

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

2 Loch Street, Townhill, Fife, KY12 0HH (Second Appeal)

Applicant: Mr Mohammed Ameen

Appellants: Alderston Pharmacy and Lloyds Pharmacy

Health Board: NHS Fife (“the Board”)

Revised PPC Decision issued: 2 April 2019

Panel case number: NAP 84 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 This is an appeal against the revised decision of the Pharmacy Practices Committee of NHS Fife which was issued on 2 April 2019 (PPC2).
- 1.2 Mr Mohammed Ameen trading as Village Pharmacy, 196 Nithsdale Road, Glasgow, (hereafter referred to as "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 2 Loch Street, Townhill, Fife, KY12 0HH ("the Premises"). The application was dated 11 April 2018.
- 1.3 Following upon that application the Board held a hearing of its Pharmacy Practices Committee ("the PPC") on 6 September 2018 and which decision was appealed against by Alderston Pharmacy, Lloyds Pharmacy and Boots UK Ltd. This decision is referred to hereinafter as PPC1
- 1.4 Following upon those appeals I issued a decision under panel case number NAP82 (2018) which is referred to for its terms.
- 1.5 In summary I concluded that the then decision of the PPC failed to properly narrate the facts and reasons upon which its decision was based and remitted the decision back to the PPC for reconsideration of its decision for the reasons contained therein.

2. Original Grounds of Appeal

- 2.1 The Appellants referred to in 1.3 above appealed on the following grounds:
 - 2.1.1 That the PPC failed to summarise the Consultation Analysis Report ("CAR") or explained how the CAR was taken into account in reaching its decision.
 - 2.1.2 That the PPC failed to provide adequate reasons to explain its decision that the services provided were inadequate particularly having regard to comments made by the PPC to the effect that there was little evidence of inadequacy and that there were gaps in the information relevant to the determination of adequacy.
 - 2.1.3 That the PPC failed to have regard to the Pharmaceutical Care Services Plan ('PCSP').
 - 2.1.4 That the PPC failed to consider the viability of the proposed pharmacy and the effect of the proposed pharmacy on the viability of existing pharmacies.

3. The National Appeal Panel's Original Decision ('NAP1')

- 3.1 I addressed each of the Appellants grounds for appeal in NAP1 and will summarise these for ease of reference:
 - 3.1.1 There was no summary of the CAR incorporated in PPC1 and no explanation of it was provided in that decision.
 - 3.1.2 The PPC had failed to comply with paragraph 3(6) schedule 3 of the Regulations (see further paragraph 4.2 of NAP1) in that there was no reasoning in PPC1 for the basis upon which it had concluded that reliance was placed on a delivery service for the

provision of the existing services rather than simply there was usage of a delivery service. That there was reliance on a delivery service was not clear from the evidence adduced at the Hearing and this was underscored by the comment from the PPC that it would have been useful to have the delivery figures to Townhill from all pharmacies in the Dunfermline area. NAP1 stated in paragraph 4.8 that the PPC failed to properly narrate the facts and reasons upon which its decision that the existing services are inadequate was based.

3.1.3 With reference to the PCSP NAP1 states that the Regulations provide that the PPC shall have regard to the PCSP (see paragraph 3(f) of schedule 3). I did note that it may be sufficient for the PPC simply to note that it had regard to the PCSP but that it may be desirable for the PPC to go further and explain any apparent inconsistencies between its decision and the PCSP. I stated in NAP1 that I was not then required to reach a decision on that issue in the event that the PPC would have the opportunity to provide further reasoning and encouraged the PPC to address the concerns of the Appellants in this regard.

3.1.4 The Appellants had raised the question of the viability of the proposed pharmacy and its effect on existing pharmacies. NAP1 stated that this was a relevant factor in considering the viability of granting the application with a view to securing the adequate provision of services. I stated that whether or not this was a live issue would depend on whether the PPC concluded that the existing provision was inadequate but did state that should the PPC conclude, on reconsideration, that the existing services are inadequate I expressed the hope that it would address the concerns of the appellants in relation to the PPCs consideration of the viability of the proposed and existing pharmacies.

4. Original Disposal

4.1 My decision set out in NAP1 was that the PPC's decision in PPC1 failed to properly narrate the facts and reasons upon which its decision was based and remitted it back to the PCC for reconsideration for the reasons stated above.

5. The current decision of the PPC ('PPC2')

5.1 The PPC reconvened on 14 March 2019 in order to reconsider its original decision and which was issued to the applicant and interested parties on 2 April 2019.

5.2 The PPC is declared to have noted the content of the CAR in that there was a high level of support for a new pharmacy, that there were no existing services based within the neighbourhood, that a new pharmacy would be beneficial for the elderly and families with children and made reference to opening hours and others.

5.3 The PPC had taken into account public transport, the Community Council's presentation and particularly noted that the topography of Townhill was located at the top of a hill in a rural location. On this basis it was considered that access to existing pharmaceutical services would be a challenge and exacerbated by transport connections. It also considered waiting times at the existing pharmacies in that there was 'anecdotal' evidence that there were such 'alleged' waiting times which, combined with travel times, could inhibit access to pharmaceutical services. The PPC noted that the PCSP had failed to identify any gaps in pharmaceutical services but had noted that the PCSP had measured the distance on a "how the crow flies" basis and considered that the topography was of greatest significance.

- 5.4 As to viability the PPC is noted as having stated that it did not think that there would be a significant effect on existing pharmaceutical services notwithstanding that one contractor had concerns regarding this and the PPC considered there was no evidence that the pharmacy would be so affected. The PPC stated that it gave weight to the applicant's justification/evidence on viability.

6. Grounds of Appeal PPC2

- 6.1 Appeals were lodged against PPC2 by Alderston Pharmacy and Lloyds Pharmacy (hereafter referred to collectively as the "Appellants").
- 6.2 There were certain aspects of the appeals from both parties which are not relevant for the purposes of the decision under PPC2. New issues raised unrelated to the issues raised by the original appellants to PPC1 may not be considered as appropriate in relation to PPC2. Accordingly the only live issues are those in connection with the grounds for appeal 1-4 in relation to PPC1
- 6.3 I do not propose to set out the Appellants grounds for appeal in detail although I would expect the PPC to consider them in relation to my disposal following subject to my comments in 6.2 above..

7. Discussion

- 7.1 What requires to be understood by the PPC and all relevant parties is that if the PPC is satisfied that the provision of pharmaceutical services at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services they should grant the application. The PPC first of all requires to decide whether or not the existing provision is inadequate. The PPC comprises pharmacists and lay members who may be expected to understand the issues involved and the evidence before it. It is an expert tribunal. Equally it must be understood that the decision must be intelligible and adequate standing the evidence adduced. A reader of the decision must be able to understand why the matter was decided as it was and what conclusions were reached on the principal issues and this reasoning does not give rise to any substantial doubt that it has erred in law.
- 7.2 As mentioned above, the PPC's determination of an application must include a summary of the CAR and an explanation of how the CAR was taken into account in arriving at its decision and that with regard to the test under Regulation 5(10). As I stated in NAP1 this is a specific mandatory requirement which goes beyond a more general requirement that the PPC provide adequate reasons for its decision. The PPC's current comments add little in satisfying the statutory requirements. Whilst it has set out some comments about the CAR it has not provided a summary of it nor has it set out in sufficient detail an explanation of how the CAR was taken into account in arriving at its decision with regard to the test. The PPC has regrettably merely set out some issues which they have drawn from it. The PPC is therefore encouraged and advised to set out a summary of the CAR, how it was carried out, the total number of responses and the breakdown and nature of those responses in detail to show how the various inferences have been drawn.
- 7.3 The PPC's reasoning in relation to the apparent significance of the topography is not clear. It does not seem to have formed any part of their reasoning in reaching the prior decision in PPC1 and it is not clear why it considers the topography results in an inadequate provision. It is not clear, for example whether it is an access issue. If it is how does it impair access to the existing pharmacies? Is the basis for this the use of delivery services? If so how has the

PPC analysed this information standing that it states that this information was not readily available?

- 7.4 The PPC's consideration of inadequacy refers to submissions of the Community Council in relation to the desirability of a new pharmacy. This is not a relevant consideration. Only if the current provision is inadequate should the PPC consider the desirability of a new pharmacy. Much more detailed consideration should be given to inadequacy. What are the detailed reasons as to why, on the evidence, did the PPC consider that the current provision was inadequate? What evidence did they prefer in support of their opinion and what evidence did they reject and the reasons why they supported and rejected that evidence?
- 7.5 I note that the reasoning in relation to the PCSP is very much linked to the topography reasoning above. It is disappointing. Whilst I would be reluctant to be too prescriptive about how much consideration requires to be given to the PCSP my view is that if the PPC is going to address it, it must do so coherently.
- 7.6 As to viability it would be preferable to set out the PPC's reasoning following on the arguments adduced in evidence. Whilst the principle is understood that if there are four pharmacies between the pharmacy which claims to be at risk there should be limited risk. If the PPC considers that the new pharmacy will be viable it should set out its reasons for considering it to be so.

8 Disposal

- 8.1 Whilst I appreciate that the members of the PPC are giving of their own time to the consideration of these applications, it is important for it to realise that it is a quasi-judicial body and it requires to adhere to the spirit and letter of the Regulations.
- 8.2 For the reasons set out above I have concluded that the decision of the PPC (PPC2) fails to properly narrate the facts and reasons upon which its decision is based. I am therefore required by paragraph 5(5) of schedule 3 of the Regulations to remit the decision back to the PPC for reconsideration and I do so with regret.
- 8.3 I advise the PPC to address each of the issues carefully and to set out reasons why they have formed their opinion on each of these based upon the evidence and, where appropriate, their own expertise.

(sgd.) J M D Graham
Interim Chair
15 July 2019