Care Standards

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

Heard on 01 to 08 July 2019 at the Tribunal Hearing Centre Birmingham

Case No: [2018] 3494.EA

BEFORE
Timothy Thorne (Tribunal Judge)
Libhin Bromley (Specialist Member)
Maxine Harris (Specialist Member)

BETWEEN

Lifeways Community Care Limited

Appellant

-v-

Care Quality Commission (CQC)

Respondent

DECISION

The Appeal

1. This is an appeal by Lifeways Community Care Limited, the Appellant pursuant to section 32 of the Health and Social Care Act against the decision of the CQC dated 21 September 2018 to refuse the Appellant's application to vary the conditions of their registration by adding an additional location to their registration in respect of the regulated activity "accommodation for persons who require nursing or personal care". The proposed additional location is Springside, 2 Spring Lane, Walsall, West Midlands, WS4 1AZ, ("Springside")

Factual Background

2. The Appellant provides social care services for people with complex care needs, including those with a learning disability, autism, and/or mental health issues. It

has been registered under the Health and Social Care Act 2008 ('HSCA 2008') since 2010 to provide accommodation for people requiring personal care and to provide personal care in accommodation which it does not own or operate.

3. On 17th January 2018, the Appellant submitted an application to CQC to vary the conditions of its registration by adding Springside as a location.

4. On 25th May 2018, the Respondent served a Notice of Proposal to refuse the application ("the NOP") for the following reasons: "we propose to refuse your application because we are not satisfied that the way you propose to carry on the regulated activity of accommodation for persons who require nursing or personal care at the new location would be compliant with the requirements of regulations made under section 20 (so far as applicable) of the Health and Social Care act 2008. This is because you propose to accommodate 10 service users in a campus style development, which is not in line with national policy."

5. On 26th June 2018, the Appellant sent representations in response to the NOP. On 21st September 2018, the Respondent served a Notice of Decision ("NOD") confirming its proposal to refuse the application The Appellant now appeals this decision.

6. The original application by the Appellant proposed a service accommodating 10 people. However, now the proposal is that Springside will accommodate 9 people. The proposed care home was previously an NHS care facility for people with learning disabilities in Pelsall, a suburb of Walsall. The proposed care home consists of a series of adjoining single storey buildings:
    a. Bungalow 1 – initially offering 3 en suite bedrooms and kitchen and living room facilities. Now the Appellant proposed accommodation for only 2 persons.
    b. Bungalow 2 – offering 3 en suite bedrooms and kitchen and living room facilities.
    c. 3 self-contained flats, with their own front doors.

7. The above proposed care home adjoins another building containing 6 supported living flats. The Appellant already provides care to the residents of these

supported living flats. The panel is only dealing with the application in relation to the proposed 9 person care home. Within the proposed care home there are some connecting doors between some of the units although there are proposals to block most if not all of them off. It is proposed that residents in the care home will share a multi-function room, a sensory room, a conservatory, an industrial style laundry, a medicine room, a large communal garden and a large car park.

8. According to the proposals the care home as a whole would be run by one manager and one deputy manager, who would together have overall responsibility for all the residents. Although each bungalow would have its own staff team, the Appellant states that staff might be shared in an emergency.

Issues

9. Put simply (and as identified in the Appellant's skeleton argument) the issues are as follows:
    a. Is the proposed 9 person care home contrary to the policy guidance contained in (inter alia) Registering the Right Support 2017 ("RRS") and Transforming Care 2012 ("TC") because amongst other things it is a 'campus' setting?
    b. If the proposed care home does breach the relevant policy and guidance are there compelling reasons to depart from the relevant policy and guidance and which nonetheless requires registration?
    c. Does the refusal to vary the conditions of the registration to add the proposed care home constitute a breach of the Human Rights Act 1998?

Representation

10. Before the Tribunal, the Appellant was represented by Mr Jake Richards and the CQC by Ms. Sophia Roper.

Restricted Reporting Order

11. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or

matter likely to lead members of the public to identify the users of the service in this case so as to protect their private lives.

Late Evidence

12. The Tribunal was asked to admit additional evidence by the Appellant, i.e. (inter alia) a CQC inspection report dated 3rd April 2019 on a home called River Lodge: the "River Lodge Evidence". In relation to this new material, the Tribunal applied rule 15 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 and took into account the overriding objective as set out in rule 2 and admitted the late evidence as it had some relevance to the issues in dispute.

RELEVANT FRAMEWORK

13. This is divided into 3 sections:
    a. The Statutory Framework
    b. Policy & Guidance
    c. Background Research

STATUTORY FRAMEWORK

<u>The Role of the CQC & Registration</u>

HSCA 2008 section 3

(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.

(2) The Commission is to perform its functions for the general purpose of encouraging–

(a) the improvement of health and social care services,

(b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and

(c) the efficient and effective use of resources in the provision of health and social care services.

HSCA 2008 section 12

14. This requires the CQC to grant or refuse an application, according to whether it is satisfied that the requirements of any relevant regulations or enactment are being and will be complied with.

HSCA 2008 section 4

15. In considering an application, the CQC ("the Commission") must have regard to the matters prescribed by section 4 HSCA 2008:

(1) In performing its functions the Commission must have regard to—

(a) views expressed by or on behalf of members of the public about health and social care services,

(b) experiences of people who use health and social care services and their families and friends,

(c) views expressed by Local Healthwatch organisations or Local Healthwatch contractors about the provision of health and social care services

(d) the need to protect and promote the rights of people who use health and social care services (including, in particular, the rights of…persons detained under the Mental Health Act 1983, of persons deprived of their liberty in accordance with the Mental Capacity Act 2005 (c. 9), and of other vulnerable adults),

(e) the need to ensure that action by the Commission in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed,

(f) any developments in approach to regulatory action, and

(g) best practice among persons performing functions comparable to those of the Commission (including the principles under which regulatory action should be transparent, accountable and consistent).

(2) In performing its functions the Commission must also have regard to such aspects of government policy as the Secretary of State may direct.

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

16. These set out Fundamental Standards which providers must comply with when carrying on a regulated activity. They include:
    a. Person-centred care - requiring care and treatment to be appropriate, meet service users' needs and reflect their preferences (Reg.9)
    b. Dignity and Respect - requiring the provider to treat the service user with dignity and respect, to include ensuring service users' privacy, autonomy, independence and involvement in the community (Reg.10)
    c. Premises and equipment - requiring that all premises must be suitable and appropriately located for the purpose for which they are being used (reg.15).
    d. In order to comply with the requirements set out in these Regulations, the registered person must have regard to the guidance issued by the Commission under section 23 HSCA 2008 (Reg.21)

GUIDANCE AND POLICY

Registering The Right Support ('RTRS')

17. RTRS is the guidance issued by the CQC under section 23 HSCA 2008 and was published in June 2017. It adopts the approach contained in other policy and guidance documents, including Transforming Care ("TC") and Building the Right Support ("BTRS") referred to below.

18. RTRS can be summarised as follows:
    a. The CQC is 'committed to taking a firmer approach to the registration and variations of registration for providers who support people with a learning disability and/or autism'
    b. The CQC intended to make decisions ensuring that care for vulnerable adults were 'developed and designed in line with Building the Right Support and other best practice guidance'
    c. The CQC "will expect providers to demonstrate in their application that their proposals comply with the principles of this guidance and the accompanying service model, or to explain why they consider there are compelling reasons to grant an application despite it departing from best practice guidance."

d. “providers can discuss proposals in advance to gain a better understanding of what is expected and improve the prospects of a successful application by developing such models of care”
e. “New services should not be developed as part of a campus style development or congregate setting.”
f. campus style development is defined as “group homes clustered together on the same site and usually sharing staff and some facilities. Staff are available 24 hours a day”
g. CQC would adopt ‘the presumption of small services “usually accommodating six or less”’ in line with current best practice in Building the Right Support, albeit this not a ‘rigid rule’
h. An example is given of an application which is unlikely to be granted as one to add a new residential home for up to 15 people, divided into self-contained units with communal areas, where inspection of the site suggested that although it is near community facilities, ‘the layout of the building and grounds would clearly restrict the residents’ engagement with the local community and it felt as though the people who live there were being hidden away’.
i. RTRS would not be applied retrospectively as this might disrupt the lives of vulnerable people who were happily settled.

Transforming Care (TC)

19. TC was published in 2012 and can be summarised as follows:
    a. The norm should always be that children young people and adults live in their own homes with the support they need for independent living within a safe environment. Evidence shows that community-based housing enables greater independence, inclusion and choice, and that challenging behaviour lessens with the right support. People with challenging behaviour benefit from personalised care, not large congregate settings.
    b. Best practice is for children, young people and adults to live in small local community-based settings.
    c. NICE Clinical guidelines for autism recommend that if residential care is needed for adults with autism it should usually be provided in small, local

community based units of no more than six people and with well supported single person accommodation

d. where children, young people and adults need specialist support the default position should be to put this support into the person's home through specialist community teams and services; the individual and her/his family must be at the centre of all support - services designed around them and with their involvement; and that people's homes should be in the community, supported by local services.
e. The CQC 's role is "to take action to ensure this model of care is considered as part of inspection and registration of relevant services…[and] CQC will also include reference to the model of care in their revised guidance about compliance.."

Building the Right Support (BTRS)

20. BTRS can be summarised as follows:
    a. People should have a choice about where they live and who they live with.
    b. The right home and the right environment can improve independence and quality of life and can help reduce behaviours that challenge.
    c. People should be supported to live as independently as possible, rather than living in institutionalised settings. Housing with occupancy of six or more, or which does not have a small, domestic feel, can quickly become institutionalised.
    d. There is a preference for "mainstream" housing either provided by a housing association, private landlord, family or ownership schemes such as HOLD (Home Ownership for people with Long-term Disabilities).
    e. Housing should not create new campus sites; hence commissioners should be cautious of contracting with providers keen to create schemes of multiple units within close proximity.
    f. It has been shown that people who present with behaviour that challenges can be effectively supported in ordinary housing in the community.
    g. Decisions should be based on what is right for each individual, but for most people, supporting them in a home near their families and friends,

and enabling them to be part of their community will be the right decision. This is in accordance with the Valuing People principles of rights, independence, choice and inclusion.

h. People should not be placed in voids in existing services or group living arrangements if it is not based on individual need and based on a person centred approach to planning

NICE guideline "Learning disabilities and behaviour that challenges: service design and delivery" (March 2018)

21. This states that if adults prefer not to live alone a "small number of people in shared housing that has a small-scale domestic feel" is appropriate. The guideline's overall aim is to "enable children, young people and adults to live in their communities."

UNDERLYING BACKGROUND RESEARCH

22. The panel was referred to a read a wealth of background research which informed the drafting and development of the aforementioned policy and guidance. There was no dispute between the parties as to the validity of the research or the applicability of the aforementioned policy and guidance to the instant appeal.

The Burden and Standard of Proof

23. Applying the rationale identified in **Care Management Group Ltd v CQC [2017] 316.EA**, the panel is required to determine the matter de novo and make its own decision on the merits. The test to be adopted is whether as at the date of the hearing the decision to refuse to vary the registration should be confirmed or directed to be of no effect. The panel can take into account all the evidence submitted including new information or material that was not available (or presented) when the CQC made its original decision. The Appellant bears the burden of establishing on the balance of probabilities that the variation to the existing registration should be granted.

24. The panel "stands in the shoes of the CQC" in carrying out this function and must therefore apply the same statutory framework, policy and guidance as the CQC as set out above.

The Hearing

25. The Tribunal attended a site visit at the proposed care home on the first day of the hearing. The Tribunal also took into account all the documentary and oral evidence that was presented. The Tribunal heard evidence from a number of witnesses on behalf of the Respondent and Appellant. The following is a precis only of what was said.

26. The Tribunal first heard oral evidence from **Ms Elizabeth Parry,** a CQC Registration Inspector. She adopted her witness statement in which she explained the process by which the CQC assesses such an application in general and how she dealt with the Appellant's application in the case before the panel. She described why she had refused the application because it did not accord with the policy and guidance set out above and how she considered that the Appellant had failed to submit any compelling reasons why the registration should be granted in breach of the policy and guidance.

27. She also described how she and Ms Henry, the 'expert by experience' (a carer for a family member with severe learning disabilities) visited the proposed care home on 13 April 2018. Both were concerned that the proposed care home had an institutional appearance. Ms Henry thought it looked like a hospital Ms Parry did not think the outside or the internal layout of the care home had a small-scale or domestic feel. However, Ms. Henry did also say some positive things about it.

28. Ms. Parry described how she asked the Appellant for comments as to how it was proposed that the application would conform to the national policy and guidance set out above. The Appellant replied in a letter dated 24 April 2018, which was sent after the site visit had been conducted by CQC. The letter said that the Appellant planned to offer 'a step down pathway to an individual tenancy' for those 'looking to step down from hospital settings or at risk of being

placed under section' This was said to be based on a model developed by themselves.

29. She also described how she discussed the application with local commissioners. It transpired that the NHS Walsall Clinical Commissioning Group had not been consulted about the proposal, but indicated that they would have preferred to commission places in small settings consistent with *RTRS*. She also learned that Walsall Council had been consulted and were supportive of the proposed application However, she was concerned that the Council had not taken into account the policy and guidance set out above.

30. In oral evidence she said that she had attended the site visit earlier that day and was asked whether anything had changed since her earlier visit. She explained that the first bungalow now had 3 bedrooms instead of 4 and the decorations were much better. It was obvious that a lot of effort had been expended in trying to make the place look better and more "homely". Unfortunately some of the interior design would not be appropriate for many potential service users as the large murals and sensory room might be disturbing to some. However she acknowledged that the Appellant would undertake to make the individual rooms bespoke in their appearance but problems with the décor of the shared rooms might still pose a problem.

31. In addition, although attempts had been made to block off some through routes and create a sense of separateness between the units this was not sufficient to deal with the problems identified by the CQC.

32. She agreed that there were no problems with staff training and the provider generally and she agreed that there were things that could be done to mitigate the risks inherent in Springside but those problems remained and to allow registration in these circumstances would not promote the "Transforming Care agenda". She said that "If we accept Good Enough we can't transform the service and achieve the necessary change.

33. She said she could not comment on the assertion that people wanted to live in such an environment. The question was whether they had an informed choice of the alternatives.

34. One problem with the proposed care home was that service users would not easily and "effortlessly" bump into neighbours who did not share their own condition. There was a risk that they would interact mainly with other people on site. That was one of the difficulties with a campus type setting.

35. She said that the CQC did not consider granting the application subject to conditions. She could not think of any conditions which would be appropriate.

36. The Tribunal then heard oral evidence from **Ms Julie O'Neill,** a CQC Registration Manager. She adopted her witness statement in which she explained that the CQC does not have a rigid "6 bed rule". She explained that other providers routinely took up the offer to discuss potential applications in advance with the CQC. She said that there was no minimum size for a care home, which can be and are registered for single users. Equally, supported living arrangements are not all for single users and the CQC did inspect providers of supported living as well as care homes. She also explained that sometimes a proposed move to supported living could be frightening for families and or individuals who required more support and information about potential benefits. She said that anyone can live in supported accommodation with the right support and planning.

37. She was asked whether a good provider could make up for the bad design of a facility such as a campus setting. She stated that "It's very difficult. The further you move away from the good model the harder it is. She later explained, "The larger the site the less flexible and able to respond." She also said that the CQC did not consider granting the application subject to conditions. She could not think of any conditions which would be appropriate.

38. In addition she was asked about the CQC report about River Lodge. She explained that that was a legacy site and it would be wrong to require such places to close and the residents to move out with all the attendant stress.

However, the challenge now going forward was to transform the sector and the CQC needed to be proactive in its approach to new registrations. The transforming care agenda was by its nature aspirational.

39. The Tribunal then heard oral evidence from **Ms Vivien Cooper,** the chief executive of a charity working with people with learning disabilities. She had visited the proposed care home and thought that "it looked like a health centre" and was worried that residents would not be part of the community. "The temptation would be to stay on site". She was also concerned that people would not choose to live there if they were told of other choices. She said that her son had learning disabilities and was now very happy in supported living accommodation and was fully integrated into the community. She said, "It's disappointing that they decided to open such a large site for so many people on one plot when they could have developed more individual services." She feared that it was for the convenience of the provider rather that the good of the individual resident.

40. The Tribunal then heard oral evidence from **Mr Raymond James CBE,** the National Learning Disability Director and Senior Responsible Officer of the Transforming Care Programme, NHS England. He adopted his witness statement and explained the nature of and background to the national policy and guidance set out above. He explained that he had the most senior public service role in England devoted to people with learning disabilities. He said he was a party to the writing of the BTRS and had "signed off on it." He said that he was "one of a few number of people" who knew the national policy and guidance very well. He explained that it was designed to reduce the likelihood of people with learning disabilities and autism from spending unnecessary periods in specialist inpatient settings, and to enable them to live lives of their choosing within their local communities.

41. He had attended the site visit and was asked to comment on what he saw. He said that the proposed care home was "not close to compatible to what is an appropriate setting" and had "many characteristics of the campus and congregate sites that are described as inappropriate."

42. He thought that the proposed care home looked “institutional” because of “its size and degree of difference; it stands out from its surroundings.” He further explained that as a place with characteristics of a campus setting there was an increased risk “of the wrong things happening.”

43. He added that the proposed care home and flats “should be viewed as part of the same site” and it was “difficult to understand the separation between the existing homes, in terms of the physical boundaries and staff.” He was also concerned that the step-down practice might become the default option, rather than concentrating on helping people move into more independent, ordinary accommodation. He also highlighted the increased risk of readmission to hospital when people are placed in inappropriate settings.

44. He also stated that in his opinion, the Appellant’s proposal was “well intended, with staff wanting to make the best of the environment but it doesn’t come close to the policy and national guidance.” He later said, “It remains my view that this proposal is not in line with national guidance.” He further explained that he was against registration of the proposed care home because “The role of public policy is to ensure that people lead the right type of life. If we allow compromise because it’s the only thing available rather than what is right; that would be wrong.”

45. He stated that commissioners and providers are expected to use the aforementioned policy and guidance as the basis for redesigning existing services and implementing new ones. He could not understand why a local authority would need such a large residential care provision when the focus should be on more independent living arrangements as per the aforementioned policy and guidance. He said that having more than six residents is “less likely to be consistent with the evidence of choice and control which people need.” As the numbers increase, the risks get larger.”

46. The Tribunal then heard oral evidence from **Dr Theresa Joyce,** the CQC National Professional Advisor for Learning Disabilities. She adopted her witness

statement and explained that she was also an independent clinical psychologist who often gave independent expert evidence in Civil Courts and Tribunals.

47. She explained that she had been involved in studying the research evidence that underpinned the national policy and guidance for 30 years and explained that the unanimous conclusion of all the research was that accommodation should be "small, ordinary and dispersed".

48. She had attended the site visit and noted that the supported living units were very close to the main units and there was no real separation between them and everyone was in effect sharing the same large site. Moreover, the entrance to one of the supported living buildings was in close proximity to the care home conservatory and multi-use room.

49. In her opinion the Appellant's proposal did not meet the requirements of the national policy and guidance set out above. This was because (inter alia) the proposed care home "is not small-scale, is not domestic in style and is clearly different to the houses in the local area. It has the appearance of a care facility, not of typical housing." In addition, it was "a cluster model of service which has some features of a campus." She added, "The outcomes of this service model have been demonstrated to be less good for people with learning disabilities than is a model based on people with learning disabilities living in the same sort of ordinary places as everyone else." She gave the Tribunal examples of the kinds of problems which arise in such settings, even with the best of intentions of staff and providers.

50. She was still unclear as to whether the Appellant's proposal was for the proposed care home to provide transitionary emergency care or long-term residential care. She was also worried about the references to Springside offering potential accommodation for people who are at risk of being placed under section. She was concerned that this might be in effect **"**an emergency service to prevent hospital admission." This was wrong and any so-called step down model should be avoided. She was of the firm view that anyone (including people with extremely challenging behaviours) could be moved out of hospital and accommodated in their own homes or smaller shared homes with proper

preparation and the right care and support provided. She described this as “do it once, do it right.”

51. She further explained that the national policy and guidance showed the Government’s intended direction of travel and that it said that “if you can’t do it right, it doesn’t mean that you should do the wrong thing; you should continue to try and do the right thing.” She later said, “If you register an inappropriate model because there isn’t an alternative at the moment, it exists forever and sucks in more people.”

52. She acknowledged that in the past the CQC had registered services with more than 6 residents “but other factors are considered” such as “whether the accommodation is small-scale and domestic in type.” In addition the CQC were loath to close down existing care homes which might not accord to the policy and guidance but the closure of which would cause disruption to residents. When asked “why did the CQC register any care homes” she replied, ‘Good question”.

53. The Tribunal then heard oral evidence from **Ms. Helen Toker-Lester,** the Integrated Personalised Care Delivery Lead for Torbay and South Devon CGC. She adopted her witness statement and explained that she used to be the national Transforming Care lead for the Association of Directors of Adult Services (ADASS). She knew that very few people chose to live in any form of residential care when offered the alternative of supported living.

54. She had attended the site visit and noticed that the proposed care home was “very different to the housing around it, not ordinary housing. The building “looks like an NHS building, almost a health centre.” She thought it had an “institutional feel” and created “a sense of otherness, that people with learning disabilities are different from those living outside.” She added that it was “placed in the community but apart from it because of its design.

55. She stated that “In my opinion I believe there are significant risks and concerns relating to the development of Springside and the proposed service.” She feared

that “In this proposal, Springside has been developed first and people will be identified to fit into it.”

56. She added that “despite the good will of staff and the strong commitment to the needs of people, it has been identified that the design of services is a prime factor in how choice of services can be affected and this can have an impact on the quality of service.” BTRS was “developed to change what we did in the past” and “Transforming Care requires new thinking”

57. She also added that her experience as a Commissioner of such services had taught her that in the long term it was cheaper for the public purse for people to live in supported living environments than in care homes. She thought that care homes were a necessary part of the choices that should be available for people but only those care homes that met the national policy and guidance set out above.

58. The Tribunal then heard oral evidence from **Mr. Justin Tydeman,** the Chief Executive of the Appellant. He adopted his witness statement and explained that he and the company fully supported every aspect of the national policy and guidance set out above. He had not read any of the underlying research prior to the litigation before the Tribunal, but had read most of the policy and guidance

59. He said that the Appellant’s proposal for registration of Springside was made before his appointment as CEO and he played no part in its preparation or the application for registration. Everyone identified in the papers as being involved had now left the company. Nonetheless he stood by the original decision to apply for registration and had made the decision to appeal to the Tribunal.

60. He said that he was unfamiliar with the process of consultation with the CQC that was in their guidance and accepted that no one at Lifeways appeared to have engaged in any attempt to contact the CQC to discuss the proposal in advance.

61. One of the many advantages of the proposed care home was the fact that the building had a history of providing services for people with learning disabilities

and was accepted as such by people in the local community. He knew this because there were no problems in obtaining planning permission. This was a "key factor" as community support could never be taken for granted.

62. He also thought it was good that the proposed care home had so much space and light and a large shared garden. It was put to him that the research referred to above made it clear that if a provision was too large it might have a deleterious effect on residents and that as the size increased the risks increased. He replied "I talk as a lay person but I'm not convinced that this is true. It's complicated. He also said, "It makes me nervous to say there can be no compromises."

63. He did not know what research was done by the Appellant or the Local Authority to see what other alternative provision was available in the area. He was asked about the letter sent by the Appellant dated 24/04/18 in which it was proposed that a step down pathway was planned for Springside and that people would be admitted who were at risk "of being sectioned." He said that this was written before he became CEO and that the author of the letter no longer worked for the Appellant. He did not think that there would be a step down policy.

64. It was put to him that such an approach was potentially harmful and he replied, "I hesitate to disagree with Dr. Joyce, but I am shocked with what she said about do it once do it right. Life is about transitions." He further explained. "If people choose to live with each other that might cause transition and change; that's the real world." He said that the environments in his care homes "are not highly dynamic and chaotic."

65. He was asked whether he still considered that the proposal complied with the national policy and guidance set out above. He replied, "If we are going to have a Tribunal every time I would think again." He later said that "we are not doing this because its less wrong, we don't accept that its wrong." He added, "I believe this will provide an excellent service on a high quality site."

66. The Tribunal then heard oral evidence from **Ms. Victoria Everett**. She adopted her witness statement and explained that she had been involved with Springside since she started working for the Appellant in September 2017. Originally she

was the proposed manager of Springside, but now she had become area manager and someone else would take over management in future.

67. She said that the flats were self-contained but the bungalows had communal areas which could be used for watching TV and socialising. She emphasised that there would be completely different teams of staff for the different bungalows and flats on site. Only in emergencies would the staff be mixed. In addition there would be a "floating" member of staff who could be used when required. She would manage the entire proposed care home.

68. She explained to the Tribunal all the advantages of Springside, including its excellent access to local community activities and amenities. In addition the local people were very welcoming as the site had a history of being used to care for those with learning disabilities. She said that a number of people had approached her who were interested in having family members come and live there when it was ready.

69. She said that she was not an expert on the national policy and guidance or the underlying research, but she did know of them. In her opinion "Springside is helpful. In my experience people find it very difficult to be thrown into the community." She added, "It's all about helping them as best as possible."

70. She maintained that in fact the bungalows and flats made up one site and the supported living flats were a different albeit adjacent site. She was asked how would members of the public know that and she replied, "It's about education. We can't change the look of the buildings."

71. The Tribunal then heard oral evidence from **Mr. Ian Staples,** the Lead Commissioner for Walsall Council. He adopted his witness statements and explained that he had been in discussions with the Appellant since 2015 in relation to the development of Springside. His colleague Mandeep Jandu (MJ) was more heavily involved in the project than him but he was unable to attend the Tribunal. He said "my understanding is that in November 2015 it was decided following conversation between [MJ] and representatives at Lifeways that instead of turning Springside into multiple supported living flats on the site, the

area required accommodation for people with more complex support needs, particularly those looking to step down from hospital settings or who were at risk of being placed under section. He said that the proposed care home would offer an "integrated pathway" and a "journey" through the bungalows and independent flats "to supported living and independence" outside.

72. He said he was aware of all his obligations under the national policy and guidance set out above. He supported the principles behind it. He described the proposed care home as the remainder of a former NHS campus and understood the CQC's concerns about the size of the proposed care home but said "I do not think the size of a service necessarily means that the care delivered is less personalised…….In any event the layout of [Springside] means that it operated as smaller living units." He did however accept that the provision of information to the CQC from the Local Authority was inadequate.

73. He said that he saw it as an advantage that the proposed care home "allows flexibility as the bungalows can operate independently of one another. This would allow for a mixture of clients to be accommodated." He said that "I am under pressure to get people out of hospital." He said that he supported the policy of "do it once and do it right" but "we have to live in the real world."

74. He thought the environment at the proposed care home was "welcoming and homely" and "the 10 bed model rather than a 6 bed model also enables some economies of scale." However, in oral evidence he accepted that greater risks existed when a large group of people were sharing, father than a small group. He accepted that risks existed because of the communal areas of Springside and that was why "it's so important to get compatibility right." He also said that the large communal garden was a problem and "it might need to be split up".

75. Another advantage of the proposed care home in his view was that "Pelsall is very accepting" and there would therefore be no problems with planning consent. He supported the proposal but did say that he was taking "a professional risk by supporting something that doesn't toe the line". He said, "I have put my head above the parapet to support this application……I didn't realise it would take on a national importance." He also said "It could be perceived as a campus but I have to balance that with local need. We consider money and cost effectiveness and resources." He added "I don't have an infinite

amount of money." He also said that although the proposed care home might look like a campus setting "I look beyond what I can see and look at how it works." He said that he accepted the criticism that the place looked like a campus and he could be "blinkered" about that but "it balances the provision for me in an area where it can work for us. But I accept that it could be perceived as a campus…….that's not ideal but it's how the care is delivered that is important." He said that one should not "over exaggerate the risks. I believe it could work for us."

76. However he said he was "passionate" about the Transforming Care agenda and wanted to close down the big hospitals. He thought that this was more important than the present litigation between the CQC and the Appellant which was just "arguing about a couple of beds." He later reiterated that he supported the CQC and the national policy and guidance but "my concern is that I don't have the luxury of seeing it that way…… I accept [Springside] is bigger than 6 beds and there is a risk. Ideally we would look at 6, but I had 12 to 15 people looking for places and I didn't have other sites available, so I made an informed decision and looked at the risks." He also said that he had "voids" in the supported living stock that he could not fill. It was possible to buy more houses but he had to consider the financial consequences.

77. He spoke of what he considered to be the need to provide more care home places in Walsall as opposed to more supported living provision. However he had had no discussion with the Appellants about what alternatives existed such as the provision of a smaller care home more in line with the national policy and guidance. He did not know whether MJ had had such a discussion.

78. The Tribunal then heard oral evidence from **Ms. Michelle Heath**. She adopted her witness statement and explained that she worked for the Appellant as a regional operational director. She had only recently become involved with Springside.

79. She confirmed that the plan was for the care home to be run by one manager and one deputy manager, who would together have overall responsibility for all the residents. Each bungalow would have its own staff team but they might be

shared in an emergency. At all times there would be a "flexible support worker" providing assistance across the care home and 2 "floating support staff" providing assistance across the care home during the night. In addition there is a "staff hub" to which all staff will have access. Residents would be able to choose their own decoration and furniture and the support would be "person centred." She was asked whether a step down service would be provided and she said she preferred the term "care pathway." She was asked about "do it once and do it right." She said, "I wish it worked but in reality it doesn't."

80. She thought it was a great advantage of Springside to have all the space as well as the large communal garden and parking facilities. She was concerned about the focus of policy on supported living because of the lack of oversight and governance. She was worried that this would create "mini institutions behind closed doors." She added that "institutionalisation was about practices and not just about buildings." She preferred the environment of a small care home.

Closing Submissions

81. The panel heard oral submissions and read written submissions as well. In summary, the CQC submitted that the proposed care home would not comply with national policy and guidance and that it was correct to refuse registration. The proposed care home offered an institutional setting, itself larger than desirable, and set in an overall site accommodating 16 vulnerable adults with similar needs for support. It was artificial to say that there would not be considerable sharing of facilities and staff, both as between the care home and the flats, and within the care home units. This would create just the type of setting which the Transforming Care programme was designed to leave behind: a community within a community, which is perceived by local residents as different.

82. In summary the Appellant submitted that "the application must be judged in all the circumstances. There are many positive aspects to the site at Springside. These include the welcoming community, the person-centred care, the specific local need and the spacious environment. All of these benefits would fall away and more people would remain in hospital because the CQC deem the

aesthetics and the fact that services would operate side-by-side to be too risky. This is a case where the decision must be made taking into account the realities for providers, commissioners and service-users in Walsall. All of these must not be overlooked in the search for perfection." It was also submitted that "Dr Joyce has a strong bias towards supported living provision. The Tribunal should therefore give limited, if any, weight to her analysis of Springside."

Conclusion & Reasons

83. For reasons given below the panel concludes that the appeal should be dismissed because the Appellant has failed to prove on the balance of probabilities that the application as now envisaged would comply with the relevant statute, regulations, and the national policy and guidance referred to above.

84. Standing in the shoes of the CQC, the Tribunal concludes on the basis of all of the evidence before it (for the reasons given below) that the application should not be granted.

85. The panel was impressed by the evidence of Mr. Raymond James CBE, the National Learning Disability Director and Senior Responsible Officer of the Transforming Care Programme, NHS England. He was a party to the writing of the BTRS and had "signed off on it." We accept that he is "one of a few number of people" who knew the national policy and guidance very well. He had attended the site visit and said that Springside was "not close to compatible to what is an appropriate setting" and had "many characteristics of the campus and congregate sites that are described as inappropriate." He opined that the proposed care home looked "institutional" because of "its size and degree of difference ; it stood out from its surroundings" and had characteristics of a campus setting which meant there was an increased risk "of the wrong things happening."

86. He also stated that although the Appellant's proposal was "well intended, with staff wanting to make the best of the environment….it doesn't come close to the policy and national guidance." He later said, "It remains my view that this proposal is not in line with national guidance." He further explained that he was

against registration because “If we allow compromise because it’s the only thing available rather than what is right; that would be wrong.”

87. He was also concerned that the step-down practice (which there was a risk would be adopted) would become the default option. He also said that he could not understand why a local authority would need such a large residential care provision when the focus should be on more independent living arrangements as per the aforementioned policy and guidance.

88. In the judgement of the panel the opinion of this witness who has visited the proposed care home with his special insight into the national policy and guidance outlined above is highly persuasive.

89. In addition the panel takes into account the evidence of Dr Theresa Joyce, the CQC National Professional Advisor for Learning Disabilities. The panel does not agree with the Appellant’s submissions that she is a biased witness whose evidence should be given little or no weight. In coming to this conclusion the panel takes into account that Dr Joyce works as an independent clinical psychologist who often gives independent expert evidence in Civil Courts and Tribunals and is aware of her obligations as an expert witness.

90. Her evidence was clear, that having seen the proposed care home and studied the application, in her opinion the Appellant’s proposal did not meet the requirements of the national policy and guidance set out above. This was because (inter alia) it “is not small-scale, is not domestic in style and is clearly different to the houses in the local area. It has the appearance of a care facility, not of typical housing.” In addition, it was “a cluster model of service which has some features of a campus.”

91. There were also unresolved concerns as to whether the Appellant’s proposal was for Springside to provide transitionary emergency care or long term residential care and she was also worried about the references to the proposed care home offering potential accommodation for people who were at risk of being placed under section.

92. In the judgement of the panel the opinion of this witness with her special insight into the national policy and guidance outlined above (and the underlying research) as well as the fact that she had seen the proposed care home is also highly persuasive.

93. In coming to its conclusions the panel has also taken into account the clear and impressive evidence of Ms. Helen Toker-Lester, the Integrated Personalised Care Delivery Lead for Torbay and South Devon CGC and former national Transforming Care lead for the Association of Directors of Adult Services. Her opinion of the proposed care home was that it was "very different to the housing around it, not ordinary housing". It "looks like an NHS building, almost a health centre." She thought it had an "institutional feel" and created "a sense of otherness, that people with learning disabilities are different from those living outside." She added that it was "placed in the community but apart from it because of its design. She stated that "In my opinion I believe there are significant risks and concerns relating to the development of Springside and the proposed service." She feared that "In this proposal, Springside has been developed first and people will be identified to fit into it."

94. In the judgement of the panel the opinion of this witness with her special insight into the national policy and guidance outlined above (and her experience as a commissioner of such services) as well as her having seen the proposed care home is also highly persuasive.

95. Moreover, the panel took into account that the Appellant's own witness Mr. Ian Staples, the Lead Commissioner for Walsall Council. He appeared to accept that the proposal was not squarely within the letter or spirit of the national policy and guidance. He spoke of taking "a professional risk by supporting something that doesn't toe the line" and he had "put my head above the parapet to support this application". Moreover, he accepted the criticism that Springside looked like a campus. He also accepted that risks existed in the communal areas of the proposed care home and that the large communal garden was a problem and "it might need to be split up." He also said, "I accept [Springside] is bigger than 6 beds and there is a risk."

96. One striking feature of this case was that the very same features of the proposed care home described by the Appellant's witnesses as being advantageous were described by the CQC's witnesses as constituting serious risks to the provision of care. The Appellant's witnesses spoke of the large space and large communal garden and parking spaces as being positive advantages. Mr. Staples spoke of Springside allowing "for a mixture of clients to be accommodated." The Appellant's witnesses also spoke about the advantages of the fact that the proposed care home was formally an NHS care facility for people with learning disabilities and therefore the local community would be more accepting of the proposed care home because they knew that people with learning difficulties would be residing there as they had in the past.

97. However, the CQC's witnesses (including Dr. Joyce and Mr. James) explained that the large space and large communal garden and parking spaces as well as the "mixture of clients to be accommodated" actually increased the sense of an institutional campus style setting and would be potentially upsetting to people with autism. Also, the fact that Springside was identified in the minds of the local community as a place where people with learning difficulties lived as a group merely increased the risks of institutionalisation and alienation from the community.

98. For reasons given above the panel considers Dr. Joyce and Mr. James to be very compelling witnesses. We accept their analysis of the aforementioned factors as disadvantages undermining the purposes of the national policy and guidance rather than advantages. As such, they constitute serious risks to the provision of care.

99. The panel also takes into account the evidence we heard from Ms Elizabeth Parry that the NHS Walsall Clinical Commissioning Group had not been consulted about the proposal and had indicated that they would have preferred to commission places in small settings consistent with RTRS.

100. Last but not least the panel has also taken into account the evidence of our own observations during the site visit. Our unanimous view was that despite the

obvious good will and efforts of the Appellant's employees at Springside, nonetheless it was obvious that the proposed care home had an institutional look to it and clearly had the characteristics of a campus style setting which stood out and was apart from the surrounding neighbourhood.

101. The proposed care home was large with many shared facilities (such as a large garden, washing facilities, car parking, a conservatory and other shared spaces) which we accept can cause difficulties as outlined above. We accept that they constitute serious risks to the provision of care. The attempts to come up with solutions such as proposals that the garden could be sub-divided and fenced off or internal doors blocked or areas used for supported living fenced off, merely highlights the many problems of the proposed care home. The panel concludes that these problems simply cannot be solved and the risks they pose successfully managed simply by the staff trying harder.

102. It was obvious to the panel that everyone involved in this case on both sides of the litigation were acting in good faith in what they considered to be in the best interests of vulnerable service users. However, in light of the evidence before us we are driven to the conclusion that the proposal is completely inappropriate by reference to the statute, as well as the national guidance and policy. We were also concerned by the unresolved questions about the exact nature of the proposed services and whether they would provide a step down approach or care pathway which is deprecated by the policy and guidance. We conclude that the proposed care home and the extent to which it departs from national policy and guidance creates unacceptable and serious risks to service users in the provision of care.

103. We acknowledge that the Appellant does provide good care in other settings and would no doubt do its best to do the same in this setting as well. But put simply there is an unacceptable risk that the Appellant would fail because of the nature of the proposed care home and the extent to which it departs so greatly from the aforesaid policy and guidance.

104. In light of all the evidence (including our findings that the proposed service would not meet the national policy and guidance) we also conclude that the

proposed care home would not meet the standards required under Regulations 9, 10 & 15 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 in that the care provided would not be adequately person-centred, delivered with the requisite dignity and respect and that the premises would not be suitable.

105. It is clear that the national policy and guidance is (and is supposed to be) aspirational. It seeks to transform existing care provision going forward. The panel accepts that the evidence establishes that the small domestic model of care promoted by the policy and guidance is (despite the challenges involved) realistic, workable and achievable. We heard evidence that in the long term it also benefits the public purse.

106. We have no doubt that the Appellant acted in good faith in making this application and would do its best to make it work. But it would be wrong for this Tribunal to allow this appeal (and effectively allow the registration) on the basis that the proposal would provide a short term sub optimal service that does not meet the standards set out in the policy and guidance. The panel agrees with the analysis of the CQC witnesses that to allow registration in these circumstances would not promote the "Transforming Care agenda" and that "if we accept Good Enough we can't transform the service and achieve the necessary change."

107. Some of the Appellant's witnesses appeared to cast some doubt on the aforesaid national policy and guidance as well as the research. However it was made clear to the panel at the outset of the hearing by Mr. Richards that the Appellant accepted that the policy and guidance was appropriate and he would not be arguing that it was wrong. Indeed in his written closing submissions he states: "It is accepted that research shows that generally smaller, more dispersed settings in the community offer better outcomes for service users."

108. In those circumstances the panel has proceeded on the basis that the policy and guidance is to be followed except in exceptional or compelling circumstances.

109. The panel considered the River Lodge evidence which seems to indicate that the CQC has rated care homes operated by the Appellant at River Lodge and elsewhere as 'Good' or 'Outstanding' even though they accommodate more than 6 people. However, the panel found this evidence of limited assistance as those decisions were obviously all fact specific. For reasons given above we have come to a different conclusion on the basis of the different evidence concerning the different proposed care home we were considering.

110. The panel also considered the case of **Centurion Healthcare Limited v CQC [2018] UKFTT 0615 (HESC)** but found it also of limited assistance as the decision was also fact specific. The application was for a new location adding 6 new residents into the same building as 6 who were already living on the site. After considering the specific evidence of the site, the Tribunal in that case did not accept that there was "a campus setting" or that a "congregate setting" was created. Again, for reasons given above we have come to a different conclusion on the basis of the different evidence concerning the different proposed care home we were considering and which we visited.

Compelling Circumstances

111. The only compelling or exceptional circumstances that have been argued by the Appellant as requiring the CQC and the Tribunal to depart from the national policy and guidance is the supposed local need for this specific provision.

112. However the panel is not satisfied that there is adequate evidence to establish a pressing local need for the particular type of service provided by the proposed care home, i.e. a care home larger than that recommended by the national policy and guidance and exhibiting the characteristics of an institutional campus setting.

113. The evidence from Ms. Victoria Everett is that a number of people had approached her and appeared interested in having family members come and live at Springside when it was ready. However, these people have provided no evidence to the Tribunal as to why they were interested and whether they had looked at alternative local provision.

114. Mr Staples said that “I am under pressure to get people out of hospital” and “Ideally we would look at 6, but I had 12 to 15 people looking for places and I didn’t have other sites available” and he had “voids” in the supported living stock.

115. However, the Tribunal was provided with inadequate evidence as to why there was a pressing need for the specific provision proposed in the Appellant’s application and there was no adequate evidence of the lack availability of alternative provision that was in keeping with the national policy and guidance. Mr. Staples had had no discussion with the Appellants about what alternatives existed and did not know whether anyone else from the Local Authority had had such a discussion.

116. There is therefore inadequate evidence to establish that the local need cannot be met by the provision of supported living or small scale care homes as envisaged in the national policy or guidance. It may be easier, more convenient, cheaper and quicker to house service users in Springside but there is inadequate evidence to establish that it is necessary to do so or that there are compelling or exceptional reasons that require it.

Conditions

117. After considering the matter fully the panel is satisfied that there are no practical conditions which could be imposed upon the registration so as to make it appropriate to allow the appeal or grant the application. The only condition mooted by Mr. Richards, i.e. that the CQC carry out much more frequent inspections of the proposed care home, is in our judgement wholly impractical and unworkable.

Human Rights & Proportionality

118. The Appellant argues that failing to grant the application and dismissing the appeal would constitute a breach of Protocol 1 of Article 1 of the European Convention on Human Rights which provides as follows:

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

119. After considering all the evidence in the round the panel concludes that this Article is not engaged in this case. The Appellant has failed to adduce adequate evidence to establish on the balance of probabilities that the decision to refuse the application or to dismiss the appeal interferes in any way with the Appellant's peaceful enjoyment of its possessions.

120. In the alternative, even if the Article is engaged, the panel is satisfied on the balance of probabilities that (in light of our earlier findings) the impugned decision is lawful (and in no way breaches the Human Rights Act 1998) in that:

a. It is taken in accordance with published law, guidance and policy
b. It pursues a legitimate aim in relation to the health and well-being of the population
c. It is proportionate in that the extent to which it may interfere with the Appellant's peaceful enjoyment of its property is outweighed by the public (or general) interest in promoting the Transforming Care and associated policies and guidance set out above.

Conclusion

121. Having balanced the impact of the decision upon the Appellant and potential service users against the impact upon the public interest in the promotion of the health, safety and welfare of people who use health and social care services, including the Respondent's ability to fulfil its registration function and role in the national agenda to transform care, we find that the decision was (and remains) lawful, fair, reasonable and proportionate.

Decision

The appeal is dismissed.

The decision to refuse to vary registration is confirmed.

NCN: [2019] UKFTT 0464 (HESC)

Tribunal Judge Timothy Thorne
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 23 July 2019