

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

Unit 1, Rosewell Community Hub, Gorton Road, Rosewell, Midlothian, EH24 9AB

Applicant: Mr Ashfaq Ahmed

Appellants: Mr Ashfaq Ahmed

Health Board: NHS Lothian (“the Board”)

PPC Decision Issued: 25 October 2021

Panel case number: NAP100 (2021)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 25 October 2021 in relation to the application of Ashfaq Ahmed (“the Applicant” or “the Appellant”).
- 1.2. The application was made on 18 February 2020. The application was considered at a meeting of the PPC on 8 October 2021. The decision of the PPC was issued on 25 October 2021 refusing the application.
- 1.3. An appeal was lodged against the present decision of the PPC by the Applicant.

2. Grounds of Appeal

- 2.1. The grounds of appeal submitted by the Appellant largely take the form of a critique of the evidence presented to the PPC rather than setting out specific grounds of appeal by reference to the available grounds of appeal under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 as amended (“the Regulations”). However, it is possible to discern the following grounds of appeal
 - 2.1.1. Consideration of the application was delayed substantially as a consequence of the COVID-19 pandemic;
 - 2.1.2. No representations were made by the Area Pharmaceutical Committee;
 - 2.1.3. The Applicant did not seek to obtain an updated letter of support from Danielle Rowley MP as he was advised that he did not need to do so because previous letters obtained in support of the application would be considered;
 - 2.1.4. The Applicant was not advised until the commencement of the consultation that his application specified opening hours of a shorter duration than the Board’s hours of service
 - 2.1.5. During the conduct of the consultation there were periods when a link to the online survey was not accessible;
 - 2.1.6. The Community Council did not receive notification inviting them to submit an appeal
 - 2.1.7. Technical difficulties were experienced with a virtual meeting;
 - 2.1.8. The representative of Lloyds was aggressive in his questioning and consulted with his Head Office during breaks in the hearing;
 - 2.1.9. The Applicant considers that there were a number of instances in which the minutes of the meeting were an incorrect reflection of events where he considers that the PPC has attributed weight to certain adminicles of evidence inappropriately or has failed to give weight to the evidence the Applicant considers important.

3. Decision

- 3.1. Under the regulations the available grounds of appeal against the decision of the Board are limited to circumstances in which there has been:
 - 3.1.1. An error of Law by the Board in its application of the regulations

- 3.1.2. A procedural defect in the way the application has been considered by the Board
- 3.1.3. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based ["schedule 3 para 5 (2B)(b) or
- 3.1.4. A failure to explain the application by the Board of the provisions of these regulations to those facts ["schedule 3 para 5 (2B)(c)"]
- 3.2. I am required to consider the notice of appeal and:
 - 3.2.1. To dismiss the appeal if I consider that it discloses no reasonable grounds of appeal or is otherwise is frivolous or vexatious.
 - 3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.2 to 3.1.4 have occurred or;
 - 3.2.3. In any other case, convene the National Appeal Panel to determine the appeal

4. Consideration of Points of Appeal

4.1. Delay

- 4.1.1. The hearing in relation to the application took place approximately 18 months after the submission of the application. Clearly the extent of the delay was far from ideal. This will have been challenging for all parties involved. However, the delay is a consequences of circumstances entirely outwith the control of the Board
- 4.1.2. It is apparent from the decision that the evidence submitted to the PPC has been considered on its merits and the fact that some of the information submitted with the application may have been older than would usually have been the case it has not been considered to the prejudice of the Applicant.
- 4.1.3. In the circumstances I do not consider there to be any merit to this ground of appeal. In addition, it should be borne in mind that, from a practical perspective, there is nothing which could be done by the PPC once the delay had occurred. It could not retrospectively cure the delay and nor could it consider the application more favourably simply because of the delay.

4.2. No Representations from the APC

- 4.2.1. The Board is obliged on receipt of the application, to notify the APC. There is no obligation on the APC to make representations to the Board in relation to any application. There is, currently, no merit in this ground of appeal.

4.3. Updated Representations from MP

- 4.3.1. The letter produced by the applicant from Danielle Rowley MP relates to a different application and as such it was appropriate for the PPC not to consider it.
- 4.3.2. The Appellant complains that he was advised by the Board that updated letters of support were not necessary as the application was being considered as a continuation of a previous application. If the Board advised the Applicant in these terms, it is clearly incorrect. It is not function of the Board to advise the Applicant on how to present his case. The Applicant is responsible for his own application. The Applicant must provide all of the information he considers relevant in support of his application in order to be able to persuade the PPC of the merits of the application. That is the Applicant's responsibility, regardless of what advice he may have received from other parties.
- 4.3.3. It is clear from the evidence submitted, that the Applicant (from the terms of the appeal) did obtain updated supporting information from other sources. If he had relied explicitly on the advice he states he received from the Board there would have been no need for

him to do so. As such, even if the Applicant was entitled to rely on the advice he states he was given by the Board, it is clear that he has not done so.

4.3.4. If I am wrong about the points above, I am in any event satisfied that if the PPC had considered the letter of support from Danielle Rowley MP (or an updated letter in similar terms) it would have had no bearing on the outcome of the Application. Although it is appropriate for the PPC to have regard to the views of MPs as reflecting the views and interests of the community they represent, the primary obligation of the PPC is to have regard to relevant factual information in order to establish whether the existing service is inadequate and, if so, whether it is necessary or desirable to grant the application. This highlights issues with regards to access. These issues have been considered in detail by the PPC in coming to the view that the existing services are adequate. The letter of support does not provide any substantive information which goes beyond or adds to the information considered by the PPC, it merely highlights the issues which the PPC has, in any event, had regard to. As such, I am satisfied that any oversight in relation to the letter of support from Danielle Rowley MP has had no bearing on the outcome of the application. For the reasons set out above I consider that this ground of appeal has no realistic prospects of success.

4.4. Advice in respect of opening hours

4.4.1. The Appellant complains that he was not advised until after the commencement of the consultation that his proposed opening hours did not meet those required by NHS Lothian's hours of service. On receipt of that advice the Applicant revised his proposed opening hours. He considers that had his revised opening hours been in place at the commencement of the consultation, a more positive response may have been received.

4.4.2. It is the responsibility of the Applicant to decide upon the details of his proposal. He is required to have regard to all appropriate standards and guidance which may be relevant when preparing the application. It is not for the Board or any other party to advise the Applicant as to the content of his application.

4.4.3. In any event, the opening hours proposed by the Applicant would only have been relevant should the PPC have decided that the existing service provided to the neighbourhood was inadequate. It did not reach that conclusion. As such, the attractiveness of the Applicant's proposed opening hours was not, ultimately, relevant.

4.4.4. For these reasons, I consider that this ground of appeal has no realistic prospect of success.

4.5. Accessibility of Consultation

4.5.1. The Appellant complains that when an online link was published to an online survey as part of the consultation process, there were technical issues with the operation of the online survey. The Appellant acknowledges the issues were resolved, that parties were able to freely access the survey and that those that had been unable to access the survey would have been able to access it at a later stage had they been keen to do so. Although it is possible that some potential respondents may not have sought to access the system again they were not prevented from doing so. There will always be operational factors which limit the ability or willingness of potential respondents to participate in a survey. With all the will in the world, no such system will ever be perfect. What matters is that a reasonable opportunity is given to participate in the consultation.

4.5.2. The Appellant states that some responses may have been lost. However, there is no indication in the appeal that the consultation was materially impaired, or the outcome altered. To the contrary, it is clear from the decision of the PPC that the PPC would have found it challenging to draw any firm conclusions from the response rate in light of differing estimates for the population of the neighbourhood and that, notwithstanding any lost responses, the CAR identified similar themes to those highlighted by the Applicant. As such there has been no prejudice to the Applicant as a consequence of any lost responses.

4.5.3. For these reasons, I consider this ground of appeal to have no realistic prospect of success.

4.6. Notice of Appeal to Community Council

4.6.1. The Appellant states that the Community Council did not receive notice indicating that they had a right of appeal against the decision. The Appellant states that he is aware of this as a result of his discussions with the Community Council prior to the submission of his own appeal.

4.6.2. I am not able to comment on whether the Community Council did or did not receive notice indicating that they had a right of appeal. It should be noted that the Community Council are not a party under which the Regulations automatically confer a right of appeal. However, it is likely that they would fall within one of the categories of parties specified in paragraph 1 of schedule 3 to the Regulations, particularly as they appeared at the hearing. As such I would have expected them to have been provided with notice of a right to appeal. If the Community Council were not provided with notice of a right to appeal, it would constitute a procedural error. However, such a procedural error would have no bearing on the merits of the decision reached by the PPC (as it could only have occurred after the decision was made). In addition, it has not altered the ability of the Appellant to bring this appeal, in which he has been able to raise any issues which he has with the decision. As such, there has been no prejudice to the Appellant as a result of any such procedural error.

4.6.3. The only practical relevance of such a procedural error would have been in the timing of an appeal by the Community Council. In that regard it is evident from the terms of the Appellant's appeal that from, on or around 11 November 2021, the Community Council has been aware of their right of appeal (it having been identified to them by the Appellant). As far as I'm aware the Community Council have not sought to appeal despite their entitlement to do so having been drawn to their attention by the Appellant.

4.6.4. For these reasons, I consider that this ground of appeal has no realistic prospects of success.

4.7. Technical Difficulties during Hearing

4.7.1. The Appellant highlights four instances in which there were issues presented by the technology which may have prevented certain parties from hearing and/or seeing the conduct of the hearing. Clearly, it would be preferable if all hearings could be conducted in person. However, there are particular circumstances which exist at present which prevent hearings taking place in person.

4.7.2. When hearings are conducted remotely, it is almost inevitable that there will be some minor disruption due to technical issues. In this case, the technical issues identified by the Appellant were minor and were addressed at the time by the PPC. I do not see any reasonable basis for criticism of the way in which the PPC dealt with these issues. Had there been any significant issues, they would have been clear at the time and it was open to all parties appearing at the hearing to raise them at the time in order that they may be addressed. It is not appropriate for any such issues to be addressed retrospectively.

4.7.3. I do not consider there to be any merit in this ground of appeal.

4.8. Conduct of Lloyds Representative

4.8.1. The Appellant claims that the representative of Lloyds was aggressive in his questioning and dismissive of answers provided by the Applicant and other parties. In addition, the Appellant complains that the representative of Lloyds consulted with their Head Office to obtain information during the hearing.

4.8.2. In respect of the manner and approach of the representative of Lloyds, parties should act respectfully to each other, but it is common practice (rightly so) for each party to be

allowed to ask questions of all parties participating in the hearing. There is nothing wrong with parties being robustly challenged on representations they are making to the PPC. From the minutes of the hearing there appears to be nothing unusual about the conduct of parties in questioning each other. However, this is ultimately a matter for the Chair of the PPC to address and control during the hearing and not a matter to be considered at appeal.

4.8.3. In relation to the representative of Lloyds consulting with their Head Office during the hearing, I can see no issue with this. Parties should seek to provide all relevant information to the PPC in order to assist in the consideration of the application and if this information is not immediately to hand but may be obtained without undue delay, I see no reason why that should not occur. I would consider such consultations with Head Office to be routine.

4.8.4. For these reasons I do not consider there to be merit in this ground of appeal.

4.9. PPC's consideration of evidence

4.9.1. A substantial proportion of the appeal is devoted to a detailed analysis of the evidence considered by the PPC and criticisms of how the PPC has narrated that evidence, the assessment of evidence by the PPC, the weight which the PPC has accorded to particular evidence and the conclusions which the PPC has drawn based on that evidence.

4.9.2. I do not propose to set out in detail the issues raised by the Appellant (if it is subsequently necessary details may be obtained from the letter of appeal itself), however, the broad thrust of the issues raised by the Appellant are:

4.9.2.1. The PPC was wrong to conclude that issues raised in relation to access largely related to convenience rather than inadequacy over the existing service;

4.9.2.2. The PPC failed to have due regard to evidence of deficiencies in the services and standard of service offered by particular pharmacies currently serving the neighbourhood;

4.9.2.3. Weight was given to the ability to access services remotely or to use delivery services;

4.9.2.4. Information which the Appellant considers to be incorrect was given to the PPC by interested parties

4.9.2.5. Insufficient weight was given to difficulties residents of the neighbourhood may experience in accessing a pharmacy situated outwith the neighbourhood (for example, for issues accessing a car or deficiencies in public transport); and

4.9.2.6. The PPC did not accurately assess the population of the neighbourhood and the prospect of it increasing

4.9.3. With respect to the Appellant, the sort of minute analysis of the evidence considered by the PPC is not appropriate in an appeal of this nature. The PPC is an expert decision making body and it is to be afforded the appropriate margin of deference in relation to its ability to assess the evidence before it. The Appellant may well disagree with the assessment of the PPC however that is not, of itself, a ground of appeal. What must be considered is whether the reasoning of the PPC in reaching the decision it has is reasonable and comprehensible to a participant in the proceedings.

4.9.4. In this case the reasoning of the PPC in reaching the conclusion it did is both clear and eminently comprehensible. The rationale behind the decision of the PPC is that the neighbourhood does not contain other core services (i.e. food shopping and GP services). As a result, issues of immediate access (in the sense of being able to walk to a pharmacy or have easy access by public transport) is of limited relevance as all residents of the neighbourhood will require to leave the neighbourhood to access

essential services. In addition, whilst not core there are delivery services available. Although these may not be suitable or available in every instance, the PPC was satisfied that the remote services available, combined with the requirement to leave the neighbourhood for basic services, meant that the residents of the neighbourhood were not prevented from accessing pharmaceutical services by virtue of the location of the pharmacies serving the neighbourhood. In relation to the quality of the existing services, there are five medical practices and seven pharmacies within a three-mile radius of the neighbourhood. As such, immediately outwith the neighbourhood (which residents will require to leave for basic services) there are a significant number of pharmacies. Although there may be some issues with the services provided by individual pharmacies and the population of the neighbourhood is increasing there are a sufficient number of pharmacies in the immediate vicinity that residents of the neighbourhood will be able to freely access the services which they need. As such the PPC did not feel able to conclude that the existing services were inadequate.

- 4.9.5. The PPC acknowledged that there were many aspects of the application that were attractive and would no doubt have been well received by the neighbourhood. However, having concluded that the existing services were not inadequate the desirability or otherwise of the application was irrelevant.
- 4.9.6. The Appellant's examination of the minutiae of the evidence does not address or provide a basis to contradict the substance of the PPC's decision.
- 4.9.7. For these reasons I do not consider that there is any realistic prospect of this ground of appeal succeeding.

5. Disposal

- 5.1. For the reasons set out above I conclude that the appeal discloses no reasonable grounds. On that basis I dismiss the appeal.
- 5.2. I have set out in previous decisions that I would encourage prospective Appellants, before submitting an appeal, to consider carefully the available grounds of appeal and to focus their letters of appeal by reference to the available grounds. I can well appreciate that Appellants, particularly Applicant Appellants, may feel frustrated when unsuccessful with applications that they have invested a significant amount of time preparing and pursuing. However, lengthy letters of appeal which take issue with every minor procedural matter in the process and challenge the decision largely because the Appellant disagrees with the conclusions reached by the PPC (rather than how they have been reached) are not to be encouraged. Potential Appellants should focus on whether there have been significant oversights or errors which have had a material bearing on the outcome of the application.

(sgd) J Michael D Graham
Chair
National Appeal Panel
19 December 2021