

Neutral Citation no. [2006] NIQB 63

Ref: WEAC5629

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: 15/09/2006

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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APPLICATION BY JOHN NEILL BELL GORDON  
FOR JUDICIAL REVIEW

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WEATHERUP J

**Applications for inclusion in the Pharmaceutical List.**

[1] This application for judicial review is made on behalf of N & R Gordon Limited (known as "Gordon's Chemists") which operates a pharmacy in Newry. The applicant objects to the opening of a pharmacy in Newry by MH (Newry) Ltd. The application concerns a decision of the National Appeal Panel issued on 28 February 2006 adding MH (Newry) Ltd of the Medical Hall Unit 14B, The Quays Shopping Centre, Newry, County Down to the pharmaceutical list. Mr Larkin QC and Mr Johnson appeared for the applicant, Mr McGleenan for the respondent, the National Panel, and Mr Lavery QC and Mr O'Rourke for the notice party, MH (Newry) Ltd.

[2] MH (Newry) Ltd applied for inclusion in the pharmaceutical list on 5 October 2004. The application was dealt with by a Pharmacy Practices Committee (PPC) on 24 January 2005 and by a decision issued the following day the application was refused on the grounds that the proposed outlet was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood, which was defined by the PPC as the area of the city west of the Newry canal. MH (Newry) Ltd appealed the decision of the PPC on 17 February 2005 and the National Appeals Panel (NAP) considered the appeal on 14 February 2006. The NAP issued its decision on 28 February 2006 allowing the appeal. The NAP reached a different decision on the area of the neighbourhood. There being no other pharmacies within the NAP's neighbourhood it was concluded that it was desirable in order to secure adequate provision of pharmaceutical services that MH (Newry) Ltd be added to the pharmaceutical list.

[3] Arrangements for pharmaceutical services are provided for under Article 63 of the Health and Personal Social Services (Northern Ireland) 1972 which provides that every Health and Social Services Board shall, in accordance with the regulations, make arrangements in respect of its area for the provision to persons who are in that area of pharmaceutical services. Article 63(2A) provides that the regulations shall include provision for pharmaceutical lists and for applications to a Health and Social Services Board for inclusion in such lists and that such applications shall be granted only if the Board is satisfied in accordance with the regulations "that it is necessary or desirable to grant it in order to secure in the neighbourhood in which the persons are located the adequate provision by persons included in the list of the pharmaceutical services or some of the pharmaceutical service specified in the application."

[4] The relevant regulations are the Pharmaceutical Services Regulations (NI) 1997. In addition a Guide was issued by the Department of Health and Social Services in 1997 setting out the procedures which the Boards should follow in dealing with applications to provide pharmaceutical services.

#### **The Applicant's Grounds for Judicial Review.**

[5] The applicant's grounds for judicial review are -

(a) In making the decision of 28 February 2006 the NAP acted unfairly in that it relied upon or took into account material from MH (Newry) Ltd that -

- (i) was improperly accepted by the NAP as a late submission;
- (ii) was not furnished to the objectors for their consideration and response;
- (ii) contained incorrect and misleading assertions of fact.

(b) The NAP acted unfairly in not affording an oral hearing, especially bearing in mind the late submission of factually incorrect information by MH (Newry) Ltd, without the applicant being given an opportunity to respond.

(c) The NAP acted unfairly in that applicant and other objectors had no opportunity of rebutting or explaining the entirety of the evidence forwarded to the NAP by MH (Newry) Ltd.

(f) The NAP acted unfairly in not providing certain members of the panel with full disclosure of all written materials, in particular both the

applicant's and other objectors' additional submissions, either in time or at all, for their consideration in advance of the hearing.

(g) The NAP acted unfairly in not providing certain members of the panel sufficient or any time and privacy in which to read, digest and familiarise themselves with all information relevant to the hearing, in particular all written submissions by the applicant and his fellow objectors.

(i) The Chairman erred in permitting to non-voting members to vote on the issue of whether or not to hold an oral hearing, contrary to paragraph 19 of Part IV of Schedule 4 of the Pharmaceuticals Services Regulations 1997.

Grounds (d), (e) and (h) were disallowed at the leave stage.

### **The Evidence of Proceedings at the Panel Meeting.**

[6] Evidence was filed by five members of the NAP and by the Secretary, Mervyn Bryson. On 13 December 2005, Mr Bryson wrote to the members of the NAP who were attending the appeal on 14 February 2006, enclosing documentation. This comprised the papers originally before the PPC, being a summary of the case, the letter of application and application form, a report from Dr Braniff, a Chartered Planning Consultant, letters of support for the application and notices of objection to the application, including the objection of the applicants in the present case.

[7] Further, Mr Bryson wrote to the solicitors involved indicating that any additional representations should be submitted by 7 February 2006. On 7 February 2006, Mr Bryson received additional representations from the objectors and this material was forwarded to the NAP members by post on 8 February 2006. By reason of postal difficulties at that time, some members of the NAP did not receive the objectors' representations prior to the meeting of the NAP on 14 February 2006. On 8 February 2006, Mr Bryson also received additional material from MH (Newry) Ltd, which was outside the deadline of 7 February 2006. For that reason Mr Bryson did not forward MH (Newry) Ltd's additional material to the NAP on the basis that the NAP would determine on 14 February 2006 whether to accept MH (Newry) Ltd's late material.

[8] Valerie Crawford is a pharmacist and a non-voting member of the NAP. Prior to the NAP hearing on 14 February 2006, she received the documentation that had been before the PPC. When she arrived at the NAP at 10.00 am on 14 February 2006, she received the objectors' representations amounting to 47 pages. Ms Crawford comments that she was only able to

briefly glance at the new documents before the hearing commenced and did not have time or privacy to read and absorb them. The objections are described as detailed, factual and laden with information and she found it impossible to consider and digest the information in any meaningful fashion or with any understanding of its importance.

[9] The NAP meeting began at 11.00 am and the NAP considered whether to admit the late material submitted by MH (Newry) Ltd. Ms Crawford did not recall any formal vote on the admission of the objectors' late material. She states that she found specific allegations regarding the conduct of existing licensed pharmacists to be implausible and inaccurate. Further she refers to discussion of the need for an oral hearing and ascribes to the Chairman the comment that the last time an oral hearing was required it necessitated booking a hotel room and the hearing lasting a whole day. All but one member of the NAP voted against an oral hearing and Ms Crawford states her belief that the Chairman inappropriately influenced this decision by giving the impression that an oral hearing would cause inconvenience.

[10] Paula McDade is a pharmacist and a non-voting member of the NAP. On 13 February 2006 she received the documents that had been before the PPC as well as the objectors' representations. Ms McDade states that she had insufficient time to deal with the material and did not feel that she was familiar with the information and data provided. At the meeting she received MH (Newry) Ltd's late material and noted several statements which she considered to be inaccurate. Ms McDade supports Ms Crawford on the Chairman's comments about an oral hearing and expresses the view that the decision was reached for personal convenience.

[11] Paul Kelly is a retired pharmacist and a voting member of the NAP. Prior to the hearing on 14 February 2006, he received the papers that had been before the PPC. His attendance at the meeting was delayed and he arrived at 11.00 am. The objectors' representations were produced but as there were not sufficient copies he had to share with another panel member. He supports the above version of the Chairman's comments on the oral hearing. Having later obtained further copies of both the objectors' representations and the applicant's late material, Mr Kelly states that the documents contain relevant information and members of the NAP did not have time to read the documents and he expresses the view that the hearing should have been adjourned.

[12] Brendan Smith was the Chairman of the NAP. He states that it is the practice of the NAP Secretary to hold papers which have arrived after the administrative deadline for the receipt of papers and the NAP members are asked at the beginning of a meeting if they wish to receive late material. Mr Smith denies the above remarks attributed to him by other members of the panel.

[13] Ann Lynch was a voting member of the NAP who received the PPC papers and the objectors' representations prior to the meeting on 14 February 2006. At the meeting she agreed to receive the applicant's late material and believed that there was adequate time to examine the material before the substantive discussion. Ms Lynch expresses the opinion that the additional papers from MH (Newry) Ltd and the objectors added little to the earlier material.

### **The Additional Material from MH (Newry) Ltd.**

[14] The applicant's first ground relates to the additional material furnished by MH (Newry) Ltd. The first complaint is that the NAP accepted the late material of MH (Newry) Ltd. Submissions were to be lodged by 7 February and MH (Newry) Ltd's material was not received until 8 February. There is no statutory time limit and this was an administrative time limit imposed by the NAP Secretary. The admission of additional material was a matter for the NAP. It was within their discretion to accept material presented outside the administrative time limit.

[15] The second complaint is that the additional MH (Newry) Ltd material was not furnished to the objectors. In addition the applicant complains that the additional material that the applicant considered to be mistaken. A related ground concerns the absence of any opportunity for objectors to rebut the additional material from MH (Newry) Ltd. The procedure on applications is set out in Part 1 of Schedule 4 of the 1997 Regulations.

Paragraph 1 requires the Board to give written notice of an application to "any person whose name is included in the pharmaceutical list and who currently provides pharmaceutical services in the Board's area and whose interests may, in the opinion of the Board, be significantly affected if the application were granted" and any person so notified may within 30 days make written representations to the Board (paragraph 1(1)(c)).

In considering an application the Board is required to have regard to any such representations received by the Board (paragraph 2(1)(b)).

Upon making a decision the Board shall give to the applicant and any person who has made representations to the Board, notice of its decision together with reasons (paragraph 3(2)).

Further to a decision, the applicant and any person who was given notice of the applicant and who made representations to the Board may appeal against the decision of the Board (paragraph 4(2)).

[16] From the above structure it is apparent that pharmacists such as the objectors in the present case are to be made notice parties to any application which may significantly affect their interests and that they may make written representations; the PPS, on behalf of the Board, is obliged to have regard to such representations; the Board must give notice of its decision to any person who has made such representations and any such person has a right of appeal against the decision to the NAP.

[17] The Board may determine an application in such manner as it thinks fit (paragraph 2(2)) and on appeal the NAP shall determine an appeal in such manner as it thinks fit (paragraph 20(1)). However, the manner of determination of such applications and appeals must comply with the requirements of procedural fairness. Fairness is a flexible principle depending upon “the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates”. In any scheme of statutory decision making the courts will imply “so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.” Lord Bridge in Lloyd v McMahon [1987] AC 625.702.

[18] The “Guide to the revised arrangements for considering applications to provide pharmaceutical services” issued by the Department contains relevant provisions.

At paragraph 5 the Guide repeats the requirements for notification of parties set out in the regulations. Paragraphs 5.22 to 5.25 deal with “Good Practice”. At paragraph 5.22 it is stated that every stage of the procedure must comply with the principles of natural justice, which among other things is said to dictate that “any interested parties must be informed in good time of applications and representations made and decisions reached; all parties should be made aware of the arguments being advanced both for and against an application and parties should be informed that any documents they submit will be copies to the other parties; and the parties must be given a right of reply to any arguments advanced”.

Further to a reference about commercial confidentiality it is stated at paragraph 5.25 that, as a general rule, information given to a PPS for the purposes of considering an application, should also be made available to the other parties.

Paragraph 6 deals with appeals and 6.11 to 6.15 deal with consideration of appeals. At paragraph 6.13 it is provided that in determining an appeal the NAP may look at the decision of the Board solely on the basis of materials before the Board, or alternatively may

determine the appeal by reconsidering the application on the basis of all evidence then available.

Paragraph 6.14 states, "Appeal papers should be copied (see paragraphs 5.21 to 5.25 on the principles of natural justice and the handling of confidential information) to the parties whom the Board is required to notify of their decisions".

[19] The Guide reflects the common law rules of procedural fairness. The right to know and respond entitles each party to know the case to be met and to make representations accordingly. The standard for procedural fairness would require the application papers to be furnished to the notice parties for their representations and those representations to be furnished to the applicant for a reply. Almost inevitably there will be issues about the limits that must be imposed on the nature and extent of exchanges between the parties. These are issues for each decision-making tribunal. However, in the present case the NAP decided to receive the additional MH (Newry) Ltd material without reference to the objectors and thereby deprived the objectors of the right to know the content of the added case and to respond accordingly. The appeal process took one year so there was ample opportunity to provide for a schedule that would have permitted the exchange of additional material prior to the meeting of the NAP.

[20] On behalf of the NAP and MH (Newry) Ltd it is contended first of all that the additional material was not significant and secondly that the applicant has not demonstrated that there are any representations that they would have made to the NAP that would have had a bearing on the decision. On the issue of the significance of the additional material, MH (Newry) Ltd, added a revised report from Dr Braniff, the Chartered Planning Consultant, and other material. The Braniff report had been revised to deal with disabled access and the Disability Discrimination Act. A new Part 6 had been added to the report which amounted to three pages of comment on disabled access, together with individual comments on disability access at each of eight other pharmacies in Newry. In addition there was correspondence and minutes of meetings forwarded by MH (Newry) Ltd in support of their application.

[21] In the written decision the NAP sets out its consideration of the adequacy of existing pharmaceutical services and at paragraph 12 noted the points made by MH (Newry) Ltd. This included reference to disabled facilities in the Quays Centre, there being only one pharmacy in Newry providing proper disabled access and action being needed to improve disabled access to pharmacy patients in Newry, which the application would resolve. Disability was a consideration in the decision of the NAP, as is apparent from the reasons set out at paragraph 15, which refers to the Quays Centre access to wheelchairs and mobility scooters for the disabled and good

parking facilities including disabled parking. I am satisfied that the issue of disability is of significance and it had a bearing on the decision of the NAP.

[22] However, the NAP and MH (Newry) Ltd contend that the applicant ought to have set out in the papers on this application for judicial review the nature of the representations that they would have made, had they been afforded a right to respond to the additional MH (Newry) Ltd material. In reply the applicant contends in general terms that there are mistakes in the additional MH (Newry) Ltd material and that a reply would be required to over 20 typed pages of additional submissions. The particulars of the response are said to be a matter for the NAP rather than the Court.

[23] Where a party to judicial review contends that they have been denied the opportunity to make representations to the decision maker, and further contends that there are material representations that would have been made to the decision maker, it is appropriate to provide some outline of the nature of those representations so that the Court might determine if there is indeed a case to be made to the decision maker. To fail to do so risks the Court concluding that no meaningful response would have been provided, a factor that might bear heavily against that party in the exercise of the Court's discretion in judicial review. While the applicant has not provided any particulars of a proposed reply to the additional material I am satisfied that the significant issue of disability would have attracted a substantive reply from the applicant, which may have had some bearing on the decision.

[24] I find procedural impropriety in the decision of the NAP of 28 February 2006 in taking into account the additional material submitted by MH (Newry) Ltd without that material having been disclosed to the objectors and any responses also being considered. Accordingly I will refer back the appeal of MH (Newry) Ltd for reconsideration by a different panel of the NAP. In so finding it is not intended to interfere with the continued trading of MH (Newry) at the location pending the further determination of the NAP.

[25] As the case is being referred back to the NAP it is proposed to deal briefly with the specific issues raised in relation to the NAP hearing on 14 February 2006 and to give fuller consideration to matters of general application.

### **Oral Hearings.**

[26] It was contended that there ought to have been an oral hearing. Paragraph 20 of Schedule 4 of the 1997 Regulations provides that the NAP may "if it considers that oral representations are unnecessary, determine the appeal without hearing any oral representations." Paragraph 6.11 of the Guide adds that oral hearings should not always be required "but may be



necessary where the issues are complex or where the written evidence is insufficient for a decision to be reached.” It is a matter for the discretion of the NAP to determine if an oral hearing is unnecessary, within the requirements of procedural fairness. In the present case the members of the NAP decided that an oral hearing was unnecessary, with one vote against.

[27] On the general issue of oral hearings it would require the complete outline of facts and definition of issues by the exchange of applicant’s submissions and objectors’ representations before it could be determined whether the issues are sufficiently complex or the written evidence so insufficient that an oral hearing would be required. That will be a matter for the new NAP when all the material is available. Nothing that I have said should be taken as any indication as to the decision that the NAP should make on this issue.

[28] However, the applicant contended that there was an improper consideration taken into account in determining whether to hold an oral hearing. Three members of the NAP contested the basis on which the Chairman addressed the issue of an oral hearing. It is not proposed to attempt a resolution of the issue of fact as to what was said at the meeting. The result was the decision taken by the members of the NAP. The considerations that each member took into account cannot be determined on the evidence available. Of course the decision must be taken for proper purposes and on the basis of valid considerations and not determined by personal convenience. If irrelevant considerations are introduced into deliberations then members of the panel must raise their objections at the meeting to be recorded by the secretary.

### **Consideration of the Appeal Papers by Panel Members.**

[29] Further grounds concern the opportunity of the panel members to consider the papers in the appeal. The complaint is framed in the first place as a lack of opportunity to consider all the papers in advance of the meeting and further as insufficient time to become fully familiar with the material. It is not intended to interfere with the practice of holding until the meeting any material submitted outside administrative time limits. Accordingly there will be some material that is sent to panel members in advance and there may be other materials that only become available too panel members at the meeting. Whether the material is forwarded to panel members in advance, or receipt of such material is delayed, or there is material that only becomes available at the meeting, there should in all cases be an opportunity for the panel members to consider the material before being required to deliberate on the appeal.

[30] For some members of the panel that was convened in the present case the objectors' representations did not arrive by post so there was no opportunity to consider those papers until the morning of the hearing. For others the objectors' representations arrived the previous evening with limited opportunity to be considered. In all cases the late MH (Newry) material was considered on the morning of the hearing in accordance with the normal practice for late information. All members of the NAP should of course have had sufficient opportunity to consider all appeal papers. If there is not sufficient opportunity to do so, the NAP should not proceed. Panel members should not proceed and should not be required to proceed to deliberate upon an appeal in the absence of sufficient opportunity to consider all appeal papers. Again this is a matter to be raised by the panel members at the meeting and if it is considered that objections are not addressed the panel member should have that view recorded by the secretary.

### **Voting Rights.**

[31] Finally there is the issue of two non-voting members being permitted to vote on the issue of an oral hearing. Paragraph 19 of Schedule 4 of the 1997 Regulations provides for voting as follows:

“(1) Subject to sub-paragraph (2), (3) and (4) every appeal considered by the National Appeal Panel shall be considered by all members present, but be determined only by a majority of votes of the members present who are entitled to vote.

(2) A member – (a) who is appointed in accordance with paragraph 16(3)(c) and whose name is not included in the pharmaceutical list and who is not an employee of a person whose name is included in that list; or (b) who is appointed in accordance with paragraph 16(3)(d); or (c) who is the Vice-Chairman, provided he is not acting as Chairman, is entitled to vote.

(3) A member who appointed in accordance with paragraph 16(3)(c) and whose name is included in the pharmaceutical list, or is an employee of a person whose name is included in that list, is not entitled to vote and shall withdraw immediately before a decision on an appeal by voting takes place.

(4) The Chairman, or Vice-Chairman if acting as Chairman, shall not be entitled to vote at any meeting except in the case of an equality of votes of the other persons present and voting, in which case he shall have a casting vote.”

[32] Paragraph 16(3) provides that the NAP shall consist of nine members of whom the Chairman and Vice-Chairman are appointed by the Department. Four are pharmacists (of whom only two shall be persons whose names are or who are employees of persons whose names are included in the pharmaceutical list) and three are nominated by the Board. The voting members are the Vice-Chairman, the members nominated by the Board and the pharmacists whose names are not included in the pharmaceutical list and who are not employees of a person whose name is included in that list.

[33] The appeal shall be “considered” by all members present and “determined” by those entitled to vote. Those not entitled to vote shall withdraw before a decision on an appeal by voting takes place. I interpret paragraph 19(1) as relating to the substantive determination of the appeal and that only those specified as having voting rights may make such a substantive determination. Accordingly I conclude that there is a deliberate distinction between the substantive determination of the appeal and procedural aspects of the proceedings. The Regulations require decisions on the former to be limited to those specified as entitled to vote. By contract procedural matters relating to receipt of late submissions or the holding of an oral hearing are not determinative of the appeal and the regulations do not restrict voting rights and all members present may vote on such procedural matters.

[34] By reason of the procedural impropriety set out at paragraph [24] above the decision of the NAP of 26 February 2006 will be referred back to a differently constituted NAP.