

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

Ashdown, Main Street, Newtonmore PH20 1DM

Applicant: Alan Horsburgh

Health Board: NHS Highland “the Board”

PPC Decision issued: 29 October 2020

Panel case number: NAP 98 (2020)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 Alan Horsburgh (“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 Ashdown, Main Street, Newtonmore PH20 1DM (“the Premises”).
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 9 October 2020 and a decision was issued on 29 October 2020. Appeals were lodged against that decision by the Area Pharmaceutical Committee (referred to herein as “the First Appellant” or “the APC”) and Boots UK Limited (hereinafter referred to as “the Second Appellant” or “Boots”).

2. Grounds of Appeal

- 2.1 The First Appellant’s appeal was submitted on 20 November 2020. It sets out a single ground of appeal which is that the PPC failed to notify it of the date of the re-scheduled hearing on 9 October 2020 (“Ground of Appeal 1”).
- 2.2 The Second Appellant’s appeal was submitted on 19 November 2020. The Second Appellant’s grounds of appeal are:
 - 2.2.1 Ground of Appeal 2: that the PPC erred when considering the adequacy of the existing services by placing undue influence on the promotion or awareness of existing services, rather than any evidence of the actual inadequacy of those services;
 - 2.2.2 Ground of Appeal 3: that the PPC gave inappropriate weight to the Consultation Analysis Report (“CAR”) and the evidence of the Newtonmore and Vicinity Community Council (“the Community Council”);
 - 2.2.3 Ground of Appeal 4: that the PPC erred in its approach to assessing the adequacy of the existing service by placing the burden on the existing service providers to demonstrate adequacy rather than on the Applicant to demonstrate inadequacy;
 - 2.2.4 Ground of Appeal 5: that the PPC erred in concluding that the existing service was inadequate having regard to its conclusion that the grant of the application was not *necessary* because pharmaceutical services were available outwith the neighbourhood; and
 - 2.2.5 Ground of Appeal 6: the PPC erred when considering the sustainability and viability of the existing service should the application be granted.

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 First Appellant considers that there has been a procedural error in the way in which the PPC has considered the application because the APC was not formally informed of the re-scheduled hearing fixed to consider the application.

4.2 A hearing was originally scheduled by the Board for 18 September 2020 at which it would consider the application. The Board wrote to the appropriate interested parties, including the APC, advising them of this date and indicating that it required written representations to be made by 10 September 2020.

4.3 On 11 September 2020 the hearing was re-scheduled to 9 October 2020. The Board did not formally advise the APC of the date of the re-scheduled hearing. The APC became aware of the date of the re-scheduled hearing by way of informal email communication on 7 October 2020 but were unable to attend on 9 October 2020.

4.4 The APC did not make any written representations to the Board, either before the deadline of 10 September 2020 or afterwards.

4.5 The Regulations require the Board to:

4.5.1 give written notice to the APC of the receipt of an application to which Regulation 5(10) applies and to advise the APC of its entitlement to make written representations to it (Schedule 3, paragraph 1(b)); and

4.5.2 give any person from whom it received written representations reasonable notice of any hearing convened to consider those representations (Schedule 3, paragraph 3).

4.6 The APC complains that it was not given written notice of the re-scheduled hearing. In terms of the Regulations, the Board is only obliged notify parties which have submitted written representations of any hearing date. The APC did not submit any such written representations and as such, the Board was under no obligation to advise the APC of the re-scheduled hearing date.

4.7 I note that the APC indicate that they were made aware informally on 11 September 2020 that the hearing was postponed and appeared to anticipate that a revised date for representations would be set. This can have had no bearing on the APC's failure to submit written representations as, by this time, the deadline set by the PPC to make written submissions had already expired.

- 4.8 The failure by the Board to advise the APC of the re-scheduled hearing date does not constitute a procedural defect because, as a consequence of the APC's failure to submit written representations, the Board was under no obligation to do so. As such, this ground of appeal has no prospects of success and must be dismissed.

Ground of Appeal 2

- 4.9 The Second Appellant complains that the PPC has founded its determination that the existing services provided within the neighbourhood are inadequate on concerns that the availability of services outwith the neighbourhood were not promoted. The Second Appellant asserts that the promotion of, or public awareness of, services is not a relevant consideration. Instead, the PPC should focus solely on the availability of relevant services.
- 4.10 The PPC is an expert tribunal. Its decisions in relation to areas within its expertise will be afforded a significant degree of deference. Whether or not the existing provision of pharmaceutical services is adequate is a core part of the expertise of the PPC and, as such, its decisions in this regard should be afforded a significant degree of discretion.
- 4.11 In this case, the PPC concluded that the existing services are inadequate. It did so having regard to a number of issues. The most influential factor in reaching this conclusion appears to have been the content of the CAR and the submissions of the Community Council. Both the CAR and Community Council highlighted access to the existing services as being a particular issue in that the paucity of public transport options between Newtonmore and Kingussie made it difficult for residents of the neighbourhood to access services outwith the neighbourhood. In addition, the PPC identified the lack of promotion of the existing services which are available outwith the neighbourhood which may also make it difficult for residents of the neighbourhood to access the services.
- 4.12 The PPC's primary ground for determining that the existing services were inadequate was the difficulty faced by the residents of the neighbourhood in accessing them due to the lack of available public transport. The lack of promotion of those services was, at most, an ancillary issue. To characterise this as the basis for the conclusion that the existing services are inadequate is incorrect.
- 4.13 In any event, in the context of residents of the neighbourhood having difficulty accessing services outwith the neighbourhood, I do not consider that it can be said that the PPC was not entitled to take into account the awareness of the residents of the neighbourhood of the availability of access to services outwith their neighbourhood.
- 4.14 For these reasons, I consider that this ground of appeal has no reasonable prospects of success and falls to be dismissed.

Ground of Appeal 3

- 4.15 The Second Appellant complains that the PPC gave inappropriate weight to the CAR and the submissions of the Community Council.
- 4.16 Again, the PPC is an expert tribunal and its decisions related to its areas of expertise must be afforded a significant margin of deference. The assessment and attribution of weight to evidence of inadequacy falls squarely within the expertise of the PPC.
- 4.17 The PPC is required to consider the CAR and, as such, it is not reasonable to criticise the PPC for affording conspicuous weight to it. Equally, it is clear in this instance that the responses to the CAR consistently raised issues in relation to the ability of residents of the neighbourhood to access services outwith the neighbourhood in light of the limited availability of public transport. This was clearly something which the PPC ought to take into account.

- 4.18 The Second Appellant rightly acknowledges that the evidence of the Community Council is of assistance in considering the experiences of the residents of the neighbourhood in accessing pharmaceutical services. The Second Appellant's criticism of the evidence of the Community Council is that it related to matters of convenience which were not relevant to adequacy. Whilst this is correct, it is an incomplete representation of the evidence of the Community Council. Similarly to the CAR, the Community Council highlighted difficulties for residents in accessing services outwith the neighbourhood. This was a matter focused on by the PPC when questioning the representative of the Community Council.
- 4.19 The criticisms of the Second Appellant in this regard are wholly unfounded. The PPC was entitled, and in the case of the CAR obliged, to have regard to the evidence which the Second Appellant criticises it for relying on. The difficulties in accessing the existing services outwith the neighbourhood were a clear focus of the CAR, the Community Council and the PPC. As such, there appears to be no reasonable grounds to criticise the decision making of the PPC in this regard. In any event, and as previously mentioned, the assessment of the evidence and weight to be given to it is a matter within the expertise of the PPC and its decision in this regard may not be reasonably challenged .
- 4.20 For these reasons, I consider that this ground of appeal has no reasonable prospects of success and falls to be dismissed.

Ground of Appeal 4

- 4.21 The Second Appellant complains that rather than requiring the Applicant to demonstrate the inadequacy of the existing services the PPC placed the onus on the Second Appellant to demonstrate the adequacy of the existing services. In support of this proposition, the Second Appellant notes that the questions posed in the CAR asked respondents whether they would agree with the proposition that the existing services are inadequate. The Second Appellant considers that this phraseology may have created a perceived presumption that the existing services were inadequate which the Second Appellant then required to rebut.
- 4.22 The Regulations require any applicant for a pharmaceutical licence to demonstrate that the existing service in a neighbourhood is inadequate before it may be eligible for a licence. As such, every application will start from the proposition that the existing service is inadequate. It is, therefore, perfectly reasonable to ask as part of the CAR whether residents agree with this proposition. It does not give rise to any presumption to that effect – it simply asks residents to respond to the applicant's proposition that the existing services are inadequate.
- 4.23 There is no obligation placed on the provider of the existing services to demonstrate their adequacy. The existing service provider is simply given an opportunity to respond to the case put by the applicant – which may include the CAR if it is supportive of the applicant's proposition. It is not unreasonable to ask any party opposing the application to address a CAR response which broadly supports the application. This is particularly the case where the CAR identifies a clear issue, as it did in this case, in relation to access to existing services.
- 4.24 The other matters raised by the Second Appellant under this ground of appeal relate to the assessment of evidence by the PPC and non-participation of the APC in the application. These matters are addressed above. As stressed above the PPC is an expert tribunal which is to be afforded a reasonable degree of discretion in its assessment of the evidence. It is not obliged to detail in its decision every adminicle of evidence to which it has had regard and plainly is not obliged to give equal weight to all submissions before it. The non-participation of the APC is a matter for the APC and irrelevant to any appeal by the Second Appellant.
- 4.25 For these reasons, I consider that this ground of appeal has no reasonable prospects of success and falls to be dismissed.

Ground of Appeal 5

- 4.26 The Second Appellant states that the PPC has erred when concluding that the existing service was inadequate because they concluded that it was not *necessary* to grant the application because a service was being provided outwith the neighbourhood and had regard to securing adequacy in the future. The Second Appellant considers the two statements contradictory and that the PPCs statements in relation to necessity indicate that it has fallen into error when considering adequacy generally.
- 4.27 The test which the PPC must consider is in two parts. First, the PPC must assess whether the existing services are inadequate. If the PPC concludes that the existing services are inadequate, the PPC may grant the application if it concludes that doing so is necessary or desirable in order secure the adequate provision of pharmaceutical services.
- 4.28 It is implicit in the test to be applied that the PPC may conclude that the existing services are inadequate but still conclude that it is not necessary to grant the application in order to secure adequate provision. This may be on a number of grounds – for example, the PPC may be of the view that the current inadequacy could be addressed in some other way or because the application before it does not address the inadequacy. This conclusion does not interfere with the initial conclusion that the existing service is inadequate – it is a separate matter. Equally, it does not prevent the PPC granting the application as it may conclude that the grant of the application is desirable, notwithstanding the fact that it has concluded that it is not necessary.
- 4.29 In this case, given that the principal inadequacy is the difficulty in residents of the neighbourhood accessing the existing services due to difficulties with transport is perfectly understandable that the PPC concluded that it was not necessary to grant the application (because theoretically difficulties with transport could be resolved), however, it was still desirable that the application be granted (because it is unlikely that the difficulties with transport would be resolved swiftly).
- 4.30 As part of the consideration of the desirability of granting an application it is appropriate for the PPC to consider securing the adequacy of services into the future. When the neighbourhood is an expanding community (as in this case) there will always be a balance to be struck by the PPC between current over-provision and future adequate provision. The PPC cannot be criticised for engaging with that issue.
- 4.31 For these reasons, I consider that this ground of appeal has no reasonable prospects of success and falls to be refused.

Ground of Appeal 6

- 4.32 The Second Appellant considers that the PPC has erred in its consideration of the effect of the grant of the application on the sustainability of the existing service providers. In particular, the Second Appellant suggests that it was inappropriate for the PPC to have regard to the ability of the existing service providers to increase their income from non-pharmaceutical sources.
- 4.33 The PPC is required to consider the sustainability of the existing service providers and the applicant's proposed practice as part of its assessment of the necessity or desirability of granting the application. In doing so the PPC is entitled to have regard to all aspects of the sustainability of the existing provider. As the Second Appellant acknowledges, this is not a straightforward task but it is one which falls squarely within the expertise of the PPC and, as such, the PPCs decision in this regard must be afforded a margin of deference.
- 4.34 There is nothing in the Second Appellant's grounds of appeal which goes beyond a disagreement with the conclusions reached by the PPC. The Second Appellant may well

disagree with the PPCs reasoning or conclusions (although I would note that it does not in fact go as far as to suggest that the PPC was wrong in concluding that the existing service provider would be sustainable notwithstanding the grant of the application) but this does not constitute a valid ground of appeal. As such, this ground of appeal has no reasonable prospects of success and falls to be dismissed.

Disposal

- 5.1 For the reasons set out above, I have concluded that the grounds of appeal set out by the First and Second Appellants have no reasonable prospect of success. I, therefore, dismiss both appeals.

- 5.2 I would note as a general point that a number of grounds of appeal advanced in this case were largely an assertion that the PPC was wrong to reach the conclusions it did. As set out in section 3 of this decision, there are limited and specific grounds on which a decision of the PPC may be appealed. Simply disagreeing with the conclusions of the PPC is not a valid ground of appeal. As I have set out above, the PPC is an expert tribunal and this requires to be borne in mind by Appellants when considering its decision. I would encourage all appellants to consider carefully whether there exist genuine grounds of appeal, by reference to the available grounds of appeal set out in the Regulations, before submitting appeals to the NAP.

J Michael D Graham

Interim Chair

18th February 2021