

# National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)**

**(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

**(the “Regulations”)**

**DECISION**

**of the**

**CHAIR**

**of**

**THE NATIONAL APPEAL PANEL**

**In the application relating to**

**2 Loch Street, Townhill, Fife**

**Applicant: Mr Mohammed Ameen**

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

**PPC Decision issued : 27 September 2018**

**Panel case number : NAP 82 (2018)**

## **Decision of the Chair of The National Appeal Panel**

### **1. Background**

- 1.1 Mr Mohammed Ameen, trading as Village Pharmacy, of 196 Nithsdale Road, Glasgow (hereinafter referred to as “the Applicant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 2 Loch Street, Townhill, Fife (“the Premises”) . The application was dated 11 April 2018.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 6 September 2018. The PPC decided that, the current provision of services in the neighbourhood defined by the PPC was inadequate and it was necessary for the application to be granted in order to secure that the adequate provision of pharmaceutical services to the neighbourhood. The PPC accordingly granted the application.
- 1.3 Appeals were lodged against the decision of the PPC by Alderston Pharmacy (hereinafter “Alderston”), Lloyds Pharmacy (hereinafter “Lloyds”) and Boots UK Ltd (hereinafter “Boots”) on 10, 11 and 15 October 2018 respectively (together “the Appellants”).

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

- 2.1 The Appellants lodged separate letters setting out their respective grounds of appeal. There is, however, a significant degree of crossover between the respective grounds of appeal. As such, I shall summarise the grounds of the Appellants together.
- 2.2 The grounds of appeal can be summarised as follows:
  - 2.2.1 Ground of Appeal 1: the PPC failed to summarise the Consultation Analysis Report (CAR) or explain how the CAR was taken into account in reaching its decision.
  - 2.2.2 Ground of Appeal 2: the PPC failed to provide adequate reasons to explain its decision that the services provided were inadequate, particularly having regard to comments made by the PPC to the effect that there was little evidence of inadequacy and that there were gaps in the information relevant to the determination of the question of adequacy, particularly in relation to usage of delivery services.
  - 2.2.3 Ground of Appeal 3: the PPC failed to have regard to the Pharmaceutical Care Plan (PCSR).
  - 2.2.4 Ground of Appeal 4: the PPC failed to properly consider the viability of the proposed pharmacy and the effect of the proposed pharmacy on the viability of existing pharmacies.

### **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**

##### Ground of Appeal 1

4.1 The PPC is required by Paragraph 3(6) of Schedule 3 to the Regulations to include within its decision a summary of the CAR and an explanation of how the CAR was taken into account by the PPC in reaching its decision. This is a specific mandatory requirement which goes beyond the more general requirement that the PPC provide adequate reasons for its decision.

4.2 The comments of the PPC in relation to the CAR are limited to noting that the response indicated the highest rate of return seen by the committee. No summary of the CAR and no explanation of how the CAR was taken into account is provided in the decision of the PPC. The PPC has, therefore, failed to comply with Paragraph 3(6) of Schedule 3 to the Regulations and, in so doing, has failed to properly narrate the facts and reasons upon which its decision is based.

##### Ground of Appeal 2

4.3 The PPC addresses the issue of the adequacy of the existing provision of services under the heading “Adequacy of Existing Services” and under the heading “Committee Vote and Decision”.

4.4 The PPC concludes that the reliance on a delivery service makes the existing service provision inadequate as it cuts out face to face consultations. While the PPC addresses other issues in relation to adequacy, reliance on a delivery service appears to be the sole basis on which the PPC has concluded that the existing service is inadequate.

4.5 It is stated in the letter of appeal from Boots that it is not axiomatic that because a patient makes use of a delivery service they do not also visit a pharmacy in person. This seems to me to be correct. The critical element of the rationale for the PPC’s decision must, therefore, be that reliance was placed on a delivery service.

4.6 Having considered the decision of the PPC I can see no explanation or reasoning for the basis on which the PPC has concluded that reliance is placed on a delivery service for the provision of the existing services, rather than simply there was usage of a delivery service.

4.7 There may have been evidence considered by the PPC which allowed it to fairly conclude that reliance was placed a delivery service. However, if such evidence existed it is not so plain from the narration of the evidence provided by the PPC that the PPC did not require to address its reasoning in reaching this conclusion in its decision. This is particularly so standing the comment from the PPC that it would have been useful to have the delivery figures to Townhill from all Pharmacies in the Dunfermline area.

- 4.8 For these reasons, I consider that there has been a failure by the PPC to properly narrate the facts and reasons upon which its decision that the existing services are inadequate is based.

#### Ground of Appeal 3

- 4.9 The PPC is required to have regard to the PCSR. The PPC states in its decision that it has taken cognisance of the PCSR. However, the ground of appeal advanced by the Appellants argues that the PPC is required to go further than simply acknowledging that it has taken cognisance of the PCSR, particularly standing that the PCSR concludes that the access needs of the vast majority of the population are met and that there are no large gaps in the existing service provision.
- 4.10 The requirement to have regard to the PCSR is just that, a requirement to have regard to it. It is not equivalent to the specific requirement placed on the PPC to explain how it has taken the CAR into account. As such, I consider it can be sufficient for the PPC simply to note that has had regard to the PCSR.
- 4.11 In certain circumstances, it may be desirable for the PPC to go further and explain any apparent inconsistencies between its decision and the PCSR. This may be done with specific reference to the PCSR or it may be self-evident from the wider reasoning of the PPC. The Appellants clearly consider this is one such situation.
- 4.11 My conclusions in relation to Grounds of Appeal 1 and 2 already require me to refer the matter back to the PPC for reconsideration. This will require the provision of further reasoning in relation to its decision in relation to the adequacy of the existing service. This reasoning may address any issues raised in relation to the interaction of the decision of the PPC and the PCSR.
- 4.12 In this situation, as I am not required to reach a decision on this issue, I do not do so. However, standing that the PPC shall have the opportunity to provide further reasoning I would encourage it to address the concerns of the Appellants in this regard.

#### Ground of Appeal 4

- 4.12 The final ground of appeal relates to the assessment by the PPC of the viability of the proposed pharmacy and its effect on existing pharmacies. This is a relevant factor in considering the desirability of granting the application with a view to securing the adequate provision of services.
- 4.13 Whether or not this is a live issue depends on whether the PPC concludes that the existing provision is inadequate. As a result of my conclusion in relation to Ground of Appeal 2, I am required to refer the matter back to the PPC for reconsideration. As a result, I do not consider it appropriate that I reach a decision on this matter. However, should the PPC conclude, on reconsideration, that the existing services are inadequate, I would encourage it to address the concerns of the Appellants in relation to the PPC's consideration of the viability of the proposed and existing pharmacies.

#### **Disposal**

- 5.1 For the reasons set out above, I have concluded that the decision of the PPC fails to properly narrate the facts and reasons upon which its decision is based. I am, therefore, required by paragraph 5(5) of Schedule 3 of the Regulations to remit the decision back to the PPC for reconsideration and I shall so do.

- 5.2 As an aside, I note that the reasoning of the PPC is largely set out in a single continuous paragraph which moves from issue to issue without any apparent structure and mixes issues in relation to adequacy, necessity and desirability together. This will inevitably make it difficult for all parties to discern a clear line of reasoning.
- 5.3 I would encourage the PPC when issuing its reconsidered decision to address each issue which it considers significant individually and to set out the facts which it considers relevant, its reasoning and its conclusions in relation to each such issue individually. This will make it easier for all parties to consider the decision in future.

(sgd) JMD Graham

Interim Chair

18<sup>th</sup> December 2018