OUTER HOUSE, COURT OF SESSION

[2025] CSOH 21

P1067/24

OPINION OF LORD LAKE

In the Petition of

ABBEY CHEMISTS LIMITED

Petitioner

for

Judicial Review of a decision of the National Appeal Panel dated 10th September 2024 to refuse the Petitioner's appeal against the decision of the Pharmacy Practices Committee of Greater Glasgow and Clyde Health Board issued on 20th June 2024 to grant TC Trading (Scotland) Limited's application to be included on Greater Glasgow and Clyde Health Board's Pharmaceutical List in respect of premises at 4 Blackford Road, Paisley PA2 7EP

Petitioner: M Lindsay KC; Freeths LLP
Third Respondent: J Bradley; Lay representative

25 February 2025

[1] The petitioners seek judicial review of a decision of the National Appeal Panel dated 10 September 2024. They are the first respondents to the petition. The decision in question concerned refusal of an appeal which has been made by the petitioners from a decision of the Pharmacy Practices Committee of Greater Glasgow and Clyde Health Board. They are the second respondents to the petition. The PPC had made their decision on 20 June 2024 granting an application made by TC Trading (Scotland) Limited to be included in the Board's Pharmaceutical List. The applicants are the third respondents to his petition. The first respondent and the second respondent did not appear when the matter called for a

substantive hearing before me which meant that the only opposition came from the applicants whose admission to the list had been successful. Both the petitioner and the third respondent had prepared notes of argument which they adopted as part of their submissions and which I have taken into account.

Legal background

[2] A party who wishes to be included in a Health Board's list of pharmaceutical practices and thereby to be in a position to provide pharmacy services, requires to apply to the Health Board. Their application is considered by the PPC. The procedures and criteria for inclusion within the pharmaceutical list are specified in the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009. In terms of the Regulation 5(10), an application such as that made in this case may only be granted if the PPC:

> "is satisfied that the provision of pharmaceutical services at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list."

There are various pieces of information which must be submitted by an applicant. One of these is a Consultation Assessment Report ("CAR"). As the name suggests, this sets out the results of a consultation exercise with potential users of the pharmaceutical services and may be used as part of the assessment of adequacy.

[3] In terms of paragraph 5 of Schedule 3 of the Regulations, an appeal may be taken from the decision of the PPC to the National Appeal Panel in circumstances including those specified in paragraph 5(2B). That paragraph states:

> "5(2B) The circumstances are—
>
> (a) there has been a procedural defect in the way the application has been considered by the Board;

(b) there has been a failure by the Board to properly narrate the facts or reasons upon which their determination of the application was based; or
(c) there has been a failure to explain the application by the Board of the provisions of these Regulations to those facts."

Paragraph 5 of the Schedule contains the following provisions in relation to appeals to the NAP which are relevant:

"5(5) The Chair, after considering the notice of appeal and the decision of the Board, shall— ….
(b) remit the decision back to the Board for reconsideration if the Chair is of the opinion that any of the circumstances in sub-paragraph (2B) have occurred"

"5(7) Where the Chair remits an application back to the Board for reconsideration—
(a) the Chair shall give to the Board such advice as appears to the Chair to be desirable with a view to remedying the defect or failure that has led to the decision to remit;
(b) the Chair shall send a copy of the remitted application and the advice issued to the Scottish Ministers; and
(c) the Board shall reconsider the application."

Factual background

[4] On 8 January 2023, TC Trading applied to the PPC for admission to the Greater Glasgow and Clyde Pharmaceutical List. At a meeting on 11 September 2023, the PPC granted the application. On 22 October 2023, the petitioners appealed that decision to the NAP and, on 12 June 2024, the appeal was upheld. The matter returned to the PPC and, on 20 June 2024 the reconvened PPC again decided to grant the application. That decision was in turn appealed by the petitioners to the NAP and it is the decision of the NAP refusing the appeal that the petitioners seek to review. In order to examine the decision of the NAP it is necessary also to consider the decision of the PPC. For the petitioners to obtain the remedies they seek they require to demonstrate that there was a flaw in the decision of the PPC that could have been corrected by the NAP and that the NAP decision did not grant this remedy and was itself flawed in a manner which renders it susceptible to judicial review.

First ground – failure by PPC to reconsider the application

[5] The first ground of challenge is summarised in the following averment in the petition:

> "The First Respondent [the NAP] failed to recognise that the PPC had merely refreshed its original decision by providing further reasons in support of its original decision and had not reconsidered the Application anew."

The petitioners contend that the failure by the PPC to consider the application anew was a procedural defect on their part and that in not allowing the appeal in light of that, the NAP had erred in law or acted unreasonably.

[6] In the first appeal to the NAP there were three grounds of appeal. The second concerned whether, when considering adequacy of provision, pharmacies in neighbouring neighbourhoods should be taken into account and whether there had been an over reliance by the PPC on the CAR and the third was whether the reasons stated by the PPC were adequate. The appeal was allowed on the second and third grounds. In the decision by the NAP of 12 June 2024 upholding the petitioners' appeal, the chair said the following in relation to the disposal:

> "5.1. For the reasons set out above I consider that the appeal is successful in respect of Grounds of Appeal 2 and 3. I shall therefore refer the matter back to the PPC for reconsideration.
> 5.2. In relation to Ground of Appeal 2, its reconsideration of the application should be undertaken with reference to those other sources of evidence and information and taking care not to over rely on the CAR.
> 5.3. In relation to Ground of Appeal 3 sufficient reasons need to be given when reaching a decision."

[7] When the matter came back before the PPC, an issue arose as to the approach to be taken. The committee sought advice from the NHS Central Legal Office. The relevant part of that advice was in the following terms:

> "The NAP decision of 12 June calls for the PPC to be reconstituted to reconsider the application. The NAP Chair upheld three substantive criticisms in the decision on adequacy. The decision involved an over reliance upon the CAR. The PPC should have taken into consideration the extent to which the CAR could be relied upon given the changes in the area. The PPC must consider the pharmaceutical services available in neighbouring neighbourhoods. The NAP Chair also found that the reasoning was inadequate.
>
> The task for the PPC is to go back to its decision on adequacy and reconsider the application from there, taking close account of the three factors identified by the NAP Chair. It is possible that the PPC did not give any consideration or sufficient consideration to i. the extent to which the CAR could be relied upon given the changes in the area or ii. the pharmaceutical services available in neighbouring neighbourhoods; but it is also possible that the PPC did consider these things, it just failed to narrate that it did so in its reasoning, which in any event, the NAP found it was deficient. Whatever the situation was, the finding that there was an over-reliance on the CAR seems to invite a rebalancing of the factors being considered in relation to the application, and that suggests to me that this PPC's role is to start again with their private session, consider and discuss all of the evidence anew, and for the voting members to come to a decision on adequacy again, setting out sufficient reasoning to explain the various strands of evidence which the PPC had before it, explaining why evidence was given weight or not given weight, what weight each piece of evidence was given and the reasoning behind the eventual decision. The CAR must be sufficiently relied upon, but not overly relied upon, and how it was taken into account needs to be set out in the reasoning in relation to each aspect of the decision making."

[8] Having received this advice, the PPC went on to make a decision granting the application. In response to the second PPC decision, the petitioners again appealed to the NAP. There were two grounds of appeal stated as follows:

> "(b) there has been a failure by the Board to properly narrate the facts or reasons upon which their determination of the application was based; and
> (c) there has been a failure to explain the application by the Board of the provisions of these Regulations to those facts."

It is apparent that they did not rely on sub-paragraph (a) of paragraph 5(2B) of Schedule 3 quoted above - the presence of a procedural defect.

Submissions

[9] While it is clear from the narrative above that the effect of paragraph 5(5) of Schedule 3 to the Regulations and the decision of the NAP was that the PPC were required to "reconsider" their decision, the issue that arises is what this entails. The petitioners submit that it requires the affected parts of the decision to be made anew with the PPC addressing its minds to the merits of the application. Using the definition of the neighbourhood from their earlier decision, the PPC would have to consider again whether there was adequate provision at present and, if not, whether it was necessary or desirable to grant the application. They relied on the judgment of Fordham J in *R (on the application of Moss)* v *Service Complaints Ombudsman of the Armed Forces (No. 3)*, [2024] EWHC 669 (Admin). There, he said that his earlier decision quashing the Ombudsman's decision required that there be a further "fair and reasonable decision on the merits" although he recognised that in that new decision the Ombudsman might say the same things as in the decision that was quashed (paragraph 21). The petitioners contend that in this case the PPC merely relied on the earlier decision and provided some new reasons for taking it. In this regard, the petitioners referred to paragraph 15.9 of the minutes which stated:

> "The PPC revisited the evidence to familiarise themselves again with the case and explored their original reasoning. It was agreed that all of the content in the original decision formed part of the refreshed decision."

The petitioners placed emphasis on the second sentence in that passage. It was submitted that this indicated that the PPC had not made a new decision on the merits and had just adhered to the old decision with some additional reasons. It was said that this did not amount to a "reconsidering" of the decision. The petitioners relied also on advice obtained by the PPC from the CLO. It was not said that this had any particular status in terms of

tying the hands of the PPC but it was said that it was correct and ought to have been followed.

[10] The respondent submits that the petitioners are taking an approach which is unreasonably semantic and that terms such as "refreshed", "revisited" and "reconsidered" would be regarded as equivalent by the PPC which is not made up of lawyers. The respondent submits that the PPC had done what was required of them.

Decision

[11] It is necessary to consider what the PPC actually did when the matter came before them for the second time. The members of the PPC on that occasion were the same as those on the earlier one but this was clearly what had been intended by the NAP when stating that additional reasons were to be given for the earlier decision. Paragraph 15.1 of the minutes which relate to the occasion on which it came back before the PPC record that the application had been remitted back to them for reconsideration on the basis that two of the grounds of appeal were upheld. They considered the advice that had been obtained from the CLO and recognised that the matter had been referred back for "reconsideration".

[12] As noted above, paragraph 15.9 of the minutes records that the PPC revisited the evidence to familiarise themselves with the case and that they "explored their original reasoning". An exploration of the evidence indicates that this was more than a simple adoption of the earlier decision. In addition, the committee did not move straight from that examination of the earlier decision to the conclusion of their reasoning. Instead, they noted that the "neighbourhood" as defined in their first decision was larger than had been contended for by the applicants and therefore included a larger population. They noted that the information obtained in the CAR would have reached people within the area covered by

their extended definition of neighbourhood and beyond. They noted there was a need to consider whether the CAR was still valid in view of the change to the neighbourhood as defined. In paragraph 15.10 of the minute, the PPC did consider the change in boundary and its effects but concluded that they could still be relied upon. That was a conclusion that it was open to them, as an expert tribunal, to make.

[13] In paragraph 15.11, the PPC considered that in relation to the CAR there has been numerous methods to engage as many respondents as possible beyond the original neighbourhood decision. They went on to consider what evidence was available to them other than the CAR. They noted that one pharmacy currently supplied the "bulk" of the service to the neighbourhood and set out the basis which this service might be considered inadequate. They conclude that the existing service provision is inadequate but go on to consider services that might be provided by pharmacies in neighbouring neighbourhoods. The petitioners have made challenges to a number of the elements of the decision of the PPC in this regard and they are considered below. What matters for consideration of the first ground of challenge is that it was only after consideration of these issues that the committee went on to consider adequacy.

[14] The minutes disclose that the committee members applied their minds to the appropriate test and made a decision afresh as to the adequacy of existing provision. The decision of the NAP had required them to consider the weight that they placed on the joint consultation exercise and it is clear that they did so. They also considered the information about provision of services from pharmacists located outside the neighbourhood. Viewed in context, paragraph 15.9 appears to mean that the reasoning of the original decision has been reconsidered and the conclusion reached that it remained valid. The fact that this is legitimate was recognised in *Ross*. Rather than set out all the reasoning again, it was

incorporated by reference. It is important to note, however, that the consideration by the PPC does not end with the examination of the earlier decision. As noted above, they then go on to consider a number of additional matters. So, when paragraph 15.13 of the minute narrates that the PPC were satisfied that the service was not adequate, that is clearly a new decision. This is followed by paragraph 15.15 and 15.16 which are to the same effect. It may be noted that while the original decision had been that it was "necessary and desirable" to grant the application to ensure adequate provision (paragraph 11.23), the later decision was solely that it was necessary (paragraph 15.16). It is therefore apparent that even if a high test is adopted for what was required of the PPC, they had carried out what was required of them and given a fresh decision.

[15] On that basis, it does not appear that the decision of the PPC was flawed in the way the petitioners contend. However, there is a further problem in relation to this ground of challenge. The challenge is to the decision of the NAP. It is therefore necessary to consider what issues were put before the panel. It is apparent from the letter seeking to appeal the second PPC decision that it was not contended that there had been a procedural flaw in the second decision of the PPC. There was not a statement that the decision was vitiated because it did not amount to a reconsideration. In that situation, it cannot be said that no reasonable appeal panel would have failed to quash the decision of the PPC. On both bases, the first ground of challenge is rejected.

[16] The petition includes a ground of challenge that the NAP failed to provide adequate reasons for its own decision. It was said that this was, in effect, ancillary to each of the other submissions which allege irrationality. It was contended that if the court was to conclude that it was open for the NAP to reach the decisions they did, they had nonetheless failed in providing adequate reasoning for so doing. In relation to what was required by way of

reasons I was referred to the decisions in *South Buckinghamshire DC* v *Porter (No 2)*, [2004] 1 WLR 1953, and *United Co-operative Ltd* v *National Appeal Panel for Entry to the Pharmaceutical Lists*, 2007 SLT 831. I have therefore considered the reasoning of the NAP in this matter and consider that it is sufficient. The decision of the panel refers to paragraphs 15.15 to 15.21 of the minute of the committee decision. Those are the ones which I consider above are sufficient to indicate that the matter was considered afresh by the committee. An informed reader would not be left in doubt as to the basis of the decision. It follows that there are sufficient reasons set out in the decision of the panel.

Second ground – errors in assessment of adequacy

[17] The second ground of challenge considers the assessment of the adequacy of provision that was carried out by the PPC. Once again, it is claimed that the decision of the NAP was irrational or it did not give adequate reasons for its decision to refuse the appeal. There were a number of different elements to this challenge and it is most convenient to consider them in turn.

[18] Firstly, it was contended that the PPC had erred in one of the early statements in relation to this to the effect that the petitioner provided the "bulk" of the services to the neighbourhood (minutes, paragraph 15.12). It was contended that this was incorrect and, because the PPC had based its conclusion that provision was inadequate principally on the basis that the provision by the petitioners was inadequate, this vitiated the decision as a whole.

[19] The word "bulk" does not have a particular legal meaning or significance. A dictionary definition would be that it simply means the majority. While the petitioner submits that it was incorrect to say that they provided the "bulk" of the service, there is no

information before me that would enable me to conclude that the petitioners in fact provided less than 50% of the service. The petitioners appear to rely on the fact that other pharmacies were noted also to be supplying in the area. That, however, is not inconsistent with the petitioners supplying the majority. In any event, it is not apparent that this is a basis on which it can be said that the decision of the panel was irrational. The assessment of the current service provision was a matter for the committee as an expert tribunal. The test to find a decision irrational is always a high one. Precisely how high depends on the context. In some situations, the courts have become more willing to undertake a more exacting scrutiny of what has taken place. It may therefore be said that there is a range or spectrum of degrees of scrutiny to which a decision might be subject. The decision here, however, is the decision of a specialist tribunal. As such it is at the end of the spectrum where the courts are least willing to interfere and will all do so only in the event that the decision is plainly wrong or it is manifestly appropriate to intervene (*Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council*, 2017 SC 542, para [25]). So, in so far as it was contended by the petitioners that the reasoning of the PPC contained a "huge leap", this is not a matter with which the panel would be entitled to interfere and they cannot be considered to have erred in not doing so.

[20] The petitioners contended that the PPC erred and had conflated customer satisfaction with the adequacy of provision, that it was said that the provision of 24-hour delivery technology had resulted in the service provision being inadequate and that the NAP has erred in not allowing an appeal on this ground. The PPC minutes do not disclose any such conflation. Paragraph 15.12 noted that steps had been taken by the petitioners to increase dispensing volume but the PPC considered that the effect of that had been to sacrifice other areas of their business model. It was that sacrifice which had affected the

provision of services to patients and led to patient dissatisfaction. Patient satisfaction is something that was considered in the CAR and is legitimate for the PPC to take into account in their assessment of adequacy. The NAP cannot be criticised for not sustaining the appeal on that basis. Insofar as it is contended that the committee took comments by Mr Mohammed, the principal of the petitioners, out of context, the evaluation of evidence is something that is entirely within the remit of the committee and is not something which can be challenged on appeal to the NAP or a judicial review to this court.

[21] The petitioners noted that paragraph 15.11 of the minute contained consideration of the contents of paragraph 11.9 of the minute which recorded part of the deliberations on the original decision. Paragraph 15.11 stated that the joint consultation exercise was not restricted to newspaper advertisement. It said also that the committee was satisfied that there are numerous methods to engage with as many respondents as possible beyond the existing neighbourhood definition. It was said that this was contradictory of what was contained in 11.9. In my view on a proper reading there is in fact no conflict and what paragraph 15.11 is saying is in essence a correction of paragraph 11.9. That is, while paragraph 11.9 appears to indicate a restricted scope for the CAR, having revisited the matter, the PPC do not consider this to be the case. Such a reading is required to be consistent with the statement in the final sentence of paragraph 15.11 that, "The PPC were satisfied that there were numerous methods to engage as many respondents as possible beyond the original neighbourhood definition." That was a decision that was open for the PPC to make as the expert tribunal. I do not consider that the NAP can be said to have acted irrationally in not finding fault with the decision of the committee in this regard.

[22] As noted above, part of the original NAP decision required the PPC to have regard to other sources of evidence in relation to provision of services by other providers. It is

apparent that the PPC did so. The petitioners claimed that on the basis of paragraph 15.14 of the minute, the reason that this evidence has been accorded no weight was that it was said that the contractors were not represented at the hearing. The petitioners noted that out of six possible pharmacies, four were in fact represented and that this indicated an error which should have been noted.

[23] I do not consider that this is the correct way to read paragraph 15.14 of the minute. It is in the following terms:

> "The PPC were mindful that the weight they could give to the provision of pharmaceutical services to the neighbourhood was restricted to those contractors who had attended the original oral hearing. Although the PPC were provided with information about the other pharmacies, the weight they could place on this was restricted due to the absence of these representatives at the original oral hearing; without representation at the oral hearing there's no opportunity for evidence to be presented and/or challenged."

Given its natural meaning, this indicates that while the weight that could be placed on submissions from parties who are not represented was limited, weight *would* be accorded to those who were represented. In relation to the issue of what weight could be given to the alternative provision of supply, it is relevant to note that in both paragraph 15.20 and 11.8 of the minute it was noted that while it had been claimed that other pharmacies had the capacity to increase provision, no evidence had been provided to the PPC to support that claim. The PPC are the expert body charged with responsibility for making a decision about these factual matters and it would not have been appropriate for the NAP to open up and reconsider these factual issues. The decision of the NAP can accordingly not be faulted on this basis.

[24] A further challenge from the petitioners noted that there is a two-stage test in the Regulations to be considered before an application is granted. The test had been considered in *Lloyds Pharmacy Ltd* v *National Appeal Panel for Entry to the Pharmaceutical Lists*, 2004

SC 703. It was submitted for the petitioners that the fact that an inadequacy in provision has been identified does not mean that admission to the list ought automatically to be granted. It was said that in that situation, it is necessary that the PPC go on to consider the merits of the particular premises to which the application relates. It was said also in this context that it was open to the committee to consider whether another application might be made by a different party for different premises which would be more advantageous.

[25] The argument advanced by the petitioners in this regard does not accord with the wording of the Regulations. They state that the application may be granted "only if it is necessary or desirable *in order to secure adequate provision of pharmaceutical services in the neighbourhood*" (emphasis added). The interaction of the words "necessary" and "desirable" was considered by Lord Drummond Young in the *Lloyds Pharmacy* case to which I was referred. He indicated that "necessary" meant that the additional premises would do no more that make up an existing shortfall. Allowing an application might, however, be "desirable" to allow for some over-provision in the short term in order to secure adequacy for the future. What is noticeable is that both of these terms relate to the assessment of supply against demand. The term "desirable" is not intended as part of an evaluation of the quality of the application other than in relation to the ability to meet the demand. While the circumstances of a particular application might be taken into account to assess whether it is capable of meeting demand and is therefore necessary or desirable, it does not appear from the Regulations that there is a general requirement to consider the desirability of any particular premises once the test of necessity or desirability is met. So, although the original decision did consider the merits of the premises in respect of which the third respondents sought admission to the list, this was not necessary. Accordingly, the NAP did not fail in not allowing the appeal on this basis.

[26] The petitioners argued that the consideration by the PPC of the CAR was flawed in two respects. The first was that the neighbourhood identified in the CAR was different from that identified by the PPC and the second was that the CAR was out of date. These were the two grounds of appeal which had been specifically upheld by the NAP in the first appeal. In addition, the original NAP decision had warned against over reliance on the CAR.

[27] The PPC expressly considered the fact that the boundaries of the neighbourhood as defined by them were not the same as those that had been defined by the applicant and used in the joint consultation exercise. It was in light of that, that they carried out the revisiting of paragraph 11.9 considered above. However, no doubt in view of the instruction from the NAP, the PPC did not rely solely on the CAR. Having noted the CAR findings, the PPC tested the results against what the committee members had observed for themselves. This included the fact that there were queues outside the petitioners' pharmacy, that it had no capacity to extend its services and that admissions had been made by its proprietor, Mr Mohammed, at the original hearing. On that basis of all these matters, they decided that the provision of pharmaceutical services was inadequate. As the specialist tribunal charged with the responsibility of evaluating adequacy, this was a decision that they were entitled to make and the NAP cannot be faulted for not upholding a challenge in respect of it. As with the other grounds, the submission was made that even if the decision could not be said to be irrational, there are inadequate reasons for it at that the petitioner is left in real and substantial doubt as to what the basis of the decision was. I do not agree. The minutes make it clear that regard has been had to the CAR, that there has been consideration of whether the CAR is representative, and that other factors have been taken into account. The requirements stated in *South Bucks Council* have been met.

[28] The NAP noted that in this regard the petitioners were, in effect, seeking to advance an argument in support of a ground of appeal that had not been stated - that the relevant test had been misapplied (paragraph 4.7). The panel emphasised that the conclusions reached by the PPC and the standard or weight to be attached to the information were matters for the PPC and that the challenge by the petitioners was in essence that they disagreed with the conclusions of the PPC. That was regarded by the panel as not being a valid ground of appeal (paragraph 4.8). On the basis of the foregoing, not only was that decision open to them, it was a correct decision.

Conclusions

[29] On the bases that I have indicated above, I do not consider that any of the challenges made by the petitioners to the decision of the NAP should succeed. Accordingly, I sustain the second plea-in-law for the respondents, repel the pleas-in-law for the petitioner and refuse the petition.