[2005–06 Gib LR 185]

R. (Application of BRUGADA and BRUGIE LIMITED) v. SCHEME PHARMACISTS BOARD

SUPREME COURT (Schofield, C.J.): November 8th, 2006

Administrative Law—judicial review—amenability to review—Scheme Pharmacists Board subject to review—decision on Scheme membership not to be Wednesbury unreasonable, to have regard to statutory requirements in Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999, especially reg. 4(1) requirement of securing adequate provision of pharmaceutical services

Medicine—pharmaceutical services—Scheme membership—"adequacy" of existing provision properly assessed under Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999, regs. 4(1) and 7(1), on continuum of adequacy—to consider nature and scope of services offered in Gibraltar and applicant's neighbourhood, level and ease of access, waiting times for service, etc.—high degree of "wholly adequate" provision sufficient for refusal of new application

A applied for judicial review of the refusal of the Scheme Pharmacists Board to grant membership of the Medical (Group Practice Scheme) to his company.

A was a registered pharmacist whose company, B. Ltd., held a trade licence to carry on a pharmacy business in premises in Main Street approved by the Medical Registration Board. The company was licensed to dispense pharmaceutical products under private prescriptions and applied to become a Scheme Member under reg. 4(1) of the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999 to enable it to fill prescriptions issued by doctors within the Government's Health Service. After an oral hearing, at which A and various objectors were heard, the Scheme Pharmacists Board refused the application.

It concluded (in terms of regs. 6(1) and 7(1)(b) of the Regulations) that there was already an "adequate provision" of Scheme Members in Gibraltar able to dispense on GHA prescriptions and relied heavily on an official Pharmaceutical Services review published in December 2004. They were easily accessible in terms of their geographical distribution (though that distribution was unequal) and an adequate choice between them according to quality. All six existing Scheme pharmacies in the neighbourhood of B. Ltd.'s premises provided similar services, including limited provision for disabled access and short waiting periods for

service, but were "more than adequate" in terms of reg. 7(1)(a). The Board accepted, however, that services could and should be improved and expressed itself willing to grant a new licence if "innovation" were offered in terms of improved facilities and upgraded services, which was not the case here. It took into consideration confidential information about the number of prescriptions dispensed annually by existing Scheme Members and the increase in the cost of medication and concluded that the introduction of a further Scheme Member would inevitably dilute the market, possibly threatening the economic viability of smaller members, driving them out of business and thereby reducing the overall choice for members of the public.

In reaching its decision, the Board specifically disregarded (a) the claimants' financial investment in the lease and premises; (b) the fact that a trade licence had been granted; (c) objections to A's qualifications, since he was duly registered in Gibraltar; and (d) objections based on the dilution of the stock levels of other Scheme Members.

A and B. Ltd. sought judicial review of the refusal on a number of overlapping grounds which collectively asserted unreasonableness, unfairness, and procedural irregularity.

Held, dismissing the application:

(1) None of the grounds raised by the claimants showed that they had not had a fair hearing or that the Board's conclusion was not reasonable. In terms of *Wednesbury* unreasonableness, the Board had not taken into account matters it ought not to have considered, or failed to take into account matters it should have considered, or reached a conclusion that no reasonable Board could have reached. There were factors weighing on both sides but it had not found those against its decision to be overwhelming. It had properly applied its mind to the relevant statutory provisions (paras. 7–17).

(2) The Board's judgment on the question of the "adequacy" of existing provision was essentially pragmatic and had properly been made on a continuum between wholly adequate and wholly inadequate and could not be faulted. It had legitimately found that whilst existing services were not *wholly* adequate, they were more than simply adequate and therefore at the higher end of "adequacy" than the lower. In any case, it was only a matter to which the Board was to "have regard" and not one that was determinative of the issue (paras. 21–26).

(3) The suggestion that there was undue and prejudicial delay showing bias against the claimants could not be supported. That there had been some delay was unquestionable—the original application of December 29th, 2004 was not finally heard until September 23rd, 2005 and the Board's decision handed down on October 11th, 2005. But the reasons for the delays—involving adjournments requested by both sides, difficulties in obtaining documents and the unexpected illness of counsel—were not attributable to the Board. The claimants had all the information they

required by the time of the hearing and there was nothing to suggest that the delays were the result of bias on the part of the Board (paras. 29–30).

(4) The claimants' assertion that it was improper for the Board to rely on the official review of pharmaceutical services, since they were unaware of it and only received copies of it after the Board's decision, could not be supported. The review was referred to in the objectors' skeleton arguments and A himself was questioned on it at the hearing. The claimants were therefore on notice that it would be considered by the Board. Moreover, the Board had adopted a balanced approach to the report of the official review and only relied on it to the extent that it used the review's findings on the adequacy of existing services to bolster its own independent conclusion on adequacy (paras. 31–36).

(5) It was true that the Board may have made minor errors of fact (*e.g.* in its findings on wheelchair access and waiting times for service) but they were not so significant that they could lead to a finding of unreasonableness. Overall, the Board reached a reasonable conclusion after a fair hearing and the application for judicial review would be dismissed (paras. 38–42).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; [1948] L.J.R. 190; (1947), 177 L.T. 641; 63 T.L.R. 623; 45 L.G.R. 635; 112 J.P. 55; 92 Sol. Jo. 26, applied.

(2) *Cepsa (Gibraltar) Ltd.* v. *Stipendiary Magistrate*, 1991–92 Gib LR 385, distinguished.

(3) *Education & Science Secy.* v. *Tameside Metropolitan Borough Council*, [1977] A.C. 1014; [1976] 3 All E.R. 665, referred to.

(4) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 1 All E.R. 465; [2001] UKHL 67, referred to.

(5) *R. (Lowe)* v. *Family Health Servs. Appeal Auth.*, [2001] EWCA Civ. 128, distinguished.

(6) *West Glamorgan County Council* v. *Rafferty*, [1987] 1 All E.R. 1005, applied.

Legislation construed:

Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations (L.N. 1999/107), reg. 6(1): The relevant terms of this paragraph are set out at para. 4.

reg. 7: The relevant terms of this regulation are set out at para. 4.

J.J. Neish, Q.C. and *D. Bossino* for the claimants;

R.R. Rhoda, Q.C. Attorney-General, and *Miss K. Khubchand, Crown Counsel*, for the defendant;

M. Isola for the interested parties.

1 **SCHOFIELD, C.J.:** Albert Brugada is a registered pharmacist and has been so since September 20th, 2000. He is the beneficial owner of Brugie Ltd. which operates the Trafalgar Pharmacy situated at 48/50 Main Street, Gibraltar (to which I shall refer as "the premises"). I shall refer to Mr. Brugada and Brugie Ltd. as "the claimants." The premises were licensed under the Trade Licensing Ordinance but on September 27th, 2004, the licence holder, J.T. Sons Ltd., applied for an extension to its trade licence to enable a pharmacy business to be carried on at the premises. This was with a view to the licence being transferred to Brugie Ltd. The application was granted on December 31st, 2004, despite the objections of the operators of eight pharmacies, subject to the trade licence being transferred to Brugie Ltd. and approval of the premises by the Medical Registration Board. Registration of the pharmacy was approved by certificate of the Medical Registration Board, pursuant to s.7 of the Medical Health Ordinance, on May 20th, 2005.

2 On December 29th, 2004, Brugie Ltd. applied to become a Scheme Member pursuant to reg. 4(1) of the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999. The applicants were already licensed to prescribe pharmaceutical products under prescriptions issued by private practitioners. The effect of membership of the Scheme is that the applicants would be able to prescribe such products under prescriptions issued by doctors within the Government's Health Service. The application was heard by the Scheme Pharmacists Board ("the Board") on September 23rd, 2005, at which hearing the applicant and various objectors, and their counsel, were heard. The Board delivered its decision denying the application on October 11th, 2005. It is against the Board's decision that this application for judicial review is filed.

The legislative framework

3 Section 3 of the Medical (Group Practice Scheme) Ordinance establishes a Scheme by which all persons registered, and their dependants, are entitled to benefits prescribed by Regulations made under the Ordinance, The Scheme is administered by the Gibraltar Health Authority (see s.3(3)). Part III of the Ordinance provides for the Scheme Pharmacists Board which, by s.12, has the duty of exercising powers relating to applications, regulation of membership of the Scheme and its general administration and regulation. A Scheme Member is described as "a registered pharmacist whose name has been included in the Scheme Pharmacist List" (see s.11). By s.22, the Minister may make Regulations providing, *inter alia*, for applications to the Board and the criteria to be used by the Board in granting applications.

4 Pursuant to s.22, the Minister made the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations ("the Regulations"). Regulations 6(1) and 7 are relevant to this application. They read:

"6.(1) Applications under regulation 4(1) shall be granted only if the board is satisfied that it is necessary or desirable in order to secure the adequate provision of pharmaceutical services in Gibraltar for the purposes of the Scheme.

. . .

7.(1) In considering any application under regulation 4(1), the board shall have regard to the following matters—

(a) whether or not adequate pharmaceutical services are already provided by Scheme Members in the neighbourhood in which the premises named in the application are located;

(b) whether or not adequate pharmacy services are already provided by Scheme Members in Gibraltar generally;

(c) any information available to the board which, in its opinion, is relevant to the consideration of the application; and

(d) any objections to the application received by the board.

(2) The board shall, in the case where objections to an application under regulation 4(1) have been received, determine the application under regulation 4(1) with a hearing of oral representations.

(3) Where the board is to hear oral representations under sub-regulation (2) it shall give the applicant and any person from whom it has received objections not less than 14 days' notice of the time and place at which the oral representations are to be heard.

(4) The board may, if it thinks fit, consider two or more applications under regulation 4(1) together in relation to each other, and, where it proposes to do so, it shall give 14 days' notice in writing to the applicants.

(5) An applicant who objects to a notice under sub-regulation (4) may, within 7 days of receipt of the notice, send a written notice of objection to the board.

(6) Upon receipt of a notice of objection under sub-regulation (5), the board shall give the objector an opportunity to be heard.

(7) Where the board is to hear oral representations pursuant to sub-regulation (6), it shall give the objector not less than 14 days' notice of the time and place where the hearing is to take place.

(8) Objections addressed to the board for the purposes of this regulation, shall be made on such form as the board may, from time to time, require.

(9) Any person making oral representations under this regulation may be assisted at any such hearing by counsel."

The grounds

5 In his skeleton arguments, Mr. Neish, for the claimants, summarized the grounds upon which the application for judicial review is based as follows:

(a) the Board's decision was irrational in that it failed to take into account or give weight to certain matters;

(b) the Board applied the wrong test in considering the application;

(c) the Board acted unfairly and manifested bias against the claimants;

(d) the Board made serious errors in its findings;

(e) the Board failed to disclose in a timely manner or at all certain matters and material; and

(f) there was inconsistency in the Board's findings.

In this judgment, I shall follow Mr. Neish's summary.

6 Mr. Neish made the point that these grounds overlap and asserted that the picture which emerges is one of unfairness, procedural irregularity and unreasonableness.

Ground 1: Irrationality

7 The first ground is that the Board's decision was irrational or *Wednesbury* unreasonable. In support of their arguments the claimants have listed 27 matters which the Board failed to take into account or give due weight to. I do not need to overload this judgment with an item-by-item consideration of all 27 matters. Nor did the Board's reasons need to be so overloaded.

8 I hope the following is an adequate summary of the Board's reasons. In the first place, it considered regs. 6(1) and 7, which I have set out above. It went on to say:

> "The purpose of the scheme is to ensure that GHA patients have adequate access to pharmacies able to dispense medication on GHA prescriptions. In other words, ensuring that there is adequate provision of scheme members in Gibraltar. Securing adequate provision means that such pharmaceutical services should be easily accessible to GHA patients in terms of their geographical distribution and that the choice and quality of the services they provide are adequate."

9 The Board then discussed the pharmacies in the neighbourhood of the Trafalgar Pharmacy and concluded that the pharmaceutical services and

facilities provided by all of the Scheme Members in the neighbourhood are not markedly different from each other and that that the current provision of services is more than adequate. The Board also concluded that the six pharmacies in the neighbourhood are easily accessible to the general public and that at least three of them are accessible by persons in wheelchairs or with prams. The Board also stated that it was satisfied that generally patients do not have an extended wait and that the "unrefuted evidence" was that waiting time tends to be for a maximum of 10 minutes.

10 The Board then went on to consider the current provision of Scheme Member pharmaceutical services in Gibraltar generally and was again satisfied that the current provision was more than adequate. The Board made reference to a Pharmaceutical Services Review carried out by John Smith of the Healthcare Department team and published in December 2004. It said it was comforted by the conclusions of the Review that Gibraltar is well supplied by the 11 existing pharmacies. The Board said that it was unable to say that the current provision is wholly adequate and concluded that the type of services can be improved. It made a comparison between the services provided by the National Health Service in the United Kingdom and elsewhere and made reference to a category of Advanced Services and Enhanced Services.

11 The Board said it was satisfied that the recipients of pharmaceutical services had a reasonable level of choice in the neighbourhood and in Gibraltar generally, but said that there is a geographical maldistribution of services.

12 The Board then went on to consider the question of whether it was desirable to grant the application and decided that it would be desirable to grant an application where the applicant offered "innovation," which it described as "improved facilities and services designed to upgrade current service provision and to bring Gibraltar's pharmaceutical services closer to the NHS pharmacy model." The Board referred to the claimants' facilities, including the supplementary facilities and services they offered, and concluded that it was not satisfied that there would be any added benefit to recipients of pharmaceutical services from the choice of services the claimants propose to provide as to make it desirable to grant the application.

13 The Board declared that it took into consideration confidential information which consisted of an analysis of the number of prescriptions dispensed each year by each of the existing Scheme Members. It went on to consider the increase in the cost of medication and the economic impact which an additional member may have on existing members. It concluded that the introduction of an additional member would have the inevitable effect of diluting the market to such an extent that the

economic viability of some of the smaller Scheme Members may be compromised, thus driving them out of service. As these Scheme Members are located outside the neighbourhood, this may have a detrimental impact on future overall access to services.

14 Before moving on to consideration of the issues raised by the claimants on those reasons, I should say that the Board disregarded the following in reaching its decision:

(a) the financial investment made by the claimants in the purchase of the lease and the cost of refurbishing the premises;

(b) the fact that the Trade Licensing Authority granted the claimants a trade licence;

(c) objections which were raised regarding Mr. Brugada's qualifications, he being duly registered in Gibraltar; and

(d) objections to the application based on dilution of stock levels of other Scheme Members.

15 I have to ask myself whether the Board took into account matters which it ought not to have taken into account, or refused or neglected to take into account matters which it ought to have taken into account, or whether it reached a conclusion which is so unreasonable that no reasonable Board could ever have come to it (see *Associated Provncl. Picture Houses Ltd*. v. *Wednesbury Corp.* (1)). Furthermore, the court is not precluded from holding a Board's decision is unreasonable merely because there are factors on both sides of the question. If the weight of factors against a decision ought to be recognized by a reasonable Board, properly aware of its duties and powers, as being overwhelming, then its decision could not be upheld (see *West Glamorgan County Council* v. *Rafferty* (6)).

16 As I have said, I do not intend to overburden this judgment with consideration of the 27 matters listed by the claimants. It is clear that the Board properly applied its mind to the relevant statutory provisions. It carefully went into questions of adequacy and the tests of necessity and desirability and formed what is to my mind a wholly reasonable judgment. True it is that on one minor matter, the question of wheelchair access to pharmacies in the neighbourhood, the Board made an error. It is arguable that on the exact waiting period for prescriptions to be dispensed there was also an error. But there were not such errors as to bring its decision within the description of "unreasonable." True it is that the Board made reference to the Review conducted by Mr. Smith and only quoted a small aspect of the Review. But the Board declared it found "comfort" in one conclusion of Mr. Smith, which supported the Board's findings. There is no evidence that the Board adopted an unbalanced

approach to Mr. Smith's Review. It is argued that for the Board to find that the six pharmacies in the neighbourhood provide more or less similar services and facilities was a wholly superficial and inadequate assessment of the pharmaceutical services on offer. However, the Board did not have to go through a detailed comparison of the six pharmacies in its reasons. It is clear that the Board looked at a relevant issue and came to a determination upon it.

17 In my judgment, the decision of the Board was not irrational or unreasonable so that I should seek to interfere with it.

Ground 2: Wrong test

18 The claimants point to the following finding in the Board's reasons:

> "The board has considered the relevance of the following factors and has disregarded them in reaching its final decision:
>
> . . .
>
> (2) The fact that the Trade Licensing Authority granted the applicant a trade licence. The board is not bound by the decision of any other statutory body and must apply the statutory test prescribed under the Regulations. This is a different test which leaves no room for discretion . . ."

19 The claimants then point to the Board's detailed statement of grounds in which it says that it is not accepted that the Board has no discretion. There is an apparent contradiction between the two statements.

20 I must say I am somewhat puzzled by the last sentence quoted above from the Board's reasons. It is abundantly clear that the Board applied all the correct tests and exercised its discretion in reaching its decision. I do not intend to nullify what is, to my mind, a sound decision by reference to one unfortunate sentence which is in apparent contradiction to what actually occurred.

21 The Board considered whether the pharmaceutical services in the neighbourhood and in Gibraltar were adequate as it was obliged to do under reg. 7(1). It came to the conclusion that they were more than adequate on both counts. The meaning of "adequate" in the context of the regulation equivalent to the Gibraltar reg. 7(1) was considered by the English Court of Appeal in *R. (Lowe)* v. *Family Health Servs. Appeal Auth.* (5). Laws, L.J. had this to say ([2001] EWCA Civ. 128, at para. 14):

> "I believe that the regulation's true construction may be expressed somewhat more simply through these following five steps.
>
> 1. A licence to provide pharmaceutical services is *only* to be granted under regulation 4(4) for the purpose of securing in the

relevant neighbourhood the adequate provision by listed pharmacists of the services in question. So much is plain and elementary.

2. What is 'adequate' is a question of degree. There is, as it has been described, a spectrum or 'continuum' of adequacy.

3. That is, I think, ordinarily a feature of the term 'adequate' as a matter of language. But it is in any case a necessary feature of the term as it is used in regulation 4(4) since if it were otherwise—if 'adequate' were to denote a single sharp edge, such that any given set of facts would fall plainly upon one or other side of it—then it would be impossible to arrive at any construction of the earlier phrase, 'necessary or desirable' other than one in which the word 'desirable' were otiose. If the provision were *inadequate* it would simply be *necessary* to make it up by granting the application. If it were adequate, the application would have to be refused.

4. It follows that, while *on the surface* the first question for the decision-maker is simply whether existing provision is adequate, the real question is where on the sliding scale or spectrum of adequacy does the case on its facts belong.

5. To this, the logically available answers are:

(a) Wholly adequate. There is no magic in the word 'wholly', it simply refers to a state of affairs in which there is no question but that the existing provision suffices.

(b) Wholly inadequate. Again, there is no magic in the adverb. This looks at a state of affairs where further provision must necessarily be made.

(c) Marginal, or somewhere between (a) and (b). There the decision-maker may conclude that it is desirable to grant the application in order to secure adequate provision. But

(d) There may be some slippage between what is marginal and the extremes, wholly adequate or wholly inadequate. To that extent there may be slippage also between what is necessary and desirable. The judgment to be made is emphatically pragmatic."

22 The first point to make is that the English regulation is different to our reg. 7(1) in that an application only falls to be granted if the relevant Authority is satisfied that it is necessary or desirable to grant it in order to

secure the adequate provision of services in the relevant neighbourhood. The Gibraltar provision, on the other hand, merely makes adequacy, in the neighbourhood and in Gibraltar generally, a matter to which the Board shall have regard.

23 It is abundantly clear that the Board did consider the adequacy of services in the neighbourhood and in Gibraltar generally as required by reg. 7(1). It also considered the spectrum of adequacy and found that whilst existing services are not wholly adequate they are more than adequate. This clearly means that the existing services come at the higher end of adequacy rather than the lower end. I cannot fault the Board's approach.

24 Mr. Neish has referred me to the test of adequacy laid down by our Court of Appeal in *Cepsa (Gibraltar) Ltd.* v. *Stipendiary Magistrate* (2), where Fieldsend, P. had this to say (1991–92 Gib LR 385, at para. 13):

> "The relevance of the number of retailers could be to show that there was only a limited number of retail outlets to be supplied by the bulk suppliers, but this does not seem to have been the Magistrate's approach. Rather, he appears to have thought that the existence of several issued unrestricted licences showed that the needs of the community were adequately provided for. This must be a wrong approach. The question of adequacy must be tested not simply by the number of licences, but by the way in which those licences are operated, and whether their operation adequately provides for the needs of the community."

25 In the first place, that decision was a decision on the refusal of a trade licence under the Trade Licensing Ordinance. Under that Ordinance the Authority is required to grant a licence unless it is satisfied that one of a number of circumstances exists. Under the Regulations we are dealing with here, the Board may only grant an application if it is satisfied that it is necessary or desirable in order to secure the adequate provision of pharmaceutical services in Gibraltar. This is an entirely different test.

26 In the second place, I do not think that the Board merely based its decision on adequacy by reference to numbers of licences. It had in mind the adequacy of the choice and quality of services already provided.

27 In my judgment the Board did not apply the wrong test in its consideration of the application.

Ground 3: Unfairness and bias

28 The claimants assert that the Board acted unfairly and this manifested bias against them. They base these assertions on the delays in hearing their application and on the use of the Smith Review.

29 Dealing first with the question of delay, the claimants have submitted a detailed chronology and I do not think it can be gainsaid that there were delays in the hearing of the application. The application was filed by letter to the Board on December 29th, 2004. The claimants made clear that they were making a substantial investment in the Trafalgar Pharmacy and that they requested early consideration. Nonetheless, the claimants did not even receive an acknowledgement of the application until April 21st, 2005 and the hearing was not fixed until July 6th, 2005. This hearing date was then adjourned "due to submissions from all sides" and a further hearing was adjourned to August 12th, 2005. The claimants encountered difficulties in obtaining further disclosure and there appears to have been non-compliance by the objectors with directions. They complain that it took seven months for the copies of the objections to be made available to them. The claimants then sought an extension of time for filing their skeleton arguments but such application was denied and the hearing of August 12th, 2005, was confirmed. Again there was an adjournment of the application hearing, this time due to the illness of the Crown Counsel allocated to advise the Board. The claimants complain that they were given but two days' notice of this adjournment. The hearing was finally conducted on 23rd September and the decision served on October 11th, 2005, more than nine months after the application was filed.

30 There were undoubtedly unfortunate delays in the hearing of the claimants' application some of which must be the Board's responsibility or at least the responsibility of its administration. These delays undoubtedly were to the prejudice of the claimants and may go so far as to operate unfairly against them. But even if there were unfairness in that sense there is nothing in the material before me which suggests bias on the part of the Board. Setting aside for the moment consideration of the Smith Review, the claimants, despite the difficulties they encountered in obtaining disclosure and with meeting the timetable for August 12th, 2005, had all the information they required by, and ample time to prepare for, the hearing of September 23rd, 2005. The claimants have not satisfied me that the delays were as a result of bias on the part of the Board and I am of the view that no fair-minded and informed observer would conclude differently (see *Porter* v. *Magill* (3)).

31 So far as the Smith Review is concerned, it is clear that the Board made use of it in the formulation of its decision in that it found "comfort" in one of the Review's conclusions. The objectors also knew of the Review at the time of the hearing. The claimants maintain that the only parties unaware of the Review at the date of the hearing were themselves and that they were only given copies of various parts of the Review subsequent to the decision of the Board and after insisting that they receive it. They claim that the contents of the Review were not made available to them so that they could comment on its contents.

32 I do not think that any party to these proceedings would argue that there would have been no unfairness if the claimants were unaware of the existence of the Review or if the Review had formed a part of the reasons of the Board on an issue which had not been referred to at the hearing.

33 It is quite clear that the Board had dealt even-handedly with the parties in that it was not the Board which provided copies of the Review to any one of them prior to the hearing. It was the objectors who referred the Board to the Review and the claimants had ample notice that they would be referring to the Review at the hearing because it was dealt with in the objectors' skeleton arguments provided well in advance of the hearing. Furthermore, Mr. Brugada was questioned on one aspect of the Review at the hearing itself. The claimants, therefore, were on notice that the Review would be in the arena.

34 It is also important to look at the way in which the Board used the Review in its reasons. The following is the only reference to the Review in such reasons:

> "The board is comforted in its conclusions as to adequacy by the Pharmaceutical Services Review carried out by Mr. John Smith of the Healthcare Development team which concluded that Gibraltar is well supplied with 11 pharmacies."

35 So the Board was simply using the Review's conclusion on adequacy of numbers of pharmacies to confirm its own independent conclusion on adequacy of services.

36 For my part, I cannot see that the Board's use of the Review operated unfairly against the claimants.

Ground 4: Errors of fact

37 The court may intervene if the Board reached its decision on the basis of a material misunderstanding or error of fact (see, for example, *Education & Science Secy.* v. *Tameside Metropolitan Borough Council* (3)).

38 The claimants submit that the Board made the following errors of fact which are material and which should cause me to set aside its decision. First, the Board found that the pharmaceutical services already provided in the neighbourhood are more than adequate, a finding which the claimants say is contrary to the findings of the Smith Review. Secondly, that three of the six pharmacies in the "cluster" area near the Primary Health Care Centre are easily accessible by persons in wheelchairs or with prams, whereas only two such pharmacies are so accessible. This is reduced to one when the duty rota system applies because one such pharmacy does not participate in the duty rota system. It is further reduced to zero when

another such pharmacy is not on duty. Thirdly, the Board made an error in finding that the facilities and services offered by the claimants are already provided for by some or all of the Scheme Members when, assert the claimants, this is not the case. Fourthly, that the Board found that the maximum waiting time for a patient to be served with prescribed medication was 10 minutes when the evidence was that the average time for dispensing each prescription was 10 minutes.

39 I shall deal with these points in turn. The Smith Review made a number of findings, some of which were critical of the services provided by pharmacists in Gibraltar. However, a careful reading of the Review does not in any way undermine the finding of the Board that the pharmaceutical services already provided in the neighbourhood are more than adequate.

40 There was evidence before the Board as to the accessibility of various pharmacies to patients in wheelchairs or with prams, but it may well be that the Board made a mistake is finding that there were three pharmacies in the neighbourhood with such access. It seems that there were two within the neighbourhood and one outside the neighbourhood. In my judgment, even if the Board made an error of fact in this regard it is not such a material error as to warrant my interference with the Board's decision. I do not consider that the issue of accessibility was so fundamental to the Board's decision that the decision would be tipped the other way by a correct finding.

41 So far as the question of the facilities and services offered by the existing Scheme Members when compared with the facilities and services offered by the claimants is concerned, there was evidence before the Board as to these issues. The Board considered the evidence and came to a conclusion that it is impossible to say is unreasonable. It is a matter of the weight which the Board attached to various aspects of the evidence, and it is impossible to say that the Board dealt with this aspect of the evidence in so unbalanced a way as to cause this court to interfere with its decision.

42 So far as the 10-minute waiting time is concerned, even if I were to come to a conclusion that the Board made an error of fact in this regard, I do not consider that it is so material as to warrant interference with the Board's decision. The Board had evidence before it to enable it to reach a decision that there was no unreasonable waiting time for patients awaiting their prescriptions.

Ground 5: Disclosure

43 The claimants submit that the failure of the Board to disclose various matters or material amounts to procedural unfairness. They emphasize the following matters:

(a) the Smith Review;

(b) the local knowledge it relied on;

(c) whether it received complaints which were not of a formal nature about existing Scheme Members;

(d) details of the comparison it made with NHS pharmacies in the UK and elsewhere; and

(e) the confidential information available to it.

44 Let me deal with each of these in turn.

(a) I have already dealt with the issue of disclosure of the Smith Review at paras. 31–35 above and I need not repeat my findings.

(b) The Board disclosed in its summary of grounds that the local knowledge it relied on is that which any other member of the local community in Gibraltar might have, including the location, accessibility and quality of services provided by existing Scheme Members. In my judgment, this local knowledge and the fact that it was not disclosed to the claimants until after the decision was made, cannot have prejudiced the claimants' application in any way.

(c) In fact, the Board received no complaints about the services provided by existing Scheme Members and so that fact and its failure to disclose it cannot have prejudiced the claimants.

(d) The Board has now disclosed that the only comparison it made with NHS pharmacies in the UK and elsewhere was that which related to Advanced Services and Enhanced Services. This was information which three of the Board members had acquired in the course of their professional practices and is available on the NHS website. The Board considered this material in its determination of the question of "desirability." I accept the Attorney-General's submission in this regard. The Board rejected the application on the basis that the services offered by the claimants did not bring such added value as to engage the limb of "desirability." This was a factual decision based on the evidence given by Mr. Brugada about the services he offered which, one can safely assume, were not understated. The fact that the Board made reference to Advanced and Enhanced Services made no difference to its assessment of the evidence of the services provided and this comparison can not have prejudiced the claimants in any way.

(e) The confidential information which the Board considered was information on the incomes received by individual pharmacists and which is not normally available to the public. This information was very limited in scope and would not have been of assistance to the claimants.

Ground 6: Inconsistency in the Board's findings

45 The last of the claimants' grounds is that the Board's decision that the recipients of pharmaceutical services already have a reasonable choice with regard to those services provided by Scheme Members is inconsistent with its finding that the services and facilities provided are not markedly different from each other. This argument was not developed in Mr. Neish's skeleton or in argument before me. To my mind, the two statements are not inconsistent in the context in which they were made. That the 11 pharmacies in Gibraltar provide not dissimilar services is not inconsistent with a finding that, in terms of level of choice and competition, the recipients of such services already have a reasonable choice in the neighbourhood and in Gibraltar generally.

Conclusion

46 It is my judgment that, despite the plethora of matters raised by the claimants in this application, they had a fair hearing and the Board came to a reasonable conclusion. The application fails. I shall hear the parties on the question of costs.

Application dismissed.