

# 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**

**Windygates General Store, Milton Road, Windygates, Fife, KY8 5DF**

**Applicant: Mr Umar Razzaq**

**Appellants: Omnicare Pharmacy, Boots UK Ltd, Lloyds Pharmacy, Well Pharmacy and TW Buchanan (Chemists)**

**( collectively referred to as “the Appellants” )**

**Health Board: NHS Fife (“the Board”)**

**PPC Decision Issued On: 29 April 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 (“PPC”) of the Board, which was issued on 29 April 2021 in relation to the application of Umar Razzaq (“the Applicant”). The decision of the PPC was issued following the remit back to the PPC of their original decision of 30 May 2019. I remitted the matter back to the PPC on 18 September 2019 for re-consideration on the basis that I considered there to have been a failure on the part of the PPC to properly narrate the facts and reasons for their decision in a number of respects.
- 1.2 Appeals were lodged against the present decision of the PPC by Boots UK Limited (“Boots”), Lloyds Pharmacy (“Lloyds”), Omnicare Pharmacy (“Omnicare”) and Well Pharmacy (“Well”) (together “the Appellants”). TW Buchanan (Chemists) appealed against the original decision of the PPC but have not appealed against the revised decision.

### **2. Grounds of Appeal**

- 2.1 The grounds of appeal submitted by the Appellants in relation to the present decision raise similar issues to those raised in relation to the original decisions. In particular, the following issues were raised:
  - 2.1.1 the decision of the PPC in relation to the adequacy of the existing services relies on the “local knowledge” of a lay member of the panel;
  - 2.1.2 the PPC has failed to properly narrate the basis on which it concludes that the existing service is inadequate; and
  - 2.1.3 the PPC has failed to properly narrate the basis on which it concludes that the proposed practice would be viable or the basis on which it concludes that the proposal would not have a detrimental effect on the viability of the existing service
- 2.2. Given the terms of my decision, it is not necessary for me to address each ground of appeal individually. As such, this is not a complete summary of the grounds of appeal raised by the Appellants. Full details of the grounds of appeal may be found in the appeal letters submitted by the Appellants.

### **3. Decision**

- 3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, (“the Regulations”), the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
  - 3.1.1 an error in 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 ground of appeal or is otherwise 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 at 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**

##### Reliance on Local Knowledge of Lay Member

- 4.1 The revised decision of the PPC states at paragraph 13.21.2:

*“In addition, a Lay Member of the Committee shared his local knowledge of the neighbourhood which, in addition to the CAR, led the Committee to believe there was a need for an additional pharmacy to secure the provision of pharmaceutical services.”*

- 4.2 This statement is made in the context of the PPC seeking to provide further explanation of the basis on which it concluded that the existing service was inadequate.
- 4.3 This statement makes two things clear. First, that the Lay Member provided information to the PPC about his own personal experiences and views of the current service in the neighbourhood. Second, that the PPC relied upon that information in reaching the conclusion that it is necessary or desirable for the application to be granted to secure the adequate provision of services to the neighbourhood.
- 4.3 The PPC is a quasi-judicial decision maker. It is required to consider the evidence before it and make a judgment on whether the application should be granted on the basis of that evidence. The PPC is entitled to make use of its professional skills and knowledge in analysing the information presented to it. However, it is not entitled to rely on its own personal experiences and views to supplement the information presented to it.
- 4.4 It is imperative for the integrity of the system that this process is impartial and free from both bias and the perception of bias. The submission to the PPC, by a member of the PPC, of information based on the personal experiences of that member of the service under consideration could be sufficient to undermine the impartiality of the PPC. The express reliance by the PPC on such information in reaching its principal conclusion wholly undermines the decision.
- 4.5 The fact that the PPC has considered the application in this manner is of particular concern in light of two further factors.
- 4.6 First, the appeals against the original decision of the PPC raised concerns that a member of the PPC lived locally and had raised personal concerns about the adequacy of the existing service. This was disputed by the PPC and, as a result, I was not able to reach a decision on this issue when considering the matter originally. I did, however, expressly state that it was not appropriate in any circumstances for the PPC to receive, consider or rely upon evidence submitted to it by its own members. In light of that express warning, it is a matter of serious concern to me that the PPC has immediately proceeded to rely on such information.
- 4.7 Second, the original decision of the PPC was remitted back to it, in part, because the PPC provided inadequate reasoning and explanation of the basis for its conclusion that the existing provision was inadequate. For reasons which I set out below, my view remains that the PPC's explanation of its reasoning is inadequate. The express reliance on the personal knowledge

and views of a member of the PPC, apparently as a means of bolstering the grounds for a conclusion which the PPC otherwise finds it challenging to explain, enhances the perception of bias.

- 4.8 For these reasons, I conclude that there have been procedural irregularities in the way in which the PPC has considered the application.

#### Reasoning in respect of Inadequacy of Existing Services

- 4.9 Given my conclusion in relation to the reliance by the PPC on the local knowledge of a lay member of the PPC, it is not necessary for me to consider any further grounds of appeal. However, there remain elements of the revised decision of the PPC which I consider to be wholly inadequate and, as such, it is appropriate for me to comment.
- 4.10 I remitted the PPC's original decision back to them, in part, because of a failure to adequately explain their conclusion that the existing services were inadequate. I did this on a number of grounds, including:
- 4.10.1 the PPC did not appear to consider services which were accessible outwith the neighbourhood by residents of the neighbourhood and, instead, restricted itself to consideration of services delivered into the neighbourhood; and
- 4.10.2 the PPC approached the decision by asking itself whether there was evidence of adequacy when it should have asked itself whether there was any evidence of inadequacy.
- 4.11 Addressing these issues, the PPC notes that delivery of services into the neighbourhood was only provided by a delivery service which would not allow face to face access and that access to services outwith the neighbourhood would require access to a car or the bus service and that not all residents would have such access. In addition, the PPC states that it discussed and accepted the Applicants claims in relation to inadequacy and considered the CAR.
- 4.12 Unfortunately, the PPC's revised decision does not provide any significant additional clarity. The PPC does not address the tension between its conclusion that there is little demand for a delivery service and its conclusion that it is difficult to access services outwith the neighbourhood. Nor does the PPC address the tension between its conclusion that services are inadequate because the services provided outwith the neighbourhood can only be accessed by car or bus and the facts, previously set out by the PPC, that there is far higher than usual car ownership in the neighbourhood, there is a bus service with buses running more than hourly and that significant other basic amenities (including access to a bank and groceries) would require residents to travel outwith the neighbourhood in any event.
- 4.13 The PPCs statement that it considered the CAR and accepted the Applicant's claims in relation to inadequacy do not add anything. The PPC ought, particularly when it has been specifically asked to provide additional clarity for their decision, address which elements of the CAR and the Applicant's case they found compelling and why. Simply stating that the PPC had regard to them or accepted them does not provide any clarity as to the PPC's reasoning.
- 4.14 Were I required to consider this ground of appeal, I would conclude that the PPC had still failed to provide proper narration of the facts and reasons for their decision.

#### Viability

- 4.15 The PPCs original decision in relation to the viability of the proposed new pharmacy is limited to the following statement:

*“Due to the lack of demand for a collection & delivery service provided to the neighbourhood from pharmacies in the surrounding area, the Committee were of the view that a new pharmacy would have no significant effect on the existing pharmaceutical services.*

*As a result the Committee accepted that the applicant’s justification for viability and long-term sustainability was sufficient.”*

- 4.16 I remitted the original decision back to the PPC for further consideration, in part, on this basis that the PPC had failed to properly narrate the fact and reasons for its decisions in this regard. In doing so, I highlighted that it is *prima facie* illogical to conclude that a lack of demand for a collection and delivery service in the neighbourhood indicates (a) that there is unlikely to be a significant effect on the existing pharmaceutical service as a result of the establishment of a new pharmacy; or (b) that a new pharmacy would itself have access to sufficient business to be viable. To the contrary, the lack of demand for a collection and delivery service would *prima facie* demonstrate (a) that the majority of pharmaceutical services accessed by the neighbourhood are accessed by attendance at the pharmacies outwith the neighbourhood and it is this usage which would need to be considered to assess the effect of the establishment of a new pharmacy on the viability of the existing provision; and (b) that there is limited demand for pharmaceutical services which can be accessed from within the neighbourhood and that this would make establishing a viable practice within the neighbourhood challenging.
- 4.17 The revised decision of the PPC adds the following clarification:
- “The Committee felt that the comment by the NAP had been looked at in isolation and should not be, as consideration was given to the services provided into the neighbourhood via a Collection and Delivery Service, and also the services provided to the neighbourhood by the existing pharmacies in the area.”*
- 4.18 I am afraid that I consider that this provides no further clarification whatsoever of the facts and reasons for the PPCs decision.
- 4.19 It is important to highlight that my original decision did not conclude that the PPC was wrong to reach the conclusion that it did. My decision indicated that I considered that the reasons set out by the PPC did not, absent further explanation, support the conclusion which it reached. Instead, they supported the exact opposite conclusion. On that basis, I required the PPC to provide the further explanation necessary for the rationale for its decision to be understood.
- 4.20 The response of the PPC does not endeavour to provide this clarification. Instead, it simply states that it considered the supply of service to the neighbourhood by the existing pharmacies as well as the Collection and Delivery service. This provides no further explanation of the basis on which it reached the conclusion it did. It simply notes what the PPC considered.
- 4.21 Were I required to consider this ground of appeal, I would conclude that the PPC had still failed to provide a proper narration of the facts and reasons for their decision.

## **Disposal**

- 5.1 For the reasons set out above, I have concluded that there have been procedural irregularities in the way in which the PPC has considered the application, as a result of the PPCs reliance on the personal experiences of a lay member with the existing service. Given the nature of the procedural irregularity, I consider that the only appropriate order which I can make is for the application to be reconsidered by a freshly constituted panel. As the new panel will be considering the position as it was at the time of the original application it will not be necessary to proceed with a fresh CAR . The existing will suffice .

- 5.2 Given this conclusion, I am not required to consider the other grounds of appeal in full. However, as set out above, were I required to do so I would have concluded that the revised decision of the PPC still failed to properly narrate the facts and reasons for its decision in respect of the inadequacy of the existing service and the viability of the existing and proposed pharmacies were the application to be granted. As a result of the passage of time (the original decision having been made in May 2019) and the fact that the PPC has failed twice to properly narrate the facts and reasons for its decision, I would have concluded that the only appropriate order would have been to require the application to be considered by a freshly constituted panel.
- 5.3 I would note two further matters of general concern to me. First, my decision remitting the matter back to the PPC was made on 18 September 2019. The revised decision of the PPC was not issued until 21 April 2021, approximately 18 months later. Everyone will appreciate that there have been exceptional circumstances during that period which will have presented challenges for all involved. However, it is not in anyone's interests, including those of the PPC which was required to revisit its original decision, for there to be such a significant delay.
- 5.4 Second, the revised decision of the PPC is very brief in its terms. Serious issues were identified by the Appellants and in my decision of 18 September 2019 in relation to the facts and reasons provided by the PPC in support of its original decision. The letters of appeal and my original decision set out at some length the concerns with the PPCs original decision. In those circumstances, it is disappointing that the PPCs revised decision did not engage with these concerns in a similar way. Rather, the revised decision of the PPC reads as being somewhat terse and dismissive of the concerns of the Appellants and of the issues raised in my original decision. I have no doubt that this is not what the PPC intended. However, I would encourage it to take the same care when drafting its decisions as it has no doubt done when considering the matters before it.

(sgd) JMD Graham

Chair

30<sup>th</sup> June 2021