

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
77 MAIN ROAD, FENWICK, KA3 6DU

Applicant and 1st named Appellant: Ashfaq Ahmed

2nd named Appellants : Fenwick and Moscow and Waterside Community Councils

Health Board: NHS Ayrshire and Arran

PPC Hearing held: 25th January 2017

Panel Case Number: NAP68(2017)

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 of NHS Ayrshire and Arran (“the PPC”) following upon a meeting of the PPC held on 25 January 2017.
- 1.2 Mr Ashfaq Ahmed (“the Applicant” or “the 1st named Appellant”) made an application for inclusion in the pharmaceutical list of NHS Ayrshire and Arran (“the Board”) to provide pharmaceutical services in respect of the premises at 77 Main Road, Fenwick KA3 6DU (“the Premises”), said application dated 3 October 2016.

2. Grounds of Appeal

- 2.1 The 1st named Appellant submitted a letter to the Board received 2 March 2017 the grounds of which may be summarised as follows:-
 - 2.1.1 The Board failed to empanel the PPC timeously in breach of the Regulations.
 - 2.1.2 Prior to the hearing, the Appellant was advised by the Board that the area was no longer considered a Controlled Locality which was disruptive to his preparation.
 - 2.1.3 The PPC was incorrect when it had noted in its decision (paragraph 19.10) that Glencairn Surgery had only been available 2 half days per week whereas in fact it had been open 2 and one half days per week.
 - 2.1.4 In the PPC’s Decision it had noted (paragraph 19.11) that during a site visit Lloyds Pharmacy had indicated that it was now considering starting a delivery service to Fenwick. This was not part of the evidence at the hearing.
 - 2.1.5 The PPC is noted as stating at paragraph 19.11 that there was no difficulty for people living in Fenwick in obtaining prescriptions whereas the neighbourhood also included Waterside and Moscow. Further, the PPC, in discussing public transport, referred to Fenwick only whereas the defined neighbourhood included Waterside and Moscow.
 - 2.1.6 The PPC had stated at paragraph 19.12 that whilst smoking cessation, EHC and eMAS were worthwhile, the numbers using these services were not high. In challenging this statement, the Appellant states that these are compulsory core services which form part of the Contract and the PPC should not have made the assumption that all “access to EHC was more likely in urban areas”.
 - 2.1.7 The PPC stated from personal experience the bus service to Kilmarnock Bus Station was “very good”. Whereas it is the stop on Glasgow Road which is the nearest to the pharmacy. The PPC made no mention of the difficulty in crossing and then accessing the nearest pharmacy.
 - 2.1.8 The PPC had stated at paragraph 19.17 that given the size of the proposed developments, it was unlikely that residents would choose to move into the neighbourhood without access to a car. The Appellant was of the view that this was an unjustified assumption.
- 2.2 The 2nd named Appellants’ grounds of appeal in large measure echoed those of the 1st named Appellants but sought to introduce additional evidence not rehearsed during the hearing. Nevertheless that is perhaps understandable given the terms of the PPC’s Decision and to which I refer below.

3. The PPC's Decision

- 3.1 The PPC considered all of the papers introduced in advance of all the hearing including letters from Ayrshire and Arran GP Sub-Committee, the Area Pharmaceutical Practices Committee as also the Consultation Analysis Report ('CAR') and the completed questionnaires. Further, within their papers it is noted that they conducted a site visit of Fenwick and the surrounding area, prescription figure information, and bus timetables, the Board's Pharmaceutical Care Services Plan and others.
- 3.2 The PPC discussed its terms of engagement to undertake consultation and have noted a summary of the questions and analysis of the responses in the CAR. They had noted that it was inappropriate for "the Applicant to offer any advice or opinion on the outcome of this joint consultation (para 18.13)".
- 3.3 The PPC noted the boundaries of the neighbourhood as defined by the Applicant with the agreement of the interested parties and agreed that it should be defined as Fenwick including the villages of Waterside and Moscow delineated on the north by the M77, the east by the M77/A719 inter-section following the road south to Moscow, the south from Moscow travelling north on the A719 turning left and taking the unnamed road toward Sunny Side Cottage Gardens, then travelling west and taking a series of unnamed roads until the B7038/main road roundabout and on the west by the M77. The major roads provided physical boundaries. As it was a rural area the villages of Waterside and Moscow were included in the neighbourhood as the Community Councils work closely together. The definition was also consistent with the areas defined for primary school catchment and the electoral register.
- 3.4 As to adequacy, it was noted that the Chair advised the members of the PPC that it was not concerned with the viability of the proposed pharmacy as that was a matter for the Pharmacy Council in deciding whether or not to register the pharmacy. The PPC estimated that the proposed pharmacy would dispense less than 1,300 prescriptions per month on the basis of the prescription figures for the KA3 postcode and that this could be adequately dispensed by the existing pharmacies and that residents had already made alternative arrangements for accessing pharmaceutical services (following upon the closure of the GP dispensing practice on 17 January 2017). As the dispensing surgery had now closed in Fenwick, the PPC were of the view that prescriptions did not require to be dispensed in Fenwick and those with acute prescriptions usually accessed pharmacies closest to the surgery and for those with travel difficulties there was a delivery service or repeat prescriptions from Kilmaurs and Crosshouse. It was also noted (19.11) that it had been confirmed during the site visit that Lloyds Pharmacy was considering starting a delivery service in Fenwick. On these bases the PPC concluded that there was no difficulty for people living in Fenwick in obtaining prescriptions.
- 3.5 The PPC had noted that the Applicant had particularly mentioned smoking cessation, EHC and eMAS and that whilst these services were worthwhile, the numbers using these services were not high and that those accessing EHC were more likely to do so in urban areas which were more impersonal than rural settings. In any event, the PPC were of the view that it would not be expected that a great demand for EHC would exist standing the high percentage of the population was over 60 years of age. Accessibility of pharmaceutical services using public transport links was considered and it was noted that from personal experience the bus service to Kilmarnock Bus Station was very good and albeit in rural areas buses were late it was acknowledged as being a fact of life. Accordingly it was possible to access pharmacy services by bus. It had been noted that no formal complaints had been made to the Board concerning pharmaceutical services in the neighbourhood and, accordingly, this could not be utilised to demonstrate any inadequacy. The PPC acknowledged that 87 new houses had been or were in process of being built in the neighbourhood but these properties were 3 to 5 bedroom family homes and that it was unlikely that residents would choose to move to the neighbourhood without access to a car and as such it would have a choice as to where to access pharmacy services as the network in the area was excellent.

4. Discussion and Reasons for Decision

- 4.1 The Regulations require to be considered in light of the objects in the scheme set out under The National Health Service (Scotland) Act 1978 and in particular, Section 27, in that it shall be the duty of every Health Board to make arrangements as to its area for the supply to persons in the area of proper and sufficient drugs and medicines which are ordered for those persons by a medical practitioner in pursuance of his functions in the health service. An application made in any case shall be granted by the Board after procedures set out in Schedule 3 of the Regulations are followed. If, the Board is satisfied that it is necessary or desirable to grant an application in order to secure in the neighbourhood in which the premises are located, the adequate provision by persons included on the list of the services specified in the application. This is further extended by Regulation 5(10) of the Regulations in that an application shall be granted by the Board (1) only if it 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 in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list and (2) if the boundaries on the neighbourhood within which the Applicants intend to provide pharmaceutical services falls within any part of a Controlled Locality, only if it is satisfied that the granting of such an application, in its opinion, would not prejudice the provision of NHS funded services in the court control locality. For the purposes of clarification, in terms of paragraph 1(a) of Schedule 3 of the Regulations, a Controlled Locality is an area within a Health board which is remote or rural in character and which is served by a dispensing doctor. Prior to the date of the hearing, this provision did apply save for the fact that the dispensing doctors' practice withdrew the dispensing practice from the scheme on 17 January 2017, approximately 1 week prior to the hearing. Accordingly, this latter provision does not apply in the current circumstances.
- 4.2 In terms of paragraph 3(1) of Schedule 3, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided in the neighbourhood at those premises, any information available to the PPC which, in its opinion, is relevant to the consideration of the application, the CAR the Pharmaceutical Care Services Plan and the likely long term sustainability of the pharmaceutical services to be provided by the Applicant.
- 4.3 The grounds of appeal are limited to areas where the PPC has erred in law in its application of the provisions of the Regulations, that there has been a procedural defect in the way that the application has been considered and that there has been a failure by the PPC to properly narrate the facts or reasons upon which their determination of the application was based or there has been a failure to explain the application by the PPC on the provisions of the Regulations to those facts.
- 4.4 The principal aspect of the PPC's decision is whether or not it has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the grounds of appeal set out in Schedule 3, paragraphs 5(2A) and (2B) and which I have referred to in 4(3) above. It is relevant to note that 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 it must be adequate standing the evidence before it. It must enable the reader 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.
- 4.5 I do not propose to identify one or other of the appellants during the course of the reasons for my decision, but will merely refer to them as the "Appellants" collectively.
- 4.6 One of the concerns raised by the Appellants was the presence of Mr Alan Cowan, Vice Chair of NHS Greater Glasgow & Clyde PPC. It had been stated in paragraph 2.3 of the minutes that Mr Cowan was attending as an observer and had no input to the discussion of the application or in the decision making. The second named Appellants state that Mr Cowan addressed the hearing on a number of occasions and that "his comments were heard during the discussion of the application". As the second named Appellants acknowledge, his

comments were not recorded in the minutes of the hearing. I am only able to determine various issues raised in the grounds of appeal and require to accept that the minutes were a true record of the hearing signed off, as they were, by the Chair. However, I note that Mr Cowan would appear to have been permitted by the Chair to remain with the PPC after the departure of the Applicant and the interested parties, not withdrawing until after discussion of the application with the PPC and before its formal decision. Schedule 4, part 1, describes the membership, functions and procedures of the PPC. Paragraph 3 of said schedule is clear and unambiguous. The PPC *shall* (my emphasis) consist of at least a chair, a non-contractor pharmacist, a contractor pharmacist and two lay members in the current application. There is no provision for *ad hoc* membership other than the provision of deputies. Therefore, by including non-members in the deliberations, the PPC was acting outwith prescribed procedures. It is unfair because the appointment to membership is circumscribed and, it appears from the reading of paragraph 3, the make up of the PPC has been thought out to provide a balance of qualifications and influence. In my view, the incorporation of an *ad hoc* member of the committee is a fundamental breach of prescribed procedures; schedule 4, part 1, clearly sets out a strict criteria of membership and I am fortified in this view by the use of the word “shall” rather than “may” or “normally” for example. The PPC’s decision is accordingly a nullity and is most likely contrary to natural justice. The fact is, the parties frankly have no idea whether a contribution was made and whether any advice given was good or bad. In any event, the practice is contrary to the prescribed procedures of membership patent from the Regulations. I believe I have already issued two Practice Notes on this very issue.

- 4.7 The Appellants have indicated that the Glencairn surgery (which closed its doors approximately one week before the hearing) had been open for the equivalent of two and one half days a week, whereas what has been noted at paragraph 19.10 of the PPC’s decision that the surgery had only been available two half days per week. There was certainly nothing to indicate during the course of the evidence by any party as to the hours of the surgery and, accordingly, there appears to be no basis for the PPC’s assertion as to the opening hours in their decision. It is an important adminicle of evidence and it is regrettable that it had not been spoken to during the course of the evidence. I might add in passing that when the application had been lodged by the applicant, the neighbourhood was considered to fall within a Controlled Locality but, as I have stated, immediately prior to the hearing, it ceased to be so, owing to the withdrawal of the surgery. This was a significant development that was likely to have an affect on the application and on the views of those who were entitled to make representations. I note, in particular, that Ayrshire & Arran GP sub-committee wrote per their letter dated 8 January 2017 stating “The GP sub-committee understands that the local dispensing doctor has been given permission to temporarily close Fenwick surgery and that the health board are about to make a decision on whether to allow the dispensing doctor to close the surgery on a permanent basis The GP sub-committee’s views on the application are dependent on this decision and we seek to reserve its position on whether this application should be allowed”. Following upon the closure of the surgery, it would have been helpful to the PPC had they received a further opinion from the sub-committee.
- 4.8 The itinerary for the site visit is noted and in which the panel required to assemble at the Fenwick Hotel and thereafter view the premises, the surgery premises at Main Road, Fenwick, Lloyds Pharmacy in Kilmarnock, the Glencairn medical practice in Crosshouse, Kilmaurs Pharmacy in Kilmaurs, the Glencairn medical practice in Kilmaurs, and returning to the Fenwick Hotel. There is no indication as to whether the Applicant or interested parties had been invited or had attended the site visit. The minutes state at paragraph 2.6 that the members of the committee had undertaken a joint site visit. At paragraph 19.11, the PPC state that it had been “confirmed during the site visit that Lloyds Pharmacy was now considering starting a delivery service to Fenwick”. This was in contrast to the paragraph in Lloyds Pharmacy’s letter dated 17 January 2017 to the board in which it confirmed that “our pharmacy provides collection and delivery services if required”. Leaving aside the fact that a collection and delivery service is not a core requirement, it is improper and contrary to natural justice for evidence to be taken outwith a hearing and relied upon by the PPC without testing by the applicant and interested parties. Had Lloyds’ representative attended the hearing, the discrepancy between what was stated at the site visit and what they stated in their letter of 17 January could have been put to them. There was no evidence during the course of the hearing upon which that information could properly be relied on.

- 4.9 I concur with the Appellants' views that, in stating that there was no difficulty for people living in Fenwick in obtaining prescriptions, the PPC would appear to have ignored part of the neighbourhood agreed, ie Waterside and Moscow, and that whether or not the core services of EHC and eMAS may not be fully utilised, it remains a core service and requires to be provided. The Appellants, however, implied that the PPC had been somewhat dismissive as to the difficulty in accessing pharmaceutical services and, having conducted a site visit, one would have expected more than a reference to bus services not being as frequent as in urban locations and that the fact that buses were late was a fact of life. There was no reference to costs, distances or time involved. Access is an important issue for patients and had been referred to by the Appellants in their evidence. It is noted that 224 responses were received from the consultation analysis, but the PPC found it inappropriate to offer any opinion on the outcome of the joint consultation which gave rise to the report. I agree with the Appellants that this is surprising. The response is comparatively high and the PPC ought to have commented upon it. That the dispensing surgery closed initially prior to the hearing may have had a significant effect. The second name Appellants have since conducted surveys indicating such but, as this information arose post hearing, I cannot consider it. On another issue the PPC have indicated that viability is not a matter of concern to the PPC. It is. It was an issue raised by one of the presenting parties and the PPC ought to have commented on it.
- 4.10 The Appellants have raised the issue of the timing of the hearing and, had it not been for the fact that the proceedings had in any event been a fundamental nullity, I would have taken a less prescriptive view of the Regulations on the basis that no prejudice had attached to the applicant by any delay. That the proceedings were a nullity it is not necessary for me to address this in detail or any of the remaining grounds of appeal.

5 Decision

- 5.1 For the reasons set out above I find that Schedule 3 paragraph 5(2A) and (2B) are engaged
- 5.2 The Board is advised to empanel a fresh PPC absent any of the members who participated at the hearing held on 25th January 2017.
- 5.3 The Applicant and the Board jointly consult in terms of the requirements of paragraph 5A of the Regulations and to produce a new CAR as soon as reasonably practicable
- 5.4 The Applicant and interested parties may wish to consider preparing their written submissions to the new PPC in advance of the hearing. It would be helpful if all parties exchanged their submissions through the Board at least 10 days prior to the date of the proposed hearing and the Board release all submissions to each and the PPC members immediately thereafter

(sgd) J Michael D Graham
Interim Chair

3rd June 2017