the basis that, having reviewed the papers that were provided to me in relation to that appeal, it appeared that the Pharmaceutical Care Services Plan was not considered by the PPC. The PPC was required to have regard to that plan, and failure to do so constituted a procedural defect and a ground of appeal under and in terms of the Regulations.

- 2.2. In relation to the second appeal (NAP 127 (2024)), I remitted the application back to the PPC for reconsideration as the PPC had been inquorate when it met on 6 May 2024. That was then the first ground of appeal. In that decision I did not uphold the second ground of appeal which, again, related to whether the PPC had properly taken the Pharmaceutical Care Services Plan into account. In my view they had, and this was evidenced in the Minutes of the Meeting of the PPC dated 6 May 2024.
- 2.3. The Appellant now advances three grounds of appeal in relation to the reconsideration decision dated 20 August 2024.
- 2.4. Ground of Appeal 1. This ground is headed “Inadequate Review of the NHS Lothian Pharmaceutical Care Services Plan” and relates, once again, to whether it has been taken into account and this includes taking into account the concept of the “20-minute neighbourhood”.
- 2.5. Ground of Appeal 2. This ground is headed “Lack of engagement with Applicants Arguments”. This ground again makes reference to the “20-minute neighbourhood”.
- 2.6. Ground of Appeal 3. This ground is headed “Lack of Transparency in Decision-Making”. This ground is then expanded upon to include arguments relating to whether there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; and a failure to explain the application by the Board of the provisions of these Regulations to those facts. The Appellant also advances an argument in relation to apparent bias.

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 they disclose no reasonable grounds or are otherwise is 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 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 (“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 ground is headed “Inadequate Review of the NHS Lothian Pharmaceutical Care Services Plan” and relates, once again, to whether it been taken into account and this includes taking into account the concept of the “20-minute neighbourhood”.
- 4.2. As mentioned above this ground of appeal was upheld previously as part of the first appeal. It was, in my view, addressed properly at the first reconsideration hearing and was not therefore upheld as part of the second appeal. It is not upheld on this occasion either. I will discuss the “20-minute neighbourhood” concept in relation to Ground of Appeal 2.
- 4.3. Ground of Appeal 2. This ground is headed “Lack of engagement with Applicants Arguments”. This ground again makes reference to the “20-minute neighbourhood”.
- 4.4. The Appellant considers that the Board has not placed enough emphasis on the arguments relating to the “20-minute neighbourhood”.
- 4.5. Generally speaking, as a specialist tribunal, the PPC is best placed to determine the appropriate standard or weight to be applied to the evidence and information that is before it and reach its own conclusions, as it did here.
- 4.6. In relation to the “20-minute neighbourhood” in particular, that concept has its origins in a Scottish Government Programme for Government (2020) which commits the Scottish Government to working with others to achieve places in which residents have the ability to meet the vast majority of their day-to-day needs within a 20 minute walk of their home including through access to cycle routes or public transport. The Appellant correctly notes that this is a significant planning policy and this is reflected

in the fact that it already features in a draft Infrastructure Plan for Scotland and the National Planning Framework 4 (NPF4).

- 4.7. Under paragraph 3(1)(d) of Schedule 3 the Board can have regard to any other information available to it that it considers relevant and this would include this concept or any evidence or information in relation to it. However, if the Board chooses to do so, it is only one of the sources of information that the PPC can or should have regard to, and each source of information is not in and of itself a determining or special factor.
 - 4.8. If Government wanted to pursue the “20 Minute Neighbourhood” in this regard and give it some sort of special meaning, above it being considered as a matter of convenience, as is currently the case, it would be free to do so by amending the Regulations. This was discussed in NAP 111 (2022), and I will highlight this issue to the Scottish Ministers in due course. Meantime however, this ground of appeal is not upheld.
 - 4.9. Ground of Appeal 3. This ground is headed “Lack of Transparency in Decision-Making”. This ground is then expanded upon to include arguments relating to whether there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; and a failure to explain the application by the Board of the provisions of these Regulations to those facts. The Appellant also advances an argument in relation to apparent bias in this ground.
 - 4.10. In relation to the first strand of this ground, failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; and a failure to explain the application by the Board of the provisions of these Regulations to those facts, this is advanced with reference to the Pharmaceutical Care Services Plan and transparency as to the criteria to assess adequacy.
 - 4.11. In relation to the Pharmaceutical Care Services Plan this has been addressed in relation to Ground of Appeal 1. It is also the case that it was not any sort of error for the PPC to refer to the Plan dated 2021, as that was the relevant Plan when the application was made. It also the case that sufficient reasons have been provided
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generally and more recently in relation to the Plan. Those reasons also clearly disclose how adequacy was assessed.

- 4.12. In relation to the second strand of this ground, the suggestion of apparent bias is with reference to previous involvement of two members of the PPC at the first and second reconsideration meeting of the PPC. Whilst it is a matter for each PPC as to how they go about reconsidering a decision, unless expressly provided for in a NAP decision, an entirely new panel or the participation of the parties will not normally be required. This may be required if there was some sort of nullity or substantial irregularity at first instance, such as apparent bias. Most Boards reconvene to address the particular issues on appeal, as was the case here. In these circumstances, as there was no need to convene a freshly constituted panel, there was no resulting unfairness to the Appellant or apparent bias.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is unsuccessful in respect of both grounds of appeal. It is therefore refused.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

9 October 2024