

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

**AN APPLICATION BY PAUL SAVAGE AND WOODBOURNE
PHARMACY LIMITED FOR JUDICIAL REVIEW**

WEATHERUP J

[1] This is an application for judicial review of a decision of the National Appeal Panel of 28 September 2007, refusing the applicant's appeal as an objector to the relocation to 220 Stewartstown Road, Belfast of a pharmacy owned by Cooper and Anglin Ltd. This application raises the issues of delivery of a notice of appeal within the prescribed period of 21 days and the identity of the party who should determine if the notice of appeal was delivered within the prescribed period. Mr Maguire QC and Mr Brendan O'Hare appeared for the applicant, Dr McGleenan appeared for the respondent, the National Appeal Panel, and the Notice Party, Cooper and Anglin Ltd, was represented by Michael Flannigan, Solicitor.

[2] The regulation of pharmacies is provided for under the Pharmaceutical Services Regulations (Northern Ireland) 1997. Each of the Health and Social Services Boards prepares a "pharmaceutical list" of those who undertake to provide pharmaceutical services and of the addresses of the premises within each Board's area from which those persons undertake to provide such services. A person who wishes to be included on the pharmaceutical list applies to the Board and applications are determined by a Pharmacy Practices Committee appointed by the Board. There is a right of appeal to a National Appeal Panel appointed by the Department. Regulation 6 provides that a person whose name is already included in the pharmaceutical list, but who intends to relocate within the Board's area, shall apply to the Board for relocation and the above arrangements apply to such an application.

[3] The first applicant is a pharmacist and a director of the second applicant which provides pharmacy services from 128 Stewartstown Road,

Belfast in the area of the Eastern Health and Social Services Board. Cooper and Anglin Ltd provide pharmaceutical services from premises at Bell Street Road, Poleglass, Belfast and applied to the Board for relocation to 220 Stewartstown Road, Belfast. On 22 June 2006 the Pharmacy Practices Committee granted the relocation and that decision was notified to the applicant by the Board on 5 July 2006. The applicant proposed to appeal against the decision and according to the applicant's grounding affidavit a notice of appeal dated 24 July 2006 was delivered by Ms Claire Brown, on behalf of the applicant, to the reception at the offices of the Board at 12-22 Linenhall Street, Belfast at lunch-time on 26 July 2006, this being the last day for delivery of a notice of appeal by the applicant.

[4] The Regulations do not contain any discretion to extend the 21 day time limit for a notice of appeal. The decision of the National Appeal Panel of 28 September 2007 concluded by stating that the notice of appeal had not been delivered with the required 21 days and the appeal would not be considered.

[5] The application for judicial review resolves to four grounds –

1. The decision of the National Appeal Panel that the notice of appeal was out of time was irrational.
2. The Board and not the National Appeal Panel should determine whether a notice of appeal had been delivered within the 21 day time limit.
3. The National Appeal Panel failed to consider whether non compliance with the time limit would not render the appeal invalid.
4. The National Appeal Panel failed to consider whether the application of a 21 day time limit was a breach of the applicant's right to a fair trial under Article 6 of the European Convention as a disproportionate interference with the applicant's right of access to a hearing.

Was the notice of appeal received by the Board within the 21 day time limit?

[6] First of all the issue of the timing of the delivery of the notice of appeal. Schedule 4 paragraph 4 of the 1997 Regulations provides that such notice "shall be received by the Board within 21 days from the date on which notification of the Board's decision was sent to (the appellant)". The parties agreed that this Regulation required that the notice of appeal be received by the Board on or before 26 July 2006. The applicant contended at the NAP that the notice of appeal had been delivered to the Board on 26 July 2006 but did

not know at what time. By the time of the application for judicial review the applicant had consulted further with Ms Brown who delivered the letter and he averred that delivery had occurred at lunch-time on that date.

[7] By letter dated 3 August 2006 to the applicant, the Board acknowledged receipt of the notice of appeal and added - "The letter was received (via internal mail) in the Pharmaceutical Directorate at approximately 9.00am on 27 July 2006. However we assume that it had been hand delivered late on 26 July which would be within the 21 day appeal period." The applicant was informed in the letter that all relevant papers would be forwarded the Chairman of the NAP for consideration.

[8] Also on 3 August 2006 the Board forwarded to the Secretariat of the NAP the applicant's notice of appeal and added - "The letter appears to have been hand delivered and was received (via internal mail) in the Pharmaceutical Directorate at approximately 9.00am on 27 July 2006. Letters handed in at the Board's reception are normally stamped and dated but there may have been no one available to do this particularly if after 5pm. In the circumstances we must assume that the letter was hand delivered on 26 July which would be within the 21 day appeal period".

[9] The NAP convened on 18 June 2007 and decided that it required more information with regard to the time that the letter notifying the appeal had actually been delivered to the Board. Accordingly on 11 July 2006 the Secretary to the NAP notified the applicant that the NAP wished to hear submissions at an oral hearing regarding the delivery of the appeal notice. The written decision of 28 September 2007 concluded -

"10. The appellant, Mr Savage, was asked when the letter of appeal was delivered to the EHSSB.

11. Mr Savage believed that the letter was delivered by a friend to the EHSSB on 26 July 2006 but did not know at what time.

12. The panel unanimously agreed that they were not satisfied that the letter had been delivered within the statutory 21 days so the panel felt it could not consider the appeal."

[10] In a response to a request for further reasons the Secretary of the NAP stated to the applicant's solicitors on 12 October 2007 that the decision that the notice of appeal was out of time was taken after consideration of four matters, namely that the appeal notice was stamped by the Board as having been received on 27 July 2006 outside the 21 days; with reference to the Board's letter to the NAP of 3 August 2006 that as the staff of the Board were unsure

of the delivery time the applicant would be required to attend a hearing to provide confirmation of the time of delivery; that at the hearing on 27 September 2007 the applicant stated that he believed the notice had been delivered by a friend and that he did not know the time of delivery; that the panel decided to dismiss the appeal as it was unclear from the Board's letter or the applicant's evidence as to the time the Notice of Appeal was delivered and that the only fact the NAP could rely on was the date stamp which showed receipt on 27 July 2006 outside the 21 day deadline.

[11] The respondent did not contest the applicant's contention that the applicant's evidence and the Board's assumption were that the notice of appeal had been received by the Board on 26 July 2007. Accordingly in advance of the hearing of the judicial review the respondent conceded that the decision of the NAP should be set aside. However the Notice Party objected to the Court quashing the decision of the NAP of 28 September 2007 and the application proceeded to a hearing.

[12] The evidence of the applicant and the Board was such as to establish delivery of the notice of appeal to the Board on 26 July 2006. Although not before the NAP Ms Brown has filed an affidavit confirming her delivery of the notice of appeal to the Board on 26 July 2006. There is no reason to doubt that the notice of appeal was delivered to the Board on the stated date and that the notice was within time. I am satisfied, as the applicant contends and the respondent concedes, that the evidence before the NAP was such as to lead it to conclude that the notice of appeal had been received by the Board on 26 July 2007 and was within the 21 day time limit. Accordingly the appeal will be referred back to the NAP for determination of the substantive issue concerning the relocation of the pharmacy by Cooper and Anglin Ltd.

Who decides whether the notice of appeal was received by the Board within time?

[13] A further ground arising in this application for judicial review concerned whether the Board or the NAP should decide whether a notice of appeal was within time. The applicant and the respondent contended that it was for the Board to make that decision. Regulation 6(13) provides that -

“Where an application is granted, the Board shall make the relevant entries in the pharmaceutical list only after the expiry of the period within which an appeal against the decision to grant the application might be intimated or the conclusion of all the appeal procedures, whichever is appropriate.”

Schedule 4 paragraph 4 deals with appeals as follows -

(1) Where the Board has determined an application to which regulation 6(4) applies, the applicant or any person mentioned in paragraph 1(1)(c) or 1(2)(c) may appeal against the decision of the Board on the application, and notice of any such appeal shall be received by the Board within 21 days from the date on which notification of the Board's decision was sent to him.

(2) Where the Board has determined an application to which regulation 6(9) applies, the applicant or any person who was given notice of the application under paragraph 1(1)(c) or 1(2)(c) and who has made representations to the Board in accordance with paragraph 1(1) or 1(2) may appeal against the decision of the Board on the application, and notice of any such appeal shall be received by the Board within 21 days from the date on which notification of the Board's decision was sent to him.

(3) Any notice of appeal under this paragraph shall contain a concise statement of the facts and contentions upon which the appellant intends to rely.

(4) The Board shall refer a notice of appeal under this paragraph to the chairman of the National Appeal Panel appointed in accordance with Part IV.

(5) If the chairman of the National Appeal Panel, after considering the notice of appeal, is of the opinion that the notice discloses no reasonable grounds of appeal or that the appeal is otherwise vexatious or frivolous, he may determine the appeal by dismissing it forthwith, in which case he shall notify the Board accordingly.

(6) In any other case the National Appeal Panel shall be convened in accordance with Part IV and shall thereafter determine the appeal.

[14] The rationale for the contention that it is for the Board to determine whether a notice of appeal was received in time concerns the structure of

Regulation 6(13) and of Schedule 4 paragraph 4. Under Regulation 6(13) notices of appeal are furnished to the Board as the Board maintains the pharmaceutical list and entries on the pharmaceutical list can not be made prior to the expiry of time limit for appeals. Schedule 4 paragraph 4 provides for the time limit to be determined by receipt of the notice of appeal by the Board. Thereafter it is for the Board to forward notices of appeal to the Chairman of the NAP. The Chairman of the NAP may dismiss the appeal if it is determined that the notice of appeal discloses no reasonable grounds or is vexatious or frivolous. In any other case it is for the NAP to determine the appeal. The applicant points out that the Regulations do not state, as might have been the case in providing a preliminary role for the Chairman, that the Chairman would determine if the appeal was within time.

[15] There is a difference between the requirement to furnish a notice of appeal to the Board so that it might maintain an accurate up to date pharmaceutical list and the entitlement to a determination from the NAP or its Chairman on the appeal. Does the requirement to serve notice on the Board accord to the Board the right to determine the jurisdiction of the NAP to hear the appeal when there is an issue concerning the timing of the receipt by the Board of the notice of appeal?

[16] The structure is different in England and Wales, as provided by the National Health Service (Pharmaceutical Services) Regulations 1992. The pharmaceutical lists are maintained by a local Family Health Services Authority. Decisions on new applications or relocations are made by the FHSA with an appeal to the Secretary of State. A party appeals against an FHSA decision by sending to the Secretary of State a notice in writing within 30 days from the date on which the FHSA sent its decision to the applicant. Where the appeal to the Secretary of State relates to a relocation, the time limit for appeals is such period longer than 30 days as the Secretary of State may for reasonable cause allow. The Secretary of State may dismiss an appeal if it discloses no reasonable grounds or is vexatious or frivolous. Where the Secretary of State requires an oral hearing before determining an appeal he appoints one or more persons to hear the appeal and report to him. It is clear under the Regulations in England and Wales that decisions in relation to time limits will be made by the Secretary of State and that in certain cases a discretion is accorded to the Secretary of State to extend the time limit beyond 30 days.

[17] The position in Scotland is akin to that in Northern Ireland and arises under the National Health Service (Pharmaceutical Services) Scotland Regulations 1995. Decisions are made by a Board and appeals are heard by a National Appeal Panel. Notice of any appeal must be "given" to the Board within 21 days from the date on which notification of the Board's decision was sent to the appellant. The Board refers a notice of appeal to the Chairman of the Panel who may dismiss the appeal if there are no reasonable grounds

or the appeal is frivolous or vexatious. In any other case the Panel determines the appeal.

[18] It is clear from the scheme of the Regulations that a purpose of a notice of appeal being sent to the Board is to enable the Board to maintain an accurate pharmaceutical list and that the relevant entry appears in the pharmaceutical list on the day that the pharmacist is entitled to be included on the list. That day will be after 21 days have elapsed from the date on which the notification of the Board's decision was sent out if there is no appeal or at the conclusion of the appeal process if there is an appeal. It need not follow that the Board decides whether there has been compliance with the time limit.

[19] Obviously the Board would be expected to be the first to be aware of a notice of appeal having been received and whether it was within the specified time limit. If, as in the present case, there is a dispute as to whether the notice of appeal was received by the Board within the 21 day time limit the Board should be apprised of the relevant facts. It need not follow that the Board decides whether there has been compliance with the time limit.

[20] As appears from Schedule 4 paragraph 4 the Board must refer a notice of appeal to the Chairman of the NAP. There are then two decision-making processes. First of all the Chairman of the NAP may dismiss the appeal if there are no reasonable grounds or the appeal is vexatious or frivolous. In any other case the NAP shall determine the appeal. This would allow the NAP to determine whether the appellant had complied with the time limit for notices of appeal, if it is not a matter for the Board.

[21] The reason for furnishing notices of appeal to the Board relates to the maintenance of the pharmaceutical list but it does not follow that the Board is to be accorded the power to determine any issue of time limits. Indeed there may be contest between the appellant and the Board as to the circumstances in which a notice of appeal was or was not delivered or received by the Board and it would be inappropriate for the Board to be the adjudicator in a dispute to which it was a party. I am not persuaded that the structure of the Regulations is such that it is for the Board to determine whether the appeal was within time. I am satisfied that any question about compliance with the 21 day time limit should result in the notice of appeal being forwarded to the Chairman of the NAP as in any other case and that it is for the NAP to determine whether the notice of appeal was received by the Board within 21 days.

[22] The arrangements for a determination as to compliance with the time limit for receipt by the Board of a notice of appeal require procedural fairness to interested parties.

[23] This requires in the first place that the Board should refer the notice of appeal to the Chairman of the NAP in accordance with Schedule 4 paragraph 4(4), accompanied by a statement of the circumstances in which the Board received the notice of appeal. In the great majority of cases the Board will be able to notify the Chairman unequivocally that the notice of appeal was or was not received within the 21 days. In a case such as the present, where that is not possible, the Board should notify the circumstances to the Chairman, as occurred in the present case, and in the knowledge of its own working practices, may state its assumption that the notice of appeal was or was not received by the Board within the 21 days. The Board complied with this requirement in the present case.

[24] Secondly the Board should notify the appellant of receipt of the notice of appeal and whether it was or was not received within the 21 days. In those cases where it is contended by the Board that there has not been compliance with the time limit or there is uncertainty on the issue the Board should furnish to the appellant those particulars which have been forwarded to the Chairman in relation to the issue of compliance with the time limit. The Board complied with this requirement in the present case.

[25] Thirdly the Chairman of the NAP may determine the appeal by dismissing it forthwith, if he is of the opinion that the notice of appeal discloses no reasonable grounds or is vexatious or frivolous. There may be cases where the Chairman may consider the exercise of that power where compliance with the 21 day time limit remained unresolved.

[26] Fourthly the NAP will afford the appellant an opportunity to make representations in respect of the issue of compliance with the 21 day time limit. The NAP complied with this requirement in the present case.

[27] In view of the finding that the applicant complied with the 21 day time limit it is not necessary to deal with the applicant's third ground for judicial review relating to the effect of non compliance with the time limit or the applicant's fourth ground for judicial review relating to the disproportionate impact of the time limit under Article 6 of the European Convention.

[28] The decision of the NAP of 28 September 2007 that the NAP could not consider the applicant's appeal will be quashed. The substantive appeal will be heard by the NAP.