



## Primary Health Lists

### The Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

**CASE No: [2012 PHL/15540]**

#### **The Panel**

Ms Melanie Lewis, Tribunal Judge  
Mr Alan Woodcock, Professional Member  
Ms Vivien Lee, Member

#### **BETWEEN:**

**MR ASHER BARSOUM**

Applicant

AND

**NHS SOUTH WEST LONDON**

Respondent

### **DECISION WITH REASONS**

#### **Representation**

The PCT was represented by Mr Grey, Counsel instructed by Capsticks. Mr Tamby Rhajah, Community Pharmacy Lead, NHS South West London, attended as a witness.

Mr Barsoum presented his own case. Mr Lim his co-director attended. His wife Dr Lim attended as a supporter.

### The Appeal:

1. On 27 November 2012 Mr Barsoum appealed against the decision of NHS Richmond refusing the application by AR Pharmaceuticals for preliminary consent to open a pharmacy at 389-391 St Margaret's Road, Twickenham. The application was received and processed under Regulations 5 and 12 of the National Health Service (Pharmaceutical Services) Regulations 2005 as amended ("2005 Regulations")
2. Mr Grey acknowledged that the decision letter dated 12 October 2012 may have given the impression that there had been a substantive consideration on refusal of the application on fitness to practice grounds. The reality was that the application had been given no such consideration. The PCT found the application was signed by the applicant on 19 May 2012 and received by the Primary Care Support Service on behalf of NHS SW London and NHS Richmond on 25 May 2012 but the company AR Pharmaceuticals was not incorporated with Companies House as a body corporate until 21 June 2012.
3. The primary ground for refusal was therefore that the application had to be refused under 'fitness to practice' as AR Pharmaceuticals did not exist as a body corporate on the date the application was submitted.

### Decision

4. At the request of the parties and because it was expedient to do so we gave our decision. It was to strike out the application pursuant to Regulation 8 (3) (4) (c) of the Tribunal Procedures (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, on the grounds that there was no reasonable prospect of the appellant's case or part of it succeeding.
5. We declined to strike out the application on the grounds that we had no jurisdiction: Regulation 8 (3) (a). Our written reasons now follow.

### Background

6. There is no dispute as to the background to the case and we record it in summary form. We record that it is favourable to the appellant and shows flaws in the way that the application was processed. Further, it is agreed that delay set in. The reason given was re-organisation within the PCT who were also having to familiarise themselves with new regulations.
7. Mr Grey accepted that for a number of months the applicants had been given the impression that their application was being processed. That should not have happened and the application should have been sent back at the outset. At the date of application the body was not incorporated. The first time the application was given qualitative consideration was by Mr Tamby Rhajah

on 20 September 2013. He identified that the application had been faulty from the outset.

8. On 1 September 2012 the NHS Regulations 2012 came into force, now superseded by the 2013 Regulations. The applicants had wished to have their application considered under the 2005 Regulations, which applies a different test.

9. Mr Grey acknowledged and accepted that as individual practitioners, superintendents or directors both Mr Barsoum and his fellow director Mr Lim were fit to practice. No adverse factors were known. They had acted in a straightforward and transparent manner throughout.

10. We record that the evidence made clear why the applicants did not anticipate any problem with their application. The processing contractor PCCS used by the PCT identified that the company wasn't listed at Companies House. The applicants stated that the application was pending. The Pharmaceuticals Contract officer stated on 8 June 2012 that "we will need a company registration when the application goes before the committee for a decision which will be in August some time".

11. We further record that delay set in. We noted for example an email letter from Mr Barsoum to Mr Tamby Rajah dated 8 October 2012 seeking an explanation for the delay in issuing a decision.

12. We further record that there was a delay by the respondent in responding to the appeal.

### The Grounds of Appeal

13. Essentially, the appellants raised four grounds:-

(i) It was sufficient for the body corporate to exist at the time of decision.

(ii) The decision letter made clear that they met the requirements of Schedule 4, Part 3 2005 regulations in relation to 'fitness to practice'. This was in contradiction to AR Pharmaceuticals not being a fully registered body corporate.

(iii) The applicants had followed the guidance of the PCCS who had applied the 2005 regulations. .

(iv) The PCT had not followed due process and had failed to comply Regulation 27 2005 Regulations and had failed to issue their decision within four months.

### Decision with Reasons

14. In reaching our decision we have had regard to all the evidence, the skeleton argument submitted on behalf of the respondent and amplified by

oral representations. We took an inquisitorial approach so that the points raised on behalf of the appellant who was not represented could be fully explored and understood.

15. We concluded that we had jurisdiction because in order to determine if the application was void from the outset so that there was no scrutiny of the application of its merits, we had to consider evidence.

16. We examined the 2005 Regulations but found that they had no capacity within the Statutory Instrument to deem an application to have been made at a different date.

17. Section 69 Medicines Act 1969 provides three gateways for application. Here the applicants applied as a body corporate: Section 69(1) (b).

18. At the date of application AR Pharmaceuticals submitted its application for inclusion on the pharmaceutical list of NHS Richmond on 25 May 2012 it was not an incorporated body. The application was void.

19. It is clear that the PCT or the processor working on its behalf did not apply the guidance set out in the Department of Health publication 'Information for Primary Care Trust (Control of Entry) revised September 2009, which states that the first check that should be made is that the application is made by a person who is entitled to make the application. PCTs are guided to reject "at once" any applications from individuals who are to pharmacists or body corporate that do not comply with the requirements of the Medicines Act 1968.

20. At the point of application when Mr Barsoum and Mr Lim as directors of AR Pharmaceuticals made their fitness to practice declarations the company was not incorporated so that they could not meet the requirements set out in section 71(6)(b) Medicines Act 1968.

21. Therefore, the application was void as it can only be made by a body corporate, as the applicants had not applied as an individual pharmacist or a partnership. It was correct that the application was rejected.

22. Whilst we agreed that the decision letter could have been more clearly worded, we accept the evidence supports that there was no consideration of the merits of the application. That is clear from the statements made by Mr Tamby Rajah and Mr Kenny Gibson who is also a member of the Panel. At the time the application was made and the time of fitness to practice declaration had been made, the body was not incorporated and therefore the Panel didn't proceed to consider the application.

23. Accordingly we concluded that there was no reasonable prospect of the appellant's case or part of it succeeding before us due to the lack of fitness to practice evidence being available.

24. The PCT have acknowledged that they have been at fault and efforts were made to resolve this matter. The respondent's case summary dated January 2013 states that the NHS would reimburse the application fee .They further offered to consider the new application under the market entry process on an expedited basis.

### **Order**

**The appeal is struck out pursuant to Regulation 8 (4) (c) of the Tribunal Procedure (First Tier Tribunal) Health, Education and Social Care Chamber (Rules 2008).**

Tribunal Judge: Ms M.Lewis

Date Issued: 29 April 2013

