

# 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

5 Soroba Road Oban,

PA34 AJA

**Applicant:** S Kazam and I Khan for Zakpharma Ltd ("the Applicants")

**Appellants:** 1. Boots UK Ltd 2. M&D Green Group ("the Appellants")

**Health Board:** NHS Highland ("the Board")

**PPC Decision Issued:** 21 October 2025

**Panel case number:** NAP 104 (2026)

## **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 21 October 2025 in relation to the application of S Kazam and I Khan for Zakpharma Ltd (“the Applicants”).
- 1.2. The application was originally made on 17 June 2025. The application was considered at a meeting of the PPC on 22 October 2025. At that meeting the application was granted. That decision was communicated to the interested parties on 6 November 2025.
- 1.3. The first and second Appellants each lodged an Appeal against the decision of the PPC on or before 1 December 2025.

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

- 2.1. The first Appellant, Boots UK Ltd, has submitted an Appeal which runs to around 6 pages. The majority of what is said in that document is without reference to the Grounds of Appeal permitted in terms of the Regulations. One permitted ground is specifically mentioned and that relates to whether there has been a failure by the Board to narrate the facts or reasons for its decision. The first Appellant expresses this as the Board failing to articulate why the existing pharmaceutical provision is inadequate and why, it follows, the proposed pharmacy is deemed to be necessary or desirable within the defined neighbourhood.
- 2.2. The second Appellant has lodged 3 grounds of appeal. All of these grounds are advanced with reference to the Grounds of Appeal permitted in terms of the Regulations.

- 2.3. Those grounds are: Ground of Appeal 1. This ground relates to whether there has been a procedural defect insofar as the PPC considered the application outwith the 6 weeks from the date on which they received the Consultation Analysis Report (“the CAR”); Ground of Appeal 2. This ground relates to whether an error of law occurred as a result of failing to properly apply the adequacy (legal) test; and Ground of Appeal 3. This ground relates to whether there has been a failure by the Board to narrate facts or reasons for its decision and a failure to explain the application by the Board of these Regulations to those facts.
- 2.4. The ground of appeal being advanced by the first Appellant relates to the duty to give reasons, it then expands to criticise the factual basis on which the decision was arrived at. This is broadly the same ground of appeal, ground of appeal 3, being advanced by the second Appellant, so I have decided to consider these grounds together for expediency.

### **3. Legislative framework**

#### *Appeals*

- 3.1. The Regulations provide, at paragraphs 5 (2A) & (2B) of Schedule 3, a limited right of appeal against a decision of the Board in the following circumstances:
- 3.1.1. An error of Law by the Board in its application of the provisions 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; or
- 3.1.4. 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 3.1.2 to 3.1.4 have occurred or;

3.2.3. In any other case (point 3.1.1.), 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 ground relates to whether there has been a procedural defect insofar as the PPC considered the application outwith the 6 weeks from the

date on which they received the CAR. Paragraph 3 of Schedule of the Regulations provides that “the Board shall, subject to sub-paragraph (5), make a determination on the application within 6 weeks of the date that they received the consultation analysis report under Regulation 5A”. Sub-paragraph provides that the 6 week determination period can be extended in exceptional circumstances and in such an event the Board must inform parties about the extended period and the reasons for it. Failure to adhere to the Regulations in this way would constitute a ground of appeal permitted in terms of paragraph 5(2B)(a) of Schedule 3 of the Regulations – procedural defect.

- 4.2. The first Appellant submits that the CAR was finalised on 18 June 2025. The hearing took place on 21 October 2025 and the decision was issued on 4 November 2025. The first Appellant also submits that they did not receive any notice of any extended time period or the reasons for it (exceptional circumstances). In the papers provided to me there are two notes and each responds to the grounds of appeal from each appellant. Although these notes do not carry a signature or identify of an author, I presume they have been prepared by or on behalf of the Board – they are entitled “Supporting Notes”. It is not uncommon in a judicial process for the judge or body being appealed to prepare a note for the tier above them considering any appeal by way of assistance. On that basis I do not take issue with the notes, they are indeed helpful, but they should carry a note of who prepared them and be clearer on purpose.
- 4.3. In any event, the relevant note accepts that the determination took place outwith the 6 week window. The explanation offered relates to the availability of the Chair and Panel over the summer holidays. The note goes onto say that the later date for the hearing was communicated to the parties and no complaints were received. I have taken this to mean that although the date was late, this was accepted by the parties and, therefore, cured. I don’t think the Board can be criticised for taking such an approach as the diarising of multiple diaries in a 6 week window is an unenviable task, but the Regulations are clear that exceptional circumstances must exist and that any change of date and reasons for that change must be communicated to the parties.

- 4.4. It is clear that none of these things took place. This represents a procedural defect in terms of the Regulations at paragraph 5(2B)(a) of Schedule 3. Accordingly, as one of the circumstances mentioned in sub-paragraph (2B) have, in my opinion, occurred, I will remit this application back to the Board for reconsideration.
- 4.5. Ground of Appeal 2. This ground relates to whether an error of law occurred as a result of failing to properly apply the adequacy (legal) test.
- 4.6. The legal test, as mentioned above, 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.
- 4.7. In these circumstances the PPC have concluded that services are inadequate. This ground of appeal is advanced regularly by appellants and with reference to the PPC's reasoning rather than the legal test as to adequacy and some of those issues are advanced here particularly by the second Appellant. Whilst it appears from the Minutes that the legal test has been identified and then considered one cannot say this with certainty, because there are clearly issues with the extent to which sufficient reasons have been provided and, it follows, the factual basis on which the decision has been based. I will however address this fully in relation to Ground of Appeal 3.
- 4.8. However, it should be recognised that much of this ground is advanced with reference to the issue of whether the PPC was properly able to assess adequacy and then apply the legal test if, at the date of the reconsideration decision, the information before the PPC (mentioned above at paragraph 3.4) has been superseded by events. In this case this related to the recent acquisition of one of the existing pharmacies in the neighbourhood by M & D Green.
- 4.9. As mentioned above in relation to ground of appeal 1, adequacy is to be considered at a specific point in time – this being the time of its decision - and this is with a view to the PPC basing its decision on current and relevant information. This is usually at the time the application is made (with reference to the supporting evidence of the

application) and considered at the time the (first) decision of the PPC is taken; the latter being within 6 weeks of receipt of the CAR.

- 4.10. This exercise becomes more difficult where cases have been delayed for whatever reason, as was noted in the *Petition of LP North Sixteen Ltd t/a Dears Pharmacy for Judicial Review* [2025] CSOH 91; 2025 S.L.T. 1182 . It is unsatisfactory for an application to be considered on an assessment of adequacy made some time ago and when any delay is not the responsibility of the parties involved.
- 4.11. In this case it is clear the passage of time is not over a period of years. Rather the changes that have taken place are contemporaneous with the preparation of the CAR. Whilst it may be the case that any positive effects in the change of operator were yet to be realised, it was also the case that this is something that the PPC was mindful of at its meeting to consider the application. However the extent to which these and other matters were taken into account is not known. As mentioned above I will expand on this matter when considering whether the reasons given are sufficient.
- 4.12. Ground of Appeal 3. This ground relates to whether there has been a failure by the Board to narrate facts or reasons for its decision. Failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based is a ground of appeal – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3. This ground also relates to whether there has been a failure by the Board to explain the application by the Board of the provisions of these Regulations to those facts (paragraph 5(2B)(c) of Schedule 3).
- 4.13. Whether there has been a failure to provide sufficient reasons is usually considered with reference to the test set out in *Wordie Property Co Ltd v Secretary of State for Scotland* [1984] SLT 345, that test being whether an informed reader and the court is in no real and substantial doubt as to what the reasons for it (the decision) were and what were the material considerations which were taken into account in reaching it. Another iteration of that test was discussed in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, in particular that “the reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was

decided as it was and what conclusions were reached on the principal important controversial issues”.

- 4.14. When one reads paragraph 9 of the Board’s decision there are a number of questions asked with a yes or no reply and a rationale. That rationale is, broadly speaking, with reference to evidence or information that supports how that question has been answered but it does not make reference to any competing views or demonstrate that any sort of balancing exercise or consideration has fully taken place. The rationales are mainly advanced with reference to the CAR, letters and email of support received, and the community council presentation, but there are no reasons given as to why they have been preferred over other sources. In my view this falls short of the requirement to provide sufficient reasons.
- 4.15. It also the case, and this is with reference to the legal test mentioned above and the relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) which 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. In these circumstances it appears that the PPC may have conflated support for a third pharmacy and improvements that may offer with a finding that current provision is inadequate.
- 4.16. As the Appellants note, that approach relies heavily on the CAR and that presents another issue. Failure to properly consider the CAR, as a matter of procedure, is also 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. This did not take place. As mentioned above there is clearly a reliance upon the CAR but not after setting out a

summary of the CAR and how it was taken into account by the Board and, also, how it was preferred to other information or evidence and, crucially, why.

- 4.17. This represents a failure to provide sufficient reasons terms of the Regulations at paragraph 5(2B)(b) of Schedule 3. Accordingly, as one of the circumstances mentioned in sub-paragraph (2B) have, in my opinion, occurred I will remit this application back to the Board for reconsideration.
- 4.18. In relation to whether there has been a failure by the Board to explain the application by the Board of the provisions of these Regulations to those facts (paragraph 5(2B)(c) of Schedule 3, I have not reached a view on this matter given the deficiency of the reasons given.

## **5. Disposal**

- 5.1. For the reasons set out above, I shall remit the decision back to the Board for reconsideration in respect of Grounds of Appeal 1 (procedural defect) and 3 (first limb: duty to provide sufficient reasons).
- 5.2. I have not been able to reach a view in relation to Ground of Appeal 2 (error of law - failure to properly apply the legal test or the second limb of Ground of Appeal 3 (failure to explain the application by the Board of the provisions of these Regulations to those facts) given the issues around the reasons given. It may be the case that, if that Ground of Appeal is reconsidered properly as I come onto suggest below, then sufficient clarity might be arrived at. If that is not the case the Appellants remain able to advance them again if need be.
- 5.3. When I remit an application back for reconsideration I am to give to the Board such advice as appears to me to be desirable with a view to remedying the defect or failure that has led to the decision to remit.

- 5.4. In relation to Ground of Appeal 1, the reconsideration is limited and the only advice I can offer is to reiterate that the Regulations must be followed to the extent mentioned above. When the CAR is in the preparation phase Boards may find it useful to begin the diarising exercise then but if it remains impossible to do so within the 6 week window then exceptional circumstances must exist and any change of date and reasons for that change must be communicated to the parties. For the avoidance of any doubt, given the later date was accepted and the hearing took place without objection, I do not consider that the decision was vitiated by this procedural defect; as was suggested by the first Appellant.
- 5.5. In relation to Ground of Appeal 3, the duty to provide reasons is twofold. The first relates to the duty to provide sufficient reasons – generally. My advice in this regard is to clearly state the legal test being applied, the information or evidence that has been taken into account, what information has been preferred over another and why, and taking all of that into account what the outcome is and why. As mentioned above, care should be taken when doing so particularly when considering whether the threshold of inadequacy has been reached or whether these relate more directly to areas for improvement. Care should also be taken in relation to whether the application is necessary or desirable in order to secure adequate provision, that formulation being understood to relate to immediate necessary provision, some overprovision and whether the pharmacy that is the subject of the application and, it follows, those existing pharmacies would be viable if the application was granted. Is there enough demand for three pharmacies, and what evidence is that view based on? The second relates to the CAR; the decision must set out a summary of the CAR and how it was taken into account by the Board – not just a reference that it was.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

4 February 2026