

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 and Leven Pharmacy (collectively referred to as “the Appellants”)

Health Board: NHS Fife (“the Board”)

PPC Decision Issued: 19 November 2021

Panel case number: NAP105 (2022) (Formerly NAP89)

NAP105(2022)

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 taken at a meeting of the PPC on 19 November 2021 in relation to the application of Umar Razzaq (“the Applicant”).
- 1.2. The application was made on 1 November 2018. The application has had an unfortunate history with two previous decisions of the PPC having been referred to me before this one. On both occasions I concluded that it was necessary to remit the matter back to the PPC for further consideration due to errors in the way in which the application had been considered or the decision explained.
- 1.3. Following the latest remittal back to the PPC, the application was, on my direction, considered by a freshly constituted PPC.

2. Grounds of appeal

- 2.1. Three separate letters of appeal were sent by the Appellants, however, there is a degree of synergy in the grounds of appeal advanced. I therefore set out the grounds of appeal advanced by the Appellants collectively. Each ground of appeal set out has been advanced by one or more Appellants. Where grounds of appeal appear to overlap substantially with each other I’ve addressed them as a single ground of appeal. The grounds of appeal are as follows:

- 2.1.1. the PPC failed to summarise the Consultation Analysis Report (“CAR”);
- 2.1.2. the PPC failed to explain how it had taken into account representations made by the existing providers;
- 2.1.3. the PPC failed to properly explain its conclusion that the existing service in and to the neighbourhood was inadequate, and, in particular, why it had reached an alternative conclusion to the APC in relation to the adequacy of the existing services;
- 2.1.4. the PPC failed to properly take into account the fact that the PCSR indicated that there was no gap in the existing provision;
- 2.1.5. the PPC took into account a letter from a Kennoway GP which was two years old;
- 2.1.6. the PPC failed to properly explain the basis upon which it has concluded that the proposal is viable and, in particular, how its consideration of annual prescription numbers and the views of the APC on viability led it to reach the conclusion it did; and,
- 2.1.7. the PPC has taken into account speculative potential increases in population

3. Decision

- 3.1. Under 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 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 appeals if I consider that they disclose no reasonable grounds or are 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. Ground of appeal 6

4.1.1. The sixth ground of appeal was stated by all of the Appellants. The Appellants raised various issues in relation to the consideration by the PPC of viability including asserting that the PPC has failed properly to explain the basis upon which it reached an alternative conclusion to the APC in relation to viability, how the PPC considered anticipated prescription numbers relative to viability and that the PPC erred in Law by considering the ability of the Applicant to supply out-with the neighbourhood in the context of viability.

4.1.2. The PPC have adopted a style of written decision (one which is becoming increasingly common across all Health Board areas) whereby it narrates its consideration of the evidence then states in a separate section that, for the reasons previously set out it concludes one way or another. This is not a form of decision which I consider helpful. The generality of the statement "for the reasons set out above" when what is "above" is the entirety of the written decision including the narration of the evidence, inevitably leads to a lack of clarity as to which of the "reasons set out above" the PPC has relied upon unless its previous reasoning is exceptionally clear.

4.1.3. In this case at least so far as the issue of viability is concerned, the PPC's previous reasoning is not exceptionally clear. The consideration of issues around viability by the PPC is, in effect, a list of evidence submitted to the PPC. It does not analyse or address this evidence in any way. It simply narrates that these factors were placed before it and considered. As such it is impossible to discern what factors the PPC has relied on to conclude that the proposal is likely to be viable and whether it would have a material negative impact on the viability of existing pharmacies serving the neighbourhood.

4.1.4. As a result, I conclude that the PPC has failed to properly narrate the facts and reasons upon which its decision is based in this regard.

4.2. Ground of appeal 1

4.2.1. The PPC is required by the Regulations to include within its decision a summary of the CAR. In this case the PPC has indicated that it considered the CAR and highlighted one section which it considered relevant. It has not provided a summary of the CAR.

4.2.2. Separately, the PPC has highlighted that the CAR is some years old at this stage and that this has made its consideration of the CAR and the application more challenging. I sympathise with this however, as the provision of the summary of the CAR is a mandatory requirement of the Regulations I must conclude that the decision of the PPC is inadequate in this regard.

4.3. Grounds of appeal 2-5 and 7

4.3.1. As I have reached a conclusion in relation to the first and sixth grounds of appeal, I am not required to consider the remaining grounds of appeal stated. However, in order to seek to avoid, so far as possible, any further appeals in relation to the revised decision of the PPC, I would make the following observations:

- a) In relation to ground of appeal 2, the PPC is not required to take into account all representations made to it. It is only required to do so to the extent that the evidence or submissions made to it are considered to be significant factors in its decision. As such, I do not consider there to be any merit in this ground of appeal.
- b) In relation to ground of appeal 3, I consider the reasoning of the PPC to be tolerably clear in this regard. The PPC's concerns in relation to the adequacy of the existing service relate principally to access. As there are no pharmacies within the neighbourhood, residents of the neighbourhood must access services out-with the neighbourhood. Although it is perfectly possible for a neighbourhood to receive adequate services from out-with the neighbourhood, it is clearly a critical factor in such provision that residents of the neighbourhood are able to access them with relative ease. The PPC has concluded, that, in this instance, that is not the case. It is entitled to reach that conclusion. This approach is in contrast to the approach of the APC which the PPC noted had focussed its consideration on whether there were any deficiencies in the actual services offered, rather than the ability of members of the neighbourhood to access them.
- c) In relation to ground of appeal 4, the PPC is required to have regard to the PCSR. It is however, not required to follow it or address it in detail. As such, there is nothing intrinsically wrong with the PPC not addressing the PCSR in detail. However, in light of the fact that I am already referring the matter back to the PPC to provide further explanation of its decision, it would be of assistance if the PPC were to explain how it took into account the PCSR and if the PPC did not agree with the PCSR's conclusion why that is.
- d) In relation to ground of appeal 5, if it is submitted that as the letter from the GP is two years old it ought not to be taken into account as the position may have changed. It is of course unfortunate that the information available to the PPC may be dated due to the length of time that this application has been under consideration. However, I do not accept that the PPC was required to disregard the letter from the GP simply due to the passage of time. It fell to be considered alongside any up-to-date information.
- e) In relation to ground of appeal 7, it is proper for the PPC to consider any potential increases in population when considering adequacy and viability. In general, consideration should only be given to relatively fixed or certain developments. However, as I have noted in previous decisions this is not prescriptive and the PPC is entitled to have regard to wider issues in certain circumstances.

In this case given the PPC's failure to explain its decision in relation to viability it is not clear whether it has inappropriately had regard to speculatively potential increases in population. In light of the fact that I have already concluded that the decision of the PPC must be returned to it, if the PPC considers the potential increase in population to be relevant to its decision in relation to viability I would encourage it to explain that clearly, particularly if the increase in population arises from speculative rather than known future developments.

5. Disposal

5.1. For the reasons set out above, I consider that the appeals are successful in respect of grounds of appeal 1 and 6. I shall therefore refer the matter back to the PPC to clarify its decision.

- 5.2.** When clarifying these elements of its decision, I would encourage the PPC to address grounds of appeal 4 and 7 in line with my comments above in order to minimise the prospects of any further appeals.

(sgd) J M D Graham
Interim Chair
National Appeal Panel
28 February 2022