

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

94 High Street, Burntisland,

Fife. KY3 9AS

Applicant: M Ahmed

Appellants: (1) M Ahmed and (2) Burntisland Community Council

Health Board: NHS Fife ("the Board")

PPC Decision Issued: 27 October 2023

Panel case number: NAP 124 (2024)

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 27 October 2023 in relation to the application of M Ahmed.
- 1.2. The application was originally made on 1 December 2020. The application was considered at a meeting of the PPC on 27 October 2023. The PPC issued its decision to refuse the application at or around the same time.
- 1.3. An appeal was lodged against the decision of the PPC by the Applicant, now the first Appellant, on 6 December 2023 and by the second Appellant, Burntisland Community Council, on 3 December 2023.

2. Grounds of Appeal

- 2.1. The Appellants have each lodged a Notice of Appeal against the decision of the PPC. Given their similarities, I have taken their grounds of appeal together for expediency.
- 2.2. Ground of Appeal 1. This relates to whether the Board’s decision was defective when applying the relevant legal test; specifically, when considering adequacy and, in turn, viability. In terms of the Regulations, failure to properly apply the legal test is a procedural defect and a ground of Appeal in terms of paragraph 5(2B)(a) of Schedule 3.
- 2.3. Ground of Appeal 2. This relates to whether there has been a failure to consider the CAR by the Board. In terms of the Regulations, failure to properly consider the CAR, as a matter of procedure, is 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.

- 2.4. Ground of Appeal 3. This relates to whether there has been a failure to explain the facts upon which the determination of the application was based. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(c) of Schedule 3.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:

3.1.1. A procedural defect in the way the application has been considered by the Board;

3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or

3.1.3. 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 3.1.1 to 3.1.3 have occurred or;

3.2.3. In any other case, 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 relates to whether the Board’s decision was defective when applying the relevant legal test; specifically, when considering adequacy and, in turn, viability. In terms of the Regulations, failure to properly apply the legal test is a procedural defect and a ground of Appeal in terms of paragraph 5(2B)(a) of Schedule 3.
- 4.2. As mentioned above at paragraph 3.3, the relevant test to be applied by the Board when considering an application 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.
- 4.3. In considering such an application the PPC, as noted above at paragraph 3.4, shall have regard to the likely long term sustainability of the services to be provided by the applicant. This is commonly referred to as the viability of the proposed application or

pharmacy. The intention of this requirement is to help secure proper and sufficient pharmaceutical services in a neighbourhood by guarding against over-provision. This is in relation to the viability of the application at hand but also, it follows, existing pharmacies.

- 4.4. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that an application may be granted that goes further than is necessary to secure adequacy, that is to say an application that would result in some sort of over-provision would nevertheless be desirable. As mentioned above, when considering such matters, the PPC shall have regard to the likely long term sustainability of the services to be provided by the applicant. An application that is not viable, in the sense that it would adversely affect the continued viability of the other pharmacies in the neighbourhood, would not “secure” an adequate provision of pharmaceutical services going forward; and this includes situations where inadequacy has been established, that being the first question being asked in terms when applying the legal test.
- 4.5. In these circumstances the PPC concluded that the existing services were inadequate. The PPC then concluded that future provision would be adequate once the contract of the underperforming pharmacy (Lloyds) had been taken over by Dears Pharmacy. The Chair also advised that the PPC believed there would be a viability issue if the application were to be granted and there were two pharmacies on the High Street (the pharmacy to which the application relates and Dears). The PPC then contradicts itself by concluding that the pharmaceutical services being provided to the neighbourhood were adequate.
- 4.6. As mentioned above a PPC is able to conclude that current services are inadequate but nevertheless reject an application if it considers that it would not be necessary or desirable to secure adequate provision; and this could include the viability of the application itself or how it might impact the viability of existing pharmacies in terms of over-provision. That appears to be the view the PPC are taking in relation to this application, though the contradictory conclusion is unhelpful to the reader.

- 4.7. In any event, the PPC is required, in various places, to consider the application and apply the legal test with reference to *current* provision and that proposed in the application itself. It cannot, in my view, confidently conclude that service levels would, as a result of Dears Pharmacy taking over the contract from Lloyds, improve and in turn be adequate in time. With this in mind, it is also the case that a conclusion as to viability cannot be arrived at, because the concerns about viability are also dependent on the Lloyds-Dears contract change taking place, and that cannot have been a known certainty at the time this decision was made. . I will, therefore, uphold this ground of appeal.
- 4.8. As mentioned above the PPC could have granted the application in the knowledge that some over-provision would nevertheless been desirable.
- 4.9. I would also add that if it had been argued that the reasons given were not sufficient, in terms paragraph 3(6)(b) of Schedule 3, given the clear inconsistency in the concluding paragraph of the Minutes of the Meeting of the PPC dated 27 October – I would have upheld this ground as well.
- 4.10. Ground of Appeal 2. This relates to whether there has been a failure to consider the CAR by the Board. In terms of the Regulations, failure to properly consider the CAR, as a matter of procedure, is 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.
- 4.11. With reference to the Minutes of the Meeting of the PPC dated 27 October 2023, I can find no reference to the CAR. There is no summary of the CAR and no explanation as to how it was taken into account by the Board in arriving at its decision. I will therefore uphold this ground of appeal.
- 4.12. Ground of Appeal 3. This relates to whether there has been a failure to explain the facts upon which the determination of the application was based. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(c) of Schedule 3.

- 4.13. This argument is advanced with reference to two matters. The first being the analysis of comparable neighbourhoods or areas as to the viability of the application. The second being the reference to an opinion provided to a member of the PPC during a site visit.
- 4.14. As a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it and reach its own conclusions. That being said its analysis of viability has clearly been undermined given what has been said in relation to Ground of Appeal 1. With that in mind the reconsideration of that Ground should include a fresh analysis of the data before the PPC in that regard. The reference to what was said to a member of the PPC during a site visit was, in my view, permissible. Site visits serve a useful purpose in allowing members to form a general understanding of the neighbourhood at hand, services currently provided and, to some extent, local opinion. The views expressed in this regard was an example of the latter and not a determinative factor in the PPC's consideration of the application.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Grounds of Appeal 1 and 2. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In reconsidering the Application the PPC should also undertake the analysis of the data relating to viability, mentioned in relation to Ground of Appeal 3, with care.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

26 June 2024