

24 January 2024

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**APPEAL AGAINST BIRMINGHAM AND SOLIHULL ICB DECISION
NOT TO GIVE THIRD PARTY APPEAL RIGHTS TO MEJ HINGLEY
& CO LIMITED IN RESPECT OF THE DECISION TO GRANT AN
APPLICATION BY MOHAMMEDI HEALTHCARE LIMITED FOR A
NO SIGNIFICANT CHANGE RELOCATION FROM 545-547 GREEN
LANE, SMALL HEATH, BIRMINGHAM B9 5PT TO YARDLEY
GREEN MEDICAL CENTRE, YARDLEY GREEN ROAD,
BORDESLEY GREEN, BIRMINGHAM B9 5PU**

1 Outcome

- 1.1 MEJ Hingley & Co Limited is a person with third party appeal rights against the decision of the ICB set out in its letter dated 20 December 2023 (and notified to MEJ Hingley & Co Limited by letter dated 20 December 2023).

A copy of this decision is being sent to:

Mohammedi Healthcare Limited
Templebright LLP representing MEJ Hingley & Co Limited
Birmingham and Solihull LPC
PCSE on behalf of Birmingham and Solihull ICB

Advise / Resolve / Learn

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1 The Application

By application dated 14 March 2023, Mohammedi Healthcare Limited ("the Applicant") applied to the Birmingham and Solihull ICB for a no significant change relocation from 545-547 Green Lane, Small Heath, Birmingham B9 5PT to Yardley Green Medical Centre, Yardley Green Road, Bordesley Green, Birmingham B9 5PU.

2 Process

NHS England gave notice of the notifiable application in accordance with the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations") by cover letter dated 13 July 2023. This is a summary of representations made to NHS England by MEJ Hingley Limited Representative in a letter dated 11 August 2023 (i.e. within 45 days as set out in the Regulations):

2.1 "I act for MEJ Hingley & Co Limited which is included in the pharmaceutical list for premises trading as Hingley Pharmacy, 48-52 Yardley Green Road, Bordesley Green, Birmingham, B9 5QE and 77 Yardley Green Road, Bordesley Green, Birmingham, B9 5PU.

2.2 On behalf of my client I write further to your letter of 13th July 2023 and in order to make representations to NHS England on the above application.

Regulation 31

2.3 As NHS England will be aware, it is required first to consider whether it must refuse this application by reason of regulation 31 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Regulation 31 provides as follows:

(1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.

(2) This paragraph applies where—

(a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services ("the existing services") from—

(i) the premises to which the application relates, or

(ii) adjacent premises; and

(b) the NHSCB is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).

- 2.4 The applicant applies to relocate its pharmacy from 545-547 Green Lane, Small Heath, Birmingham, B9 5PT to Yardley Green Medical Centre, Yardley Green Road, Bordesley Green, Birmingham, B9 5PU.
- 2.5 As NHS England will be aware, the applicant's proposed premises, the Yardley Green Medical Centre, are already included in the HWB's pharmaceutical list, with the NHS Chemist being JMA Pharma Limited trading as M Pharmacy.
- 2.6 The applicant states that JMA Pharma Limited's inclusion in the pharmaceutical list will be removed prior to the applicant proceeding with its proposed relocation (should this application be granted) but, of course, at the time that this application is being determined, JMA Pharma Limited is included in the relevant pharmaceutical list, so that regulation 31(2)(a) clearly applies. There can be no guarantee that JMA Pharma Limited will be removed from the pharmaceutical list prior to the applicant's pharmacy relocating (were this application to be granted) and no basis upon which NHS England could require the removal of JMA Pharma Limited from the pharmaceutical list.
- 2.7 In relation to regulation 31(2)(b), NHS England must determine whether it "*is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).*"
- 2.8 In its application form, the applicant refers to the judgment of Davies J in the case of R (on the application of Pharmacy Care Plus Ltd) v Family Health Services Appeals Unit [2013] EWHC 824 (Admin).
- 2.9 As a preliminary matter, the case of Primary Care Plus Limited related to the application of regulation 17A of the National Health Services (Pharmaceutical Services) Regulations 2005. Whilst regulation 17A or the 2005 Regulations is similar to regulation 31 of the 2013 Regulations, it is not identical.
- 2.10 I have set out, above, the wording of regulation 31(2)(b). In particular, NHS England will note that it must determine whether "*the premises to which the application relates and the existing listed chemist premises should be treated as the same site*". In contrast, the relevant wording in regulation 17A was whether "the premises to which the application relates and the existing listed premises should be considered as one site".
- 2.11 NHS England may consider that there is a material difference in whether it considers the applicant's proposed premises and the premises for which JMA Pharma Limited are included in the pharmaceutical list are to be treated as "the same site" (which is the test which applies to this application) rather than whether those premises are to be treated "as one site" (which is the test stated in regulation 17A and to which the Primary Care Plus Limited determination relates).

- 2.12 It is submitted that the proposed premises are clearly “the same site” (as provided for in regulation 31(2)(b)) even if they would not be considered as “one site” for the purposes of regulation 17A (as provided for in the Primary Care Plus Limited judgment).
- 2.13 In any event, even if the regulatory test in regulation 31 is, to all intents and purposes, the same as the regulatory test in regulation 17A, it is “reasonable to treat the service that the applicant proposes to provide as part of the same service as the existing services”.
- 2.14 The applicant states, in its application form, relevantly as follows “It is clear from the judicial guidance that, regardless of whether the applicant proposes to open from premises that are currently occupied by a pharmacy or adjacent to those premises, where the applicant is not connected to the existing pharmacy owner, Regulation 31 does not apply.”
- 2.15 This appears to be a reference to paragraph 35 of the judgment of Davies J in Primary Care Plus Limited. Paragraph 35 reads as follows:
- “35. But also I can well accept that there may be intermediate positions; so, for example, there may be a commonality of ownership but the owners may not be exactly the same, and it may very well be that in such cases one would have to consider things such as the nature of the respective businesses; whether or not they are going to be physically separate or separate from a business point of view; whether or not the employees would be working in both businesses, and any other relevant matters. That conclusion seems to me to be consistent with the guidance given in 2009 by the Department of Health, to which I have been referred, whereby in short, the question is said to be whether or not the primary care trust is satisfied that the applicant has a sufficiency distinct identity and will be providing a distinct service from the already listed contractor.”*
- 2.16 In relation to the current application, there is a clear and unambiguous link between the applicant company (Mohammedi Healthcare Limited) and the company which is included in the pharmaceutical list at the proposed premises (JMA Pharma Limited). According to records held by Companies House, the position is as follows:
- 2.16.1 Mohammedi (UK) Ltd operates Mohammedi Supermarket at 330-336, Green Lane, Small Heath Birmingham, B9 5DP.
- 2.16.2 Mohammed Arshad (DOB Oct 1984) is listed in the incorporation documents for Mohammedi (UK) Ltd and later as an officer of the company in the Annual Return of 7th August 2006. All officers of the company reside/resided at 44, Longmore Road, Solihull B90 3DY.
- 2.16.3 In 2009, Mohammedi Healthcare Ltd opened a 100 hour-contract pharmacy (Mohammedi Pharmacy) in Mohammedi Supermarket, 330-336, Green Lane, Small Heath, Birmingham, B9 5DP.
- 2.16.4 The registered address of Mohammedi Healthcare Ltd was Pharmacy Section, 330-336, Green Lane, Small Heath, Birmingham, B9 5DP (ie the same address as Mohammedi (UK) Ltd t/a Mohammedi Supermarket).
- 2.16.5 In 2009, the sole director of Mohammedi Healthcare Ltd was Mohammed Asif (DOB Sep 1979) residing at 42, Longmore Road, Solihull B90 3DY.
- 2.16.6 From 2010 to 2012, the annual returns for Mohammedi Healthcare Limited detailed Mohammed Asif's address as 44, Longmore Road, Solihull, B90 3DY until a notice of a director's details changed was lodged at Companies House detailing a change to his residential address to 42, Longmore Road, Solihull, B90 3DY (ie next door).

- 2.16.7 In 2021, Mohammedi Healthcare Ltd acquired a 40-hour contract at 545-547, Green Lane, Small Heath, Birmingham B9 5PY, which operates as Mohammedi Pharmacy. This is the pharmacy which is the subject matter of the current relocation application. Mohammedi Pharmacy at Mohammedi Supermarket at 326-336, Green Lane ostensibly closed down although the signage remains.
- 2.16.8 The incorporation documents of JMA Pharma Ltd detail Mohammed Arshad (DOB Oct 1984) of 44, Longmore Road, Solihull, B90 3DY as a shareholder of the company. The registered address of JMA Pharma Ltd at incorporation in May 2022 was 44, Longmore Road, Solihull, B90 3DY.
- 2.16.9 The sole director of JMA Pharma Limited is listed as Junaid Mohammed of 44, Longmore Road, Solihull, B90 3DY.
- 2.16.10 In February, 2023, JMA Pharma Ltd acquired the 100-hour contract previously operated by Lloyds Pharmacy at Omnia Practice, Yardley Green Medical Centre, 73, Yardley Green Road, Bordesley Green, Birmingham B9 5PU, operating it as M Pharmacy.
- 2.17 In summary, therefore, the position is as follows:
- 2.17.1 Mohammedi Healthcare Ltd is applying to relocate its 40-hour contract to premises which are currently included in the pharmaceutical list in the name of JMA Pharma Ltd.
- 2.17.2 Mohammed Arshad has been a director of Mohammedi (UK) Ltd which operates Mohammedi Supermarket which housed Mohammedi Healthcare Ltd t/a Mohammedi Pharmacy from 2009 to 2021. In July 2019, he resigned from Mohammedi (UK) Ltd. He was listed as a shareholder of JMA Pharma Ltd in May 2022.
- 2.17.3 Mohammed Asif is a director of Mohammedi Healthcare Ltd, which operated, from 2009 to 2021, Mohammedi Pharmacy in Mohammedi Supermarket, the operating company of which Mohammed Arshad was a director.
- 2.17.4 Directors of all three companies either reside or have resided at 44, Longmore Road, Solihull, B90 3DY which was also the registered office of JMA Pharma Ltd at incorporation. Mohammed Asif of Mohammedi Healthcare Ltd still resides at the next door (semi-detached) property, 42, Longmore Road, Solihull, B90 3DY.
- 2.17.5 A google streetview image of 42 and 44 Longmore Road, Solihull, B90 3DY is given below. As can be seen, not only are the two properties linked as semi-detached, but they share a driveway and parking area.
- 2.18 [Photograph provided – See Appendix A]
- 2.19 In addition, it is understood that Mohammed Asif (the current director of the applicant company) regularly works in both Mohammedi Pharmacy and M Pharmacy.
- 2.20 It is therefore submitted that there is shared management of both the applicant company and the company that is included in the pharmaceutical list at the proposed premises. Both the applicant company and the company that is included in the pharmaceutical list at the proposed site share staff, including pharmacist staff, and have closely connected shareholders, officers and registered premises.
- 2.21 On that basis, regulation 31 applies to NHS England's determination of this application, and NHS England is required to refuse this application.

Regulation 24(1)(a)

- 2.22 Notwithstanding the matters raised above, NHS England is also required to refuse this application since it fails to meet the requirements of regulation 24.
- 2.23 As NHS England will be aware, it is for the applicant to demonstrate that the requirements of regulation 24 would be met by the granting of this application.
- 2.24 Regulation 24(1)(a) requires NHS England to determine whether “*for the patient groups that are accustomed to accessing pharmaceutical services at the existing premises, the location of the new premises is not significantly less accessible*”.
- 2.25 The applicant has failed to provide sufficient information in its application form to satisfy NHS England in relation to the matters contained within regulation 24(1)(a).
- 2.26 In its application form, the applicant makes only a cursory attempt at defining the pharmacy’s patient groups, and the information provided is insufficient to meet the requirements of regulation 24(1)(a). By way of example:
- 2.26.1 The applicant states that “30% of items prescribed from the current site originate from [Omnia Practice and Yardley Green Medical Centre]”. This means that the applicant is seeking to move to GP premises from which fewer than a third of its prescriptions originate.
- 2.27 Additionally, the applicant provides no information regarding patients registered with other surgeries. For example, data from NHSBSA shows that the second largest source of prescriptions dispensed by Mohammadi Pharmacy originate from Charles Road Surgery (with 17% of total prescriptions dispensed), yet the applicant makes no mention of Charles Road Surgery at all.
- 2.28 Charles Road Surgery is located to the west of the applicant’s existing premises, meaning that the proposed premises will be further away compared to the existing premises.
- 2.28.1 The applicant refers to access to the proposed premises by car compared to the existing premises. However, the applicant notes that there is only limited parking at the existing premises; it would therefore seem unlikely that many of the applicant pharmacy’s patients access the existing premises by car so that it is not clear how relevant this information is.
- 2.28.2 The applicant provides no information in relation to other modes of transport that patients may use to access the existing premises from their GP surgery. For example, the applicant does not refer to patients travelling by foot or public transport at all in relation to patients accessing the pharmacy after a visit to their GP.
- 2.28.3 In relation to patients travelling by bus (who do not access pharmaceutical services after a visit to their GP surgery), it is clear that the existing and proposed premises are not served by the same bus routes. The existing premises are served by bus routes 17, 871 and 891. In contrast, the proposed premises are served by only route 891. Any patient using routes 17 and 871 would find the existing premises located almost opposite the bus stop, where those patients would have to walk 300 metres from the bus stop to access the proposed premises.
- 2.28.4 The applicant makes no mention of where the pharmacy’s patients live. It states that 90% of its prescriptions are delivered, but it seems that this is unlikely to be an accurate estimate. The pharmacy dispenses an average of around 4,750 prescription forms a month. No information is provided about the delivery service, but assuming that it is provided 5 days a week, that would

equate to around 200 deliveries per day, or 25 per hour for 8 hours each day, or a delivery every two minutes or so being made by the pharmacy. It seems inherently unlikely that this information is correct, and no evidence is provided in support of this assertion.

- 2.28.5 The applicant's application form states that it provides a number of additional pharmaceutical services: NMS, NHS flu vaccination, CPCS, hypertension case finding service and supervised consumption. The applicant provides no information regarding the patient groups that access these services.
- 2.28.6 In relation to access to the pharmacy by those with a disability, the existing premises already offer step-free access and are large, double-front premises. The proposed premises would therefore not appear to offer any benefit in terms of accessibility.
- 2.28.7 The existing premises are located within a busy parade of shops providing a range of day-to-day services. However, the applicant provides no information regarding patients who may access the existing pharmacy premises due to its highly visible "high street" location. In contrast, the proposed premises are located away from this "high street" shopping area and are within a GP surgery in premises which are set back from the road and are not easily visible to passers-by.
- 2.28.8 For those patients who access the existing pharmacy premises by reason of its "high street" location, the proposed premises would be significantly less accessible.
- 2.28.9 In order to access the proposed premises, patients who are in the vicinity of the existing premises must cross the junction with Hob Moor Road/Blake Lane. Both Hob Moor Road and Blake Lane are busy roads, and there is no pedestrian crossing facility (for example, there is no pelican or zebra crossing).
- 2.29 In conclusion, therefore, the application fails to meet the requirements of regulation 24(1)(a). The applicant has failed to properly and fully identify the pharmacy's patient groups and, in any event, the proposed premises are likely to be significantly less accessible for at least some of the pharmacy's patient groups.

Regulation 24(1)(b)

- 2.30 NHS England must also determine whether granting this application would "result in a significant change to the arrangements that are in place for the provision of...pharmaceutical services...in any part of the area of [the HWB]".
- 2.31 It is submitted that granting this application would result in a significant change in arrangements. As stated above, the applicant's pharmacy is currently located in the main shopping area of Green Lane. It is the only-NHS pharmacy located within that shopping area and is no doubt used, at least in part, by those who are visiting and using the shops and other facilities within the large parade of shops.
- 2.32 In contrast, the applicant is applying to relocate to premises which are within a GP surgery. Not only is this a very different location (as described above), but there are already 4 pharmacies within 50m of the GP surgery (M Pharmacy, two pharmacies operated by my client and Shelley's Pharmacy).
- 2.33 Even if the M Pharmacy were to close, granting this application would simply result in clustering of pharmacies within, or in close proximity to, the Yardley Green Medical Centre and would remove service provision from the "high street" location of Green Lanes.

- 2.34 This application would therefore result in a significant change in arrangements in place for the provision of pharmaceutical services in the HWB's area and should be refused on that basis.

Conclusion

- 2.35 In conclusion, for the reasons given above I invite NHS England to refuse this application.

- 2.36 I look forward to hearing from you."

3 The Decision

The ICB considered and decided to grant the application by Mohammedi Healthcare Limited. The decision letter dated 20 December 2023 did not give a right of appeal to any party.

- 3.1 "Birmingham and Solihull ICB has considered the above application and I am writing to confirm that it has been granted. Please see the enclosed report for the full reasoning."

Actions from the Pharmacy Services Regulations Committee 11 December 2023

- 3.2 "The Committee have granted the following application for No Significant Change Relocation within a HWB's area.

- 3.3 Mohammedi Healthcare Ltd- No Significant Change Relocation – Same HWB Area Application

- 3.4 CAS-217044-K5T6V8

- 3.5 From: 545-547 Green Lane Small Heath Birmingham B9 5PT

- 3.6 To: Yardley Green Medical Centre Yardley Green, Road Bordesley Green Birmingham B9 5PU

- 3.7 Determination:

- 3.8 Committee granted the application as the applicant has met the requirements of the regulations listed below pertaining to a Relocation within the same Health and Wellbeing Board area.

- 3.9 Regulation 24(1)(a) is met.

- 3.10 The applicant has confirmed the relocation to the proposed premises would not be significantly less accessible to the patient groups who are accustomed to accessing pharmaceutical services at the existing premises.

- 3.11 Regulation 24(1)(b) is met.

- 3.12 Regulation 24(1)(c) is met.

- 3.13 Regulation 24(1)(d) is met.

- 3.14 Regulation 24(1)(e) is met.

- 3.15 Regulation 31 met.

- 3.16 Regulation 31 has been satisfied as pharmaceutical services are not being provided at the same or adjacent premises.

3.17 Appeal rights: No appeal rights.”

4 The Appeal

In a letter dated 16 January 2024 addressed to NHS Resolution MEJ Hingley & Co Limited’s Representative, Templebright LLP appealed against the decision of the ICB not to give them third party rights of appeal. The grounds of appeal are:

4.1 “We act for MEJ Hingley & Co Limited which is included in the pharmaceutical list for premises trading as Hingley Pharmacy, 48-52 Yardley Green Road, Bordesley Green, Birmingham, B9 5QE and 77 Yardley Green Road, Bordesley Green, Birmingham, B9 5PU.

4.2 On behalf of our client we write to:

4.2.1 1) Appeal a decision of NHS England [sic] not to grant our client third party rights of appeal

4.2.2 2) Appeal a decision of NHS England [sic] to grant the above application The above decisions were notified to our client by letter dated 20th December 2023.

4.3 Taking each appeal in turn:

Appeal against a decision of NHS England not to grant our client third party rights of appeal

4.4 Our client is included in the pharmaceutical list for premises at 48-52 Yardley Green Road, Bordesley Green, Birmingham, B9 5QE and 77 Yardley Green Road, Bordesley Green, Birmingham, B9 5PU.

4.5 By letter dated 13th July 2023, our client was notified of a no significant change relocation application by Mohammedi Healthcare Limited from 545-547 Green Lane, Small Heath, Birmingham, B9 5PT to Yardley Green Medical Centre, Yardley Green Road, Bordesley Green, Birmingham, B9 5PU. A copy of that letter and distribution list is attached to this appeal.

4.6 NHS England’s letter stated that our client was being notified of the application as an “interested party” to the application.

4.7 As NHS Resolution will be aware, a no significant change relocation application is a “notifiable application” for the purposes of paragraph 18 of schedule 2 to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”).

4.8 By reason of paragraph 19 of schedule 2 to the Regulations, NHS England was required to notify our client of the application as a “person included in a pharmaceutical list for the area of the relevant HWB...whose interests might, in the opinion of the NHSCB, be significantly affected if the application were granted.” It is of note that our client’s pharmacies are located within 100 metres of the site proposed by the applicant in its no significant change relocation application.

4.9 NHS England’s letter of 13th July 2023 invited our client to submit representations in respect of the application by 27th August 2023. On behalf of our client, we submitted representations to NHS England by letter dated 11th August 2023. That letter was sent by email to PCSE on the same day.

4.10 We attach a copy of our letter of 11th August 2023. The letter is 8 pages long and addresses the regulatory test which NHS England was required to apply to its determination of the no significant change relocation application.

- 4.11 By a letter and email from PCSE of 29th August 2023, PCSE sent to our client a 14 day circulation letter, together with correspondence received by PCSE from Boots, our client (the attached letter of 11th August 2023) and the LPC. A copy of that correspondence is attached to this letter of appeal.
- 4.12 The letter from PCSE dated 29th August 2023 stated that it was enclosing “written representations that we have received regarding the above application”. Our client had no further comment to make and no response was sent to PCSE to the 29th August 2023 letter.
- 4.13 On 20th December 2023, our client received notification of a decision in respect of the relocation application, stating that the application had been granted. A copy of the 20th December 2023 letter and decision report is attached to this appeal. It is to be assumed that our client was notified of NHS England’s decision to grant the application as our client is a person entitled to be so notified pursuant to paragraph 28(3)(b)(v).
- 4.14 The decision report stated that “no appeal rights” had been given to any third party (including our client), and the letter of 20th December 2023 did not provide any information to our client about third party rights of appeal.
- 4.15 Our client considers that it should have been granted third party rights of appeal against the decision to grant the relocation application since it falls within the scope of paragraph 30 of schedule 2 to the Regulations. In particular:
- 4.15.1 1) NHS England was required to notify our client of the application and subsequent decision and, indeed, our client was notified of the application and subsequent decision.
- 4.15.2 2) Our client made representations to NHS England in writing about the application
- 4.15.3 3) Given the content of those representations, NHS England should have been satisfied that our client’s representations:
- 4.15.3.1 a. Made a reasonable attempt to express our client’s grounds for opposing the application adequately
- 4.15.3.2 b. Raised grounds for opposing the application which did not relate to the legality or reasonableness of the PNA and were not vexatious or frivolous.
- 4.16 NHS England gave no reasons why our client was not afforded third party rights of appeal, and we believe that the decision not to grant our client third party rights of appeal was unlawful.
- 4.17 In accordance with paragraph 30(6) of schedule 2 to the Regulations, on behalf of our client we therefore seek to appeal the decision of NHS England not to grant our client third party rights of appeal.

Appeal against the decision of NHS England to grant the relocation application

- 4.18 Subject to NHS Resolution upholding the above appeal and granting our client third party rights of appeal against the decision by NHS England to grant the relocation application, our client’s ground of appeal in relation to the relocation grant is that NHS England failed to give any, or any proper, reasons for its decision.
- 4.19 Our client refers to its written representations to NHS England dated 11th August 2023 and asserts that:

- 4.19.1 1) For the reasons given in our client's representations of 11th August 2023, regulation 31 required NHS England to refuse this application.
- 4.19.2 2) For the reasons given in our client's representations of 11th August 2023, the application fails to satisfy the requirements of regulation 24.
- 4.20 Since our client was not provided with any response from the applicant to its representations of 11th August 2023 and since NHS England's decision failed to give any reasons why our client's representations were not accepted and why the application was granted, our client has no further substantive comments to make on the merits of the application itself at this stage beyond those contained within our letter of 11th August 2023.
- 4.21 In conclusion, therefore, for the reasons given in our letter of 11th August 2023 and on behalf of client we consider that NHS England should have refused this application. We therefore invite NHS Resolution to uphold our client's appeals and to refuse this application.
- 4.22 We look forward to hearing from you."
- 4.23 [Enclosures:
 - 4.23.1 Letter from PCSE to parties dated 13 July 2023.
 - 4.23.2 Copy of PCSE's Distribution list.
 - 4.23.3 Copy of MEJ Hingley and Co Limited Representative Templebright LLP letter to PCSE dated 11 August 2023.
 - 4.23.4 Letter from PCSE to parties dated 29 August 2023.
 - 4.23.5 Decision letter to parties dated 20 December 2023 with Actions from the Pharmacy Services regulations Committee 11 December 2023.]

5 Consideration

- 5.1 The Secretary of State for Health and Social Care has directed NHS Resolution to exercise the function of determining whether certain persons have rights of appeal on their behalf. I, as an authorised officer of NHS Resolution, have determined this appeal.
- 5.2 I have had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), and in particular paragraphs 30(3) and (6) of Schedule 2 which state (so far as is relevant):

(3) *P1 is a person to whom this sub-paragraph applies if—*

- (a) *P1 was a person whom the NHSCB was required to notify about the decision on the application by virtue of P1 being a person whose interests might, in the opinion of the NHSCB, be significantly affected by the decision, and also being—*
 - (i) *included in a pharmaceutical list ...*
- (b) *in the case of a notifiable application, P1 made representations in writing about the application under paragraph 19(4); and*
- (c) *in the case of a notifiable application but subject to sub-paragraph (6), the NHSCB is satisfied, having regard to those representations in writing and any oral representations made in accordance with paragraph 25, that P1—*

- (i) *made a reasonable attempt to express P1's grounds for opposing the application adequately in P1's representations, and*
 - (ii) *has grounds for opposing the application, which—*
 - (aa) *do not amount to a challenge to the legality or reasonableness of a pharmaceutical needs assessment, or to the fairness of the process by which a HWB or Primary Care Trust undertook that assessment, and*
 - (bb) *are not vexatious or frivolous.*
- (6) *A person to whom sub-paragraph (3)(a) and (b) applies (P2) who is not notified by the NHSCB that they are person with third party appeal rights may appeal to the Secretary of State against the determination (D1) by the NHSCB that it is not satisfied as mentioned in sub-paragraph (3)(c), provided that P2—*
- (a) *notifies the Secretary of State within 30 days of the date on which that person was notified of the NHSCB's decision under paragraph 28 (D2) that P2 wishes to appeal against D1 and D2; and*
 - (b) *includes within that notification concise and reasoned statements of P2's grounds of appeal against both D1 and D2,*
- and if the appeal against D1 is successful, P2 is a person with third party appeal rights in relation to D2 for the purposes of this Schedule.”*

- 5.3 I first considered whether MEJ Hingley & Co Limited was a person to whom sub-paragraph 30(3)(a) applied.
- 5.4 It is not disputed that MEJ Hingley & Co Limited is included on the pharmaceutical list for premises at 77 Yardley Green Road, Bordesley Green, Birmingham, B9 5PU and I have not been provided with any information to the contrary. I am, therefore, of the view that MEJ Hingley & Co Limited has met the requirements of sub-paragraph 30(3)(a).
- 5.5 The original application from Mohammedi Healthcare Limited is a notifiable application under the provisions of paragraph 18 of Schedule 2 and that the ICB gave notice of the application to MEJ Hingley & Co Limited on 13 July 2023. Further, I note the comments from MEJ Hingley & Co Limited's Representative that they made representations to the ICB in a letter dated 11 August 2023 in accordance with paragraph 19(4) of Schedule 2.
- 5.6 I therefore am of the view that MEJ Hingley & Co Limited is a person to whom sub-paragraphs 30(3)(a) and (b) apply.
- 5.7 The ICB, in its decision letter dated 20 December 2023 did not give third party rights of appeal to any party. No explanation as to why no party has been given a right of appeal is provided by the ICB.
- 5.8 I note that at 30(3)(c)(i) the regulations state that a party should have “made a reasonable attempt to express P1's grounds for opposing the application adequately”. I am of the view that:
- 5.8.1 MEJ Hingley & Co Limited made a reasonable attempt to express their grounds for opposing the application, and
 - 5.8.2 that these grounds

5.8.2.1 did not amount to a challenge to the legality or reasonableness of the PNA nor to the fairness of the process by which a HWB or PCT undertook the assessment, and

5.8.2.2 are not vexatious or frivolous.

5.9 I am of the view that MEJ Hingley & Co Limited is a person to whom sub-paragraph 30(3) (a), (b) and (c) applies and that it should have been given third party rights in accordance with the Regulations.

5.10 I note the wording of paragraph 30(6) and that, to exercise those rights properly, the appeal should include a concise and reasoned statement of the grounds of appeal against both the decision not to be given third party rights of appeal and against the substantive decision of the ICB to grant the application. I am of the view that MEJ Hingley & Co Limited has complied with both of the above.

6 Decision

6.1 MEJ Hingley & Co Limited is a person with third party appeal rights against the decision of the ICB set out in its letter dated 20 December 2023 (and notified to MEJ Hingley & Co Limited by letter dated 20 December 2023).

6.2 The appeal will proceed in accordance with the provisions of Part 2 of Schedule 3 to the Regulations.

**Head of Appeals
NHS Resolution**