First-tier Tribunal Care Standards

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

[2023] 5050.EA-MoU
Neutral Citation Number: [2023] UKFTT 731 (HESC)

Hearing by video-link
On 10, 11 and 31 August 2023
Panel deliberations on 4 September 2023

BEFORE:
Tribunal Judge Siobhan Goodrich
Specialist Member Dr David Cochran
Specialist Member Mrs Denise Rabbetts

BETWEEN:

RCH Limited

Appellant

- v -

Care Quality Commission

Respondent

DECISION AND REASONS

The Appeal

1. This is an appeal against the decision made by the Respondent on 21 June 2023 using the urgent procedures power provided under s. 31 (1) of the Health and Social Care Act 2008 ("the Act"). The decision was to impose conditions on the Appellant's registration.

2. The conditions imposed were as follows:
   Condition 1:
   The registered provider must not admit any new service user to the Location without the prior written agreement of the Care Quality Commission.

   Condition 2:
   The registered provider must provide a report to the Commission within 10 days of this notice taking effect, and on the first Monday of each month thereafter setting out the actions taken:

a) To establish and effectively operate a system to assess, monitor and mitigate all risks to service users living at the Location prioritising areas of concern found on inspection, including;

i. Risk of choking
ii. Risk of malnutrition
iii. Risk of dehydration

b) To establish and effectively operate a system to:

i. Maintain effective oversight of staff competency in relation to nutrition, hydration and risk of dysphagia.
ii. Ensure on-going competency assessments and training for all staff in relation to the delivery of care to service users in respect of choking, malnutrition and hydration risks.
iii. Ensure accidents, incidents and safeguarding concerns are appropriately identified, reported, recorded, investigated and managed; and provide a monthly overview of any accidents incidents or safeguarding concerns that occurred including the actions taken, lessons learnt and outcomes.

Restricted Reporting Order

3. 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 service users in this case, so as to protect confidentiality and privacy. We will also anonymise the names of staff members where appropriate.

The Background

4. In summary:
   a) The Appellant is the registered provider of regulated activities at Park View Care Centre in Ashford in Kent. Park View is a residential home providing accommodation for persons who require nursing or personal care, diagnostic screening procedures and treatment of disease, disorder or injury. The location was first registered in 2010.
   b) Following the receipt of concerns from the safeguarding team at Kent County Council (KCC) the Respondent carried out an inspection of Park View (hereafter “the home”) on 30, 31 May and 6 and 14 June 2023 reviewing all five domains: safe; caring; responsive, effective and well led. The Respondent identified shortfalls in relation to a range of matters but, as will be seen below, the matters of concern that led to the imposition of an urgent order are discrete.
   c) The Respondent issued a Letter of Intent (LOI) regarding possible urgent enforcement action on Friday 16 June 2023 in which the Appellant was requested to submit an action plan addressing the concerns raised by midday on Monday 19 June 2023.
   d) The Appellant duly provided an action plan. The Respondent considered that the shortfalls and omissions relating to the monitoring and delivery of care for users at risk of choking or malnutrition or dehydration or requiring support with nutrition and hydration posed a risk to the health, safety and

well-being of service users. It made a decision to impose conditions on registration on 21 June 2023 under section 31 of the Act.

e) The Inspection report was not complete as at 10 and 11 August 2023. On 31 August 2023 we were informed that the report is at the stage of review with a view to publication. Prior to publication the Factual Accuracy process will need be undertaken.

The Decision under Appeal

5. We need not relate the full decision made on 21 June 2023 which is a matter of record. In summary:
   a) The basis of the order imposed under section 31 related solely to the Respondent's concerns regarding the risk of choking, malnutrition and dehydration. The decision letter set out a number of matters of concern.
   b) In relation to "Governance" the Respondent considered that the quality and assurance systems in place did not provide oversight to show that service users were receiving support in a safe way.
   c) In the NoD the Respondent stated that it made the decision under s. 31 (1) of the HSCA 2008 to take immediate effect because of its belief that a "person will or may be exposed to the risk of harm if we do not do so."

The Appeal

6. The reasons for the appeal included that: condition 1 has the potential for a seriously detrimental impact on the viability of the service; condition 2 imposes positive obligations to provide information and carries the potential for criminal sanctions - see section 33 of the Act; more proportionate actions were available such as a request under section 64 of the Act; the Respondent had no reason to believe that information and assurances would not be supplied; the reasons relied on by the Respondent were not all factually accurate; the action plan did not appear to have been considered; the conditions will remain on the registration indefinitely with the potential for criminal sanction and with no mechanism for independent consideration; re condition 1 there is no safeguard against the Respondent unreasonably withholding consent; there has been an unreasonable refusal to permit a new admission and if this were to continue this could amount to effective cancellation of the service if resident numbers become so low that the service is no longer viable.

7. The Appellant relies on the steps taken to address the issues of concern which include, amongst other matters the action plan which was promptly provided and has been updated; improved systems for meal ordering to ensure that dietary requirements regarding consistency of food are met in line with assessed needs; newly implemented oversight systems for mealtimes to ensure the risks are monitored closely and mitigated; action taken to remind staff of the importance of positioning; the use of accident and incident reporting procedures and training and supervision to ensure staff have the requisite knowledge to meet care needs in the safest possible way; the introduction of more frequent oversight from the senior management team at the home to provide support and conduct quality assurance oversight, particularly where diet and nutrition are concerned.

8. The Appellant contends that in all the circumstances it cannot be said that any service user is at imminent risk. It contends that in light of the prompt action taken, and (in the context of) the evidence relied on by the Respondent, use of the section 31 urgent procedures was not, and is, not justified.

9. It is also submitted that the Respondent has placed disproportionate weight on the Appellant's prior inspection history so that current improvements to the home have been overlooked, resulting in incorrect enforcement action being taken. The conditions imposed were not, and are no longer, necessary.

The Respondent's Reply

10. The formal Response relied on the NoD and contended that the decision was, and remains, necessary, justified and proportionate. Whilst the Respondent does not accept that section 31 of the Act should be interpreted as meaning that there is a "serious and current" risk of harm, its position is that there was, and remains, a current risk of significant harm to service users.

11. The Appellant's assertion that the reliance of the Respondent on concerns identified for a small proportion of service users means that the decision taken is disproportionate is not accepted and does not reflect the legislative threshold. The Respondent is not required to demonstrate risk of harm to all service users.

12. Regardless of any action by KCC, there remains a risk to privately funded service users.

Attendance

13. The Appellant was represented by Mr David Pojur and the Respondent by Ms Georgina Luscombe. Those in attendance included the following witnesses from whom we heard oral evidence.

<u>For the Respondent:</u>

Mrs Kate Comfort: Lead Inspector

<u>For the Appellant:</u>

Mr Adam Went, Operations Manager
Mrs Angela Gibson, Director of Care and Quality

The Bundle and Late Evidence Applications on 10 and 11 August 2023

14. We received before the hearing a very large e-bundle consisting of 1570 pages. By the date of the hearing we had received and read the Scotts Schedule and the skeleton arguments of both parties (hereafter the ASA and the RSA).

15. At the outset of the hearing we also received, along with the Appellant's T109 application, further witness statements provided by Mr Went and Mrs Gibson with exhibits. Further documents were also produced during the hearing with the agreement of the parties and were formally lodged with the Tribunal in accordance with our direction. The parties agreed that the late evidence as above was relevant

and that it was fair that we should receive it. We agreed to the reception of the late evidence produced during the hearing on 10 and 11 August 2023.

The Hearing

16. At the start of the hearing the judge, on behalf of the panel, and in the exercise of case management, summarised the relevant legal principles and the parties agreed that these were correct.

17. The judge noted that the ASA made reference to the recent and first instance decision in **Specialist Medical Transport v CQC [2023] 4852.EA.MoU** and submitted that the risk of harm referred to in section 31 (1) is to be interpreted as a serious and current risk. The judge explained that this was not what the panel in SMT had decided. The level of risk is relevant to proportionality. The panel in SMT had assessed that the risk was low in the particular context of that case and the measure taken was disproportionate. She said that if the Appellant wished to pursue the argument seemingly made in the ASA then Mr Pojur would need to address this in due course by reference to particular paragraphs of the decision in SMT, and otherwise. Mr Pojur said that this would not be necessary.

18. The evidence was not completed during the allocated two days and it was necessary to adjourn. The earliest date that could be agreed was 31 August 2023 but it was known that Mrs Aspinall, the decision maker, was unable to attend. The parties had already said that they did not require Mrs Aspinall to attend to give oral evidence, and made plain that if her attendance was required the appeal could not be resumed before October. In the circumstances the panel agreed that 31 August was a suitable allocation to conclude evidence and submissions.

19. Minutes before the hearing resumed the Appellant served a document written by Mr Went which set out the positive feedback said to have been given by Mr Steve Butler of the Independent Commissioning Board (ICB) and a representative of KCC in a visit they had conducted the day before on 30 August 2023. Mr Pojur applied for this document to be received in evidence. This application was opposed by Ms Luscombe as the Respondent would need to make enquiries. We recognised why the document was "late". We expressed our concern that this issue posed the potential risk that the hearing would not be completed that day. This was of serious concern given that any further postponement would be to late October because of commitments. We decided, however, that it was fair and reasonable to give the parties until 12 o'clock to enable the parties to see if any progress could be made with a view to the contents of the document being agreed, or points of disagreement being narrowed. When we reconvened at midday the end result was that although both parties had emailed Mr Butler, and the Appellant's email had a "read receipt", he had not responded.

20. We considered all of the further points made by Mr Pojur and the overriding objective. We recognised in particular that the ICB/KCC visit had taken place the day before and the Appellant had acted promptly to bring this evidence forward. Mr Pojur submitted that the evidence could be received and the weight attached to it could be assessed. We recognise that in an appeal such as this much second-hand evidence has been received and it falls to be weighed when assessing risk.

However, this is in circumstances where both parties have had the full opportunity to make inquiries and or to address the evidence as necessary in their own primary evidence. We considered that it would not be fair and just to receive evidence from the Appellant in circumstances where there was insufficient time for the Respondent to complete basic inquiries regarding the accuracy of Mr Went's account of the ICB visit. In short, we considered that the reception of such evidence in circumstances where the Respondent had no real means to respond to it within the allocated hearing, would not maintain an equal footing and would be unfair. The alternative to seek to maintain equality of arms was an adjournment which was wholly undesirable and was not in the interests of justice. We refused the application.

The General Legislative Framework

21. Amongst other matters s. 2 of the Health and Social Care Act 2008 (the Act) invests in the CQC *"review and investigation functions…."* – see section 2 (b).

22. Section 3 provides that:

"(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…"

23. Section 4 provides:

Matters to which the Commission must have regard

"(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 children, of persons detained under the Mental Health Act 1983, of persons who are 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 approaches 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).”

24. Section 31 provides:

“*31 Urgent procedure for suspension, variation etc.*

(1) If the Commission has ***reasonable cause to believe*** *that* ***unless it acts under this section*** *any person* ***will or may be exposed to the risk of harm****, the Commission* ***may****, by giving notice in writing under this section to a person registered as a service provider or manager in respect of a regulated activity, provide for any decision of the Commission that is mentioned in subsection (2) to take effect from the time when the notice is given.*

(2) Those decisions are—

(a) a decision under section 12(5) or 15(5) to vary or remove a condition for the time being in force in relation to the registration ***or to impose an additional condition;***

(b) a decision under section 18 to suspend the registration or extend a period of suspension.

(3) The notice must—

(a) state that it is given under this section,

(b) state the Commission's reasons for believing that the circumstances fall within subsection (1)

(c) specify the condition as varied, removed or imposed or the period (or extended period) of suspension, and

(d) explain the right of appeal conferred by section 32…”

(our ***bold italics)***

The Regulated Activity Regulations

25. The regulations made under this section 20 of the Act are the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936 (the Regulations). Part 3 contains various provisions under the heading "Fundamental Standards". In this appeal the standards relied on by the Respondent are:

    Regulation 12: "Safe care and treatment",
    Regulation 17: "Good governance"

Self-Direction

26. The burden of satisfying us that the threshold test under s. 31 (1) is met, and that the decision is justified, necessary and proportionate, lies on the Respondent. The standard of proof 'reasonable cause to believe' falls somewhere between the balance of probability test and 'reasonable cause to suspect'. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a person may be exposed to a risk of harm. It is a low threshold test.

27. **GM and WM v Ofsted [2009] UKUT 89 (AAC)** concerned the exercise of the power to suspend under the Childcare Act 2006 in relation to a similarly low "threshold" test. At [20] Lord Justice Carnwath said that:

    "….Although the word "significant" does not appear in regulation 9, both the general legislative context and the principle of proportionality suggest that the contemplated risk must be one of significant harm…."

28. There is no definition of "harm" in the Act. It is an ordinary word and needs no gloss. In the overall legislative context of the Act we take "harm" to embrace harm to the health, safety and welfare of service users. We also consider that "harm" includes physical or psychological harm. It is not necessary for the Respondent to prove that actual harm has occurred. The panel's task is essentially that of risk assessment.

29. The appeal against the urgent decision made by the Respondent lies under section 32 (1)(a) of the Act. The panel takes into account evidence as at the date of the hearing and considers the current position. On consideration of the appeal the Tribunal may confirm the decision or direct that it is to cease to have effect – see s. 32 (5).

30. Under s. 32 (6) of the Act the Tribunal also has power to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates. "A "discretionary condition" means any condition other than a registered manager condition required by s. 13.

The Respondent's Policy/Guidance

31. We summarise the main elements of the guidance below. We recognise that the Decision Tree must be read in the context of the Enforcement Policy (EP). Both policies provide guidance but emphasise the need for judgement in the individual circumstances of each case.

The Enforcement Policy

32. The Introduction to the EP recognises that:

> *"there will be occasions, when, depending on the facts of an individual case it will not be appropriate to follow the precise steps described in this policy. It should be read as a general guide to good practice when carrying out or considering enforcement action. It cannot substitute for judgement in individual cases."*

33. The purpose and principles of enforcement are described at pages 7 and 8 of the policy. The main features of the EP are that:
    a) The two primary purposes of the CQC are:

        1. To protect people who use regulated service from harm and the risk of harm to ensure they receive health and social care services of an appropriate standard.
        2. To hold providers to account for failures in how the service is provided.

    b) The principles that guide the use of enforcement powers make clear that the starting point for considering the use of all enforcement powers is to assess the harm or risk of harm to people using the service.

    c) As to Proportionality section 3 (at page 9) of the EP states:
    "We will only take action that we judge to be proportionate. This means that our response, including the use of enforcement powers must be assessed by us to be proportionate to the circumstances of an individual case. Where appropriate, if the provider is able to improve the service on their own and the risks to people who use the service are not immediate we will generally work with them to improve standards rather than taking enforcement action. We will generally intervene if people are at an unacceptable risk of harm or providers are repeatedly or seriously failing to comply with their legal obligations."

The Decision Tree

34. Stage 3 of the Decision Tree (DT) which concerns the selection of appropriate enforcement action. Amongst other matters this states:

"…the decision-making process seeks to ensure that we take consistent and proportionate actions without being too prescriptive. It should not result in

mechanistic recommendations but should guide decision makers to reach appropriate decisions."

This stage uses two criteria which are:

- "Seriousness of the breach
- Evidence of multiple and/or persistent breaches".

35. The DT then addresses Stage 3A (1) "Potential impact of the breach" which concerns the assessment of the level of the potential impact that would result if the breach of the legal requirements was repeated. "The focus is on reoccurrence to assess if we should act to protect people using regulated services from harm in the future." It provides three categories: Major, Moderate and Minor

36. "Major" is defined as:

    "The breach, if repeated, would result in a serious risk to any person's life, health or wellbeing including:

    - permanent disability
    - irreversible adverse condition
    - significant infringement of any person's rights or welfare (of more than one month's duration) and/or
    - major reduction in quality of life"

37. "Moderate" is defined as

    "The breach, if repeated, would result in a risk of harm including:

    - temporary disability (of more than one week's but less that one month's duration
    - reversible adverse health condition
    - significant infringement of any person's rights or welfare (of more than one weeks but less than one month's duration); and/or
    - moderate reduction in quality of life."

38. "Minor" is defined as:

    "The breach, if repeated, would result in a risk of:

    - Significant infringement of any person's rights or welfare (of less than one week's duration; and/or
    - minor reduction in quality of life
    - minor reversible health condition."

39. The next stage 3A (2) refers to the assessment of "Likelihood that the facts that led to the breach will happen again". The likelihood should be based on the control measures and processes in place to manage the risks identified, including changes in practice.

40. Stage 3A (3) deals with the "Seriousness of the breach". It provides a chart which, by reference to the assessment of the potential impact of the breach (3A (1) above), and the likelihood that the fact giving rise to the breach will happen again (3A (2)) above, produces a description of the potential impact in grid form ranging from low, medium, high and through to "extreme".

41. Stage 3A (4) is then used to reach an <u>initial</u> recommendation about which enforcement powers should be used to protect people using the service from harm or the risk of harm. The initial recommendation where the seriousness of the breach has been identified as "Extreme" is:

> "Urgent cancellation
>
> Urgent suspension
>
> Urgent imposition… of conditions."

42. Where the risk is judged to be "high" the <u>initial</u> recommendation is for the same actions as above but on a non-urgent basis.

43. Stage 3B involves "Identifying multiple and/or persistent breaches." This can result in a change to the initial recommendation for enforcement action by increasing or decreasing the severity. This stage involves consideration of the 3B factors:

- 3B (1) Has there been a failure to assess or act on past risks?
- 3B (2) Is there evidence of multiple breaches?
- 3B (3) Does the provider's track record show repeated breaches?
- 3B (4) Is there adequate leadership and governance?

44. The DT guidance is that, depending on the answers to each of the above, inspectors should make an overall assessment about the most appropriate action to take. The answers to the 3(B) questions above may increase or decrease the severity of any recommended enforcement action.

Our Consideration and Reasoning

45. We have considered all the witness statements, documentary and oral evidence before us as well as the skeleton arguments and closing written submissions. The oral evidence and submissions were recorded. If we do not refer to any particular part of the evidence or submissions, it should not be assumed that we have not taken them into account.

46. The Appellant's primary case is that the Respondent's concerns were not soundly based in evidence and the conditions imposed on 21 June 2023 were unjustified, unnecessary and disproportionate. Very considerable criticism is made of Mrs Comfort. It is said that aspects of her evidence are not credible or reliable. It is said that the decision made was never justified, reasonable or proportionate at the time it was taken. It is also argued some matters of concern were rectified immediately and, further, that the action plan which was required by the Respondent has been implemented. The Appellant's case at the conclusion of the hearing was that there is now no risk that requires enforcement action and the conditions imposed are no longer justified, necessary or proportionate as at the date of the hearing.

47. An important feature in assessing risk is the degree/extent of dependence of the service users upon the main provider of care. The Appellant is the provider of longitudinal care to service users who are wholly dependent on the Appellant for the delivery of care on a 24/7 basis. Such service users are vulnerable by reason of their age and stage in life. We recognise the general risks of choking, malnutrition and dehydration associated with the elderly population. Choking incidents can occur even when all reasonable steps have been taken to mitigate risk. Elderly people may sometimes be reluctant to drink or eat. We recognise also that service users with capacity have the right to make choices as to what they wish to eat and drink and when and where they wish to do so.

48. The evidence of Mrs Comfort was that on all four days of the inspection she observed that most service users "nursed in bed" were in a slouched position, at a 45 degree angle and were not able to eat comfortably as plates were on tables to the side of them. In particular, she observed SU 4, 5 and 6 eating in slouched positions, unaccompanied by staff and with food down their faces, clothes and on their bedsheets. SALT (speech and language therapist) guidelines for SU 5 stated that SU 5 be assisted with eating and drinking when sitting upright and alert and cooperative and for SU 4 stated that they should be sat in a upright position. On 30 May and 14 June she observed that SU 4 and 5 eating unaccompanied despite SALT guidance that they be supported at meal times.

49. On 30 and 31 May 2023, Mrs Comfort had discussed with the registered manager the lack of documentation including risk assessments, referrals, incident reports and investigations into SU 3's recent choking episode. SU 3 had choked on their meal, which was a regular diet. On 14 June 2023, Mrs Comfort returned to the home and no action had been taken by staff or the registered manager. Mrs Comfort raised this again with the registered manager and staff member 2 completed the documentation whilst she was on-site. Despite this, a notification of the incident had not been sent to the CQC as required under the regulations. SU 3 continued to be given a normal diet and had not had a medication review to question whether medication should be provided in liquid form.

50. During all site visits, Mrs Comfort did not observe that service users were being supported by staff in line with their assessed needs and audits in place did not

show that the registered manager or provider had effective oversight in place to manage the risks associated with choking, malnutrition or dehydration.

51. Section 4 (b) of the Act requires the Respondent (and so the panel) to have regard to the views of service users**.** We attach weight to the information provided to Mrs Comfort by SU 3. SU 3 was visited by Mrs Comfort because records showed that he had refused meals for the last seven days. There was no documented escalation and the member of staff (MoS) on duty was unaware that SU 3 was refusing food or the reasons for it. SU 3 told Mrs Comfort that they had recently choked and staff had administered abdominal thrusts to dislodge the food. SU 3 said that they did not want to eat because they were worried as they had recently choked and they did not want to make their bed messy. As already set out in [49] above, no incident report has been completed and the RM had not been informed by the MoS involved. Clinical staff were unaware that SU 3 had consistently refused meals.

52. A relative of SU 1 and 2 told Mrs Comfort that they sometimes did not receive meals if they were unable to visit because staff did not understand the SUs or give them the time to answer, so they had put (i.e recorded) that they refused food. Most service users ate their meals in bed. SU's told Mrs Comfort that staff did not offer to take them down to the dining room to eat.

53. We noted the concern raised a member of the SG team at Kent regarding an incident when she and a police officer were visiting SU 13 on 10 July 2023. In summary SU 13 was fed a bowl of visibly hot porridge in less than three minutes although he kept asking to feed himself. The MOS would not let the SU talk. In our view the fact that the MoS acted in this way despite the presence of a police officer and a social worker suggests that this approach to care was normal.

54. The safeguarding referral made by the daughter of a SU (FG) set out in detail her concerns about her father's nutrition and hydration.

55. When considering the discharge of our functions, standing in the shoes of the Commission, we are also required to have regard to the views of contractors - see s. 4 (c). The main contractors are KCC and the Independent Commissioning Board (ICB). The documentary evidence that is before us is that:

    a) In the period between 14 April 2023 and 15 July 2023 KCC had received some 21 safeguarding (SG) referrals regarding the home all of which relate to the delivery of safe care. We recognise that some of these have since been closed. Others are still active and some are being investigated by the police pursuant to the multi-agency safeguarding procedures.
    b) Mrs Aspinall's evidence explains the background against which urgent action was taken in great detail in her witness statement. In particular she refers to ongoing concerns of KCC. She provided the "current concerns" list provided to her by Ms Morgan, a senior

practitioner from KCC's Social Care team that includes concerns received up to 15 July 2023.

c) Mrs Aspinall also refers to a SG referral on 26 July 2023 regarding oral care, that staff did not understand the care plan due to language barriers, and could not effectively communicate.
d) It is clear from the correspondence that KCC had plainly wanted the Respondent to inspect the home given the level and extent of their safeguarding concerns.
e) The Appellant contends there has been a lack of transparency. However, the communication of concerns from KCC to the Respondent is what is to be expected given that the Respondent is the regulatory body which is entrusted with inspection and investigatory functions under section 2 of the Act. Further the allegation about lack of transparency appears ill-founded: on the Appellant's own case that the vast majority of 21 or so SG referrals were made by the RM/the home. Mrs Gibson was the Safeguarding Lead but was unaware that these referrals had been made.

56. Mrs Comfort's evidence is roundly criticized by the Appellant. In particular, the Appellant challenged her credibility regarding her account of her observations regarding SU 7 given the separate records produced by members of staff regarding the care said to have been delivered, but which was not recorded in the patent file because the Inspector had the file with her. Mrs Comfort said she did not have SU 7's file in her possession at all times during her inspection that day. We do not consider that it was her evidence that she had maintained constant watch on SU 7. The key impact of her evidence was that she observed that the service user's glass of thickened fluid had not been moved during the day. If this were the only evidence in support of the Respondent's decision it would give pause for thought. In our view, however, it is but a small part of the evidence that forms the basis for real concern as to how the Appellant and its staff have approached the issues of care regarding basic issues regarding the nutritional and hydration needs for residents at the home, as well as basic measures to reduce the risk of choking.

57. It is submitted that in her evidence Mrs Comfort descended into a presentation. In our view she was a witness who did tend to pre-empt and answer the next anticipated question, but we bear in mind the nature of the cross examination and the overall context that Mrs Comfort is the subject of complaint by the Appellant. In short, the Appellant impugned her professionalism. Overall, we found that her approach was professional and her evidence was evidence based and cogent. She was on top of the detail and was able to explain the reasons for her views fully.

58. Mr Went is the Operations Manager responsible for 9 of the 11 locations provided by the Appellant. The overall number of residents across all locations is some 650 service users. He was the line manager of the registered manager (SP) who resigned her post the next working day after the LOI was issued. He told us he was unaware of any issues regarding the performance of the RM

other than relating to her communication style. He was aware that there were issues regarding appropriate training for staff regarding dysphagia. Training had taken place as arranged by Mrs Gibson and further training has been planned, but the staff feedback was that this too technical. He said that this was why an Executive Chef had been recruited and appointed which post was taken up on or about 19 June 2023. The new Executive Chef has delivered training regarding the consistency of food in line with the IDDSI standards. Mr Went has also devised cards as an aide memoire for staff members. Mr Went told us that he had never seen service users attempting to eat in a slouched position. In our view there is no reason for us to doubt Mrs Comfort's evidence as what she saw regarding most patents in bed and on repeated occasions. Mr Went agreed that eating in a slouched position and at a 45-degree angle posed an unnecessary risk of choking.

59. Mrs Gibson is the Director of Care and Quality across the organization. She told us that until early 2023 Mrs Sylvester had fulfilled the role of Quality Assurance Manager across the overall service. She said they had worked closely together. Mrs Gibson said that she had had the overview of actions taken in response to the March 2022 inspection which included the plan set out by Ms Sylvester on May 2022. She agreed that the issues raised in the March 2022 inspection regarding regulations 12 and 17 with regard to hydration and weight monitoring were persistent issues. When asked whether the 2022 action plan to address these issues had in fact been followed through she said that she could not say that it had <u>not</u> been followed through. In our view this avoided the issue. We have not had our attention drawn to documentary evidence to show that the actions set out in the document dated May 2022 had been followed up or audited. We were not provided with documentary evidence such as supervision records to show that the issues regarding the RM had been acted upon by Mr Went or by Mrs Gibson. Asked if she wished to provide any insight into why the action plan of May 2022 was not embedded she said that with any action plan it was necessary to keep continual oversight and that they had a manager who was beginning to lose grip. She said that as soon as they got a sense of this "we took action". In our view it was not until the request made in the LOI that the senior leadership team formed a plan to address the obvious risk to patient safety and well-being concerning the risks of choking, malnutrition and dehydration. An example of how issues were immediately addressed includes that Mrs Gibson who visited the home over the weekend, immediately ordered 8 tilt chairs to replace existing chairs and to increase the number of suitable chairs available to enable staff to transfer patients to the dining room.

60. We recognise that Mrs Gibson has had long experience in this sector and her career has included working for a large local authority. Mrs Gibson was very critical of KCC. She described the contract meetings she attends which she considers are effectively a "tick box" exercise. She was also very critical of the Respondent and what she perceives as a lack of engagement.

61. Mrs Gibson set out in her statement that she has responsibility for the Safeguarding of Adults across the organization. She is the Adult Safeguarding Lead. Her evidence was that she was unaware of the safeguarding (SG) referrals made to KCC in the months preceding the Respondent's decision. She told us that she was only able to gather this information by delving into the records and in the context of the appeal. She and Mr Went explained that this had been since acted upon so that information about SG referrals is now provided to the senior leadership team as a matter of course. Whilst this improvement is to be welcomed in our view the fact that this situation could have arisen speaks to an obvious deficit in oversight, leadership and governance.

62. Mrs Gibson also told us that she had been aware that there was an issue regarding the RM who resigned after the LOI was received. She said that she had noticed in about April 2023 that the RM was "not presenting as she did before". There was little in her evidence that suggested that Mrs Gibson had taken any or any effective steps to ensure that the concerns she had about the RM were followed up.

63. In our view Mrs Gibson's evidence showed a marked tendency to complain about and/or visit responsibility on everyone other than the most senior members of leadership team at the Appellant's organization.

64. Overall, the Respondent has satisfied us that its consideration took into account all the circumstances relevant to a balanced assessment of the issue of risk, in the context the risk of recurrence and the multiple and repeated breaches of fundamental standards.

65. We have made our own decision. We have considered the overall context of the service provided and have considered the Enforcement Policy and the Decision Tree. It appears to us on the basis of all of the material before us that the risk of harm to service users/patients to which any service users will or may be exposed if urgent measures were not imposed was high as at the date of decision and that the analysis of each and everyone of the 3B (1) to (4) factors were not in the Appellant's favour. The Appellant submits that too much weight was attached the past history. We disagree. The past regulatory history is highly relevant to the level of confidence that improvement measures will be actively monitored and improvement sustained. The Appellant's past history informs us that its commitment to meet the concerns regarding very similar issues in 2022 was ineffective and did not result in sustained or embedded improvement. In our view there was a very clear risk that unless enforcement action was taken a service user will or may be exposed to the risk of harm against which urgent protection should be afforded. We consider the decision made on 21 June 2023 was justified, necessary and proportionate.

66. The Appellant places much emphasis on the current position and says that the Respondent has not inspected or visited again. Amongst other matters, a new

manager is in place. Based on our experience it would be unusual for the Respondent to conduct a visit or inspection in such a short time frame, not least when the full inspection process is still not complete. In our view the evidence as a whole tends to speak to an existing culture where patient centered care had become hostage to a task-driven focus. In our view it will take time to fully embed the necessary changes. It is notable that on the issue of whether the action plan is embedded Mrs Gibson said that there are "strong signs of embedding and the shoots of sustainability are there. For me the signs are there that we are moving into that space".

67. We formed the clear view that it is doubtful that some of the improvement measures on which the Appellant relies would have been implemented but for the decision made. In our view given the clear issues regarding the adequacy of leadership and governance, as well as the past regulatory history, the impact of the improvement measures effected under the action plan needs to be verified on the basis of triangulated evidence, rather than simple assurance by the Appellant's senior management team. There remains a serious overarching issue regarding the adequacy of governance and leadership. In general terms we consider that in a setting such as this a period of at least six months is usually necessary before improvements to practice and process and overall governance realistically be considered to be embedded.

68. Whilst we recognise the efforts made by the Appellant to improve the standards of care, and the steps it has taken to address the issues, it cannot realistically be said that these improvements are embedded. We have little confidence in the assurances of Mr Went and Mrs Gibson, given our view that they were largely unaware of many of the issues relevant to the risk of choking, malnutrion and dehydration in the context of the mode of the delivery of care at the home until these were drawn to their attention by the Respondent.

69. The Respondent has satisfied us that the low threshold test for urgent action under section 31 (1) of the Act was met at the date of the decision on 21 June 2023, and that it is met today. That being so we have considered each element of the conditions imposed. Mrs Gibson agreed that condition 2 reflects that which should be in place in any event and is proportionate. We are unimpressed by the argument that compliance with this condition absorbs time that is said to be better spent in addressing other issues regarding patient care. In our view each and every element of condition 2 is justified, necessary and is proportionate to the risk engaged. In short the conditions, which have been carefully drafted to reflect the standards set out in regulation 17, are designed to enable the Respondent to have oversight of the action plan. Given that the 2022 actions did not result in sustained improvement these conditions are, in our view, wholly justified, reasonable and proportionate.

70. We considered all the submissions made regarding condition 1. We are not impressed with the argument that this condition amounts to an "embargo". There has only been one application made and this was in early July 2023. It

was considered by Mrs Aspinall and was refused for reasons she explained fully in her statement which stood as her evidence in chief. In her view the potential service user was at risk of dehydration and malnutrition and the embedding of a safe and effective monitoring system could not be evidenced within 21 days. The Appellant had made clear that the new audits and checks were scheduled to be completed at differing timescales which were daily, weekly and monthly. In Mrs Aspinall's view the oversight of safety and quality was not fully implemented and had not been given time to be embedded. We agree.

71. Mrs Gibson's evidence was that the speed with which that application was refused was such that she considers that the Respondent will refuse any application made. She said although interest had been expressed by a number of potential service users these has not been put forward to the CQC because the time involved in conducting a new service user assessment. A thorough assessment is always required to assess whether a placement is suitable for the individual needs of the proposed service user. Mrs Gibson's point was that the Appellant does not wish to undertake this time investment because it fears that consent will always be withheld.

72. At the heart of this issue is the fact that KCC currently has in place contractual suspension in the form of AP3 and PP3. In short KCC and the ICB have decided that they will not currently fund the placement of any new service users at the home or extend the contract for existing service users whose stay is temporary. We note that Mr Butler, the locality Commissioner and the Community Team Manager conducted what is termed as a "Light Touch Residential Visit on 11 July 2023 when they noted some improvements but also noted some matters of concern.

73. We recognise that the interrelationship between the agencies is such that KCC and the ICB will take into account the views of the CQC before those restrictions are lifted and vice verse. Experience informs us that whilst any condition is unlimited in time the Respondent does keep the need for conditions under active review. In our experience the fear that consent will never be granted or the restriction will remain in perpetuity is not objectively well-founded. The argument that there is no oversight of the Respondent is also not strictly correct. Application can be made by an Appellant to vary the conditions and if the Respondent refuses the proposal to vary this generates a right of appeal under section 32. That said, we recognise the difficulties that would be involved. We recognise also the obvious impact of condition 1 both in financial and reputational terms and we weigh this in the balance when considering proportionality.

74. It is a matter for the Appellant to decide whether to invest the time and effort involved in seeking the consent of the Respondent to permit admission of any potential service user. The measured and balanced view expressed by Mrs Aspinall in her statement reassures us that condition 1 does not amount to an "embargo" and is not motivated by any desire to close the home via attrition.

75. In our view, in all the circumstances, condition 1 is justified, necessary and proportionate to the risks against which safeguards should be provided. In our view the need to protect the health and safety of vulnerable service users outweighs the impact of the decision on the Appellant.

Summary

76. The Respondent has satisfied us that the low threshold test for urgent action under section 31 (1) of the Act was met at the date of the decision on 21 June 2023, and that it is met today. In all the circumstances, the discretionary decision to impose each of the conditions on an urgent basis was necessary, reasonable or proportionate on 12 June 2023, and as at today's date.

Decision

The appeal is dismissed.

Judge Siobhan Goodrich

First-tier Tribunal (Health Education and Social Care)

Date Issued: 11 September 2023