

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

3 Tweedbank Drive,
Tweedbank. TD1 3RP

Applicant and Appellant: A Razzaq ("the Appellant")

Health Board: NHS Borders ("the Board")

PPC Decision Issued: 16 January 2024

Panel case number: NAP 125 (2024)

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 dated 16 January 2024 in relation to the application of U Razzaq.
- 1.2. The application was originally made on 17 October 2023. The application was considered at a meeting of the PPC on 16 January 2024. The PPC issued its decision to refuse the application at or around the same time.
- 1.3. An appeal was lodged against the decision of the PPC by the Applicant, now the first Appellant, on 18 February 2024.

2. Grounds of Appeal

- 2.1. The Appellant has advanced one ground of appeal with three strands to it.
- 2.2. Ground of Appeal 1. This relates to whether there has been a failure to explain the facts upon which the determination of the application was based. Failure to do so is a ground of appeal in terms of paragraph 5(2B)(c) of Schedule 3.
- 2.3. The three strands to this ground of appeal are discussed below but they broadly relate to the way in which the Board considered (1) issues of convenience, (2) the viability of the application and its potential impact on existing pharmacies, and (3) the extent to which the CAR was taken into account.
- 2.4. The first strand also engages whether the legal test has been properly applied and the second and third strands whether viability and the CAR have, respectively, been considered properly – in terms of the various requirements to do so in the Regulations. For the sake of completeness I will, therefore, approach the overarching ground of appeal advanced by the appellant with these issues in mind.

3. Legislative framework

Appeals

3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:

3.1.1. A procedural defect in the way the application has been considered by the Board;

3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or

3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:

3.2.1. To dismiss the appeal if I consider that they disclose no reasonable grounds or are otherwise frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the

application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions the Board is to grant the application.

- 3.4. The Regulations provide, at paragraph 3(1) of Schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the Consultation Analysis Report (the "CAR"), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

- 4.1. Ground of Appeal 1. This relates to whether there has been a failure to explain the facts upon which the determination of the application was based. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(c) of Schedule 3.
- 4.2. As mentioned above, the first strand also engages whether the legal test has been properly applied and the second and third strands whether viability and the CAR have, respectively, been considered as a matters of procedure.
- 4.3. The first strand of this ground relates to issues of convenience. The Appellant considers that the evidence presented by the Community Council relating to difficulties in accessing pharmaceutical services went further than issues of convenience. That is to say, I presume, to the threshold of inadequacy, and this is with reference to the difficulties in accessing existing services.
- 4.4. The relevant case law (*Lloyds Pharmacy Ltd v NAP 2004 SC 73*) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum

but neither automatically means that existing services are inadequate. This also includes matters of convenience.

- 4.5. In considering the evidence presented by the Community Council the PPC considered that the issues mentioned in relation to accessing current pharmaceutical services were matters of convenience rather than inadequacy. This was, presumably, with the legal test mentioned above in mind. In any event, this was a conclusion that the PPC as a specialist tribunal was entitled to take. It was also the case that sufficient reasons were provided in this regard. This ground is not therefore upheld.
- 4.6. The second strand of this ground relates to whether viability was properly considered and sufficient reasons were given in this regard.
- 4.7. In considering an application the PPC, as noted above at paragraph 3.4, shall have regard to the likely long term sustainability of the services to be provided by the applicant. This is commonly referred to as the viability of the proposed application or pharmacy. The intention of this requirement is to help secure proper and sufficient pharmaceutical services in a neighbourhood by guarding against over-provision. This is in relation to the viability of the application at hand but also, it follows, existing pharmacies.
- 4.8. The appellant considers that viability was not properly considered. This is with reference to the Minutes of the Meeting of the PPC of 16 January 2024 where viability is mentioned, specifically, only twice. However when one considers the discussions that took place, including in relation to particular demographical data, it is clear that viability was a constant theme and was, in my view, properly considered and that sufficient reasons were given in this regard. This ground of appeal is not therefore upheld.
- 4.9. The third strand of this ground relates to whether the CAR was properly considered and sufficient reasons were given in this regard.

- 4.10. In terms of the Regulations, failure to properly consider the CAR, as a matter of procedure, is a Ground of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - paragraph 3(6)(a) and (b) of Schedule 3.
- 4.11. With reference to the Minutes of the Meeting of the PPC dated 16 January 2024 it is clear that a summary was set out and then the PPC explained how the CAR was taken into account by them in arriving at a decision; this includes not relying upon it or relying upon it to a lesser degree – and this is an acceptable approach to be taken by a decision maker as long as reasons are provided - which they are.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is dismissed in its entirety as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

18 July 2024