

First-tier Tribunal Care Standards

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

[2020] 4179.EY

Heard on 21, 22, 23, 24 and 25 June 2021 via video. Panel Deliberation hearing
28 June 2021 V Kinly

Before

**Tribunal Judge Melanie Lewis
Mrs Jennifer Cross -Specialist Member
Dr Edward Yeates - Specialist Member**

**(1) Rodor Housing and Support Ltd
(2) Mr Joseph Cholwe**

Appellant

-v-

Ofsted

Respondent

DECISION

Representation

The Appellants were represented by Mr Marven Gabula

The Respondent was represented by Mr Simon White Solicitor Ofsted Legal Services.

Witnesses:

We read/heard evidence from the following witnesses:

Appellant

1. Marven Gabula - Sole Director and Applicant Responsible Individual
2. Mr Joseph Cholwe - Applicant Registered Manager

Respondent

1. Ms Sarah Billett - Ofsted
2. Ms Louise Battersby - Ofsted
3. Mr Ricky D'Arcy - Ofsted
4. Mr Ajay Bawa - Ofsted (read)
5. Ms Karen Wareing - Ofsted

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal. For this reason, we have deliberately given only the barest details of children and omitted the names of any placing local authorities.
2. These joined appeals are bought by Rodor Housing and Support Ltd ("the First Appellant") and Mr Joseph Cholwe (the "Second Appellant") in relation to decisions of Ofsted to refuse their application for registration as a provider of two children's home and for Mr Cholwe's registration as a manager of both homes. Essentially the concern of Ofsted was that there were substantial and fundamental shortfalls in the application which the First Appellant was unable to remedy despite repeated opportunities during the registration process. Ofsted accepted that some improvements have been made but did not accept the First and Second Appellant's case had now demonstrated that they had met the regulation requirements for registration. Ofsted denied that they were biased towards the First Appellant due to concerns they had earlier raised with other statutory bodies.

The appeals

3. The case involves four joined appeals and it was agreed that both appeals must succeed as the First Appellant is required under the Regulations to appoint a suitable manager. The appeals are:-
 - a) And b) Decisions dated 26 November 2020 to refuse the registration of The First Appellant to register as a provider of a children's home, namely i) Cramlington House, 156 Cramlington Road, Birmingham, B42 2EG and ii) Minstead House, 29 Minstead Road, Birmingham, B24 8PS.
 - c) And d) Decisions dated 26 November 2021 to refuse the registration of the Second Appellant as Manager of i) Cramlington House and ii) Minstead House.
4. The First Appellant is a limited company incorporated in 2013 (company number 08358894). The sole director since company inception is Mr Marven Gabula.

Procedural Issues:

5. This was a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face-to-face hearing was not held because it was not practicable, and no-one requested the same and we considered that all issues could be determined in a remote hearing. The documents that we were referred to are in the electronic hearing bundle provided for the hearing. Time was given to make sure that the witnesses could navigate the large bundle, whether they were accessing it electronically or in hard paper copy. The Tribunal made sure that appropriate breaks were given to reflect the additional concentration required in a virtual hearing.
6. This was a public hearing and there was therefore no objection to any member of the public including staff from Ofsted listening in. A number of observers attended from Ofsted for training purposes but played no part in the proceedings. All those present were reminded that they must not record the hearing.
7. The First Appellant confirmed that he had now decided to present his own case and would be representing both Appellants. The Tribunal were mindful that he was a litigant in person. They directed him to the appropriate law and regulations and in particular made sure that he had breaks, some at his request to prepare his questions.
8. The Tribunal clarified that Mr Bawa who is a Finance Officer within Ofsted had now signed both his statements. Given that in his second statement, Mr Bawa clarified that he now had the figures queried in his first statement, Mr Gabula stated that he did not require him to attend to be questioned. Instead, he was able to question the decision maker, Ms Wareing who remained concerned about the lack of a straightforward explanation of the financial position in relation to Cramlington House and Minstead House as required by the Regulations.
9. Mr Gabula also questioned why the re-submitted SC 1 application form for registration of the Homes was not in the bundles. He thought that it had been submitted by his then solicitors. Mr White confirmed that Ofsted had not received a completed form, only the blank form included and he had queried this with the solicitors but got no response. Mrs Battersby confirmed to the Tribunal that she had alerted Mr Gabula to the fact that he had submitted a blank form when he made representations to the Notice of Proposal to refuse registration, but got no response.
10. This was not the only document both Appellants thought had been submitted as we record.

Background/ Chronology:

11. The background and evidence sets out the difference between a Children's Home, as defined in law as providing Care, as opposed to one providing a Supported Living Arrangement. This case highlights that there can be some grey areas. From September 2021 all providers accommodating a child under 16 will have to register as a Children's Home. The level of concern has been further reflected in a Practice Direction issued by the President of the Family Division in November 2019 in respect of placements of children receiving care in unregistered Children's Homes. The guidance sets out that

if care, rather than support, has been provided, then the provision is likely to require registration as a Children's Home. Whilst a child may be placed on an emergency basis, the Court should order that an application should be submitted within 7 working days for registration to Ofsted.

12. Prior to receiving the applications for Cramlington House on 24 March 2020 and 20 April 2020 for Minstead House, Ofsted had had concerns that the first Appellant had been running unregistered settings since at least 2016. This was set out in the evidence. A third application dated 9 April 2020 in respect of Kingsbury House was put on hold at the request of Rodor Housing. Ofsted had issued six 'cease and apply' letters which were sent to all local authorities and the placing authority. Having made the referrals Ofsted were not made aware of the outcomes, but in one case their own officer decided that the home was not operating as a Children's Home and was offering a good standard of support. The Appellant's case is that this background caused Ofsted to form a bias against him. Ofsted deny that bias and say it is part of the background.

13. The broad chronology is as follows:

- At H 50-57 exhibited to Mrs Billet's second statement is a chronology that sets out that the first applications were made in August 2019 but had to be sent back a number of times as they were incomplete.
- 24.3.20 and 20.4.20: applications made.
- 8.7.21: Ofsted first Registration Visit to both homes
- 9.7.21: Fit Person Interview conducted by Ofsted for Mr Marven Gabula and Mr Joseph Cholwe
- 31.7.20: Notice of Proposal to refuse BOTH applications
- 5.8.200: Mr Gabula emailed to say that having read the notice of proposal, reflected on the concerns and outstanding issues, he was satisfied that there were a number of outstanding issues to be addressed. Ofsted's conclusions were not challenged. Mr Gabula asked to withdraw the applications. Ofsted refused as the outstanding they had identified a range of had safeguarding concerns.
- 28.8.20: Written representations against refusal received from the First Appellant only. No representations from Mr Cholwe.
- 22.10.20: Second Site Visit. Both homes.
- 10.11.20: Third Site Visit to assess fire risk in both homes.
- 26.11.20: Notice of Decision to refuse both registrations.
- 23.12.20: Appeals lodged by both Appellants.

The Legal Framework

14. We note that the Grounds of Appeal setting out the relevant law were drafted by solicitors then engaged by the First Appellant. The legal framework for the registration regulation of children's home is agreed and are found in Part II of the Care Standards Act 2000.

15. Part 1, Section 1 of the act provides that an establishment is a children's home if it provides care and accommodation hopefully or mainly for children.

16. In relation to the Second Appellant, Regulation 28 of the Children's Homes (England) Regulations 2015 (the "Regulations") set out the fitness requirements for managers to ensure the safety and welfare of children is protected.

17. The burden of proof is on the Appellants to demonstrate to the satisfaction of Ofsted that the requirements of the Children's Homes Regulations are met.

18. The Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the Appellant's registration, or remove any of the current conditions.

19. Decisions about where to place a child rest with those with responsibility for the child, invariably a local authority. Under the Children Act 1989, section 22 C (6) (D) and the Care Planning, Placement and Case Review (England) Regulations 2010 a local authority can place children under 'other arrangements'.

20. It does not dispense with the need for the provider to be registered as detailed in the Care Standards Act.

The respective cases for the parties:

21. Ofsted's case was that both Appellant's had failed to demonstrate an ability to meet the requirements of registration in a range of areas. These were substantial fundamental shortfalls in the applications, which was not an "expression of interest" exercise. Even then both the Appellants had been given a number of opportunities during the registration process to remedy the shortfalls, but they did not do so nor had they done so by the date of the hearing. The Tribunal could not impose conditions requiring the Appellant to comply with mandatory prescriptive regulations, which they were required to comply with.

22. The Appellants acknowledged that in respect of both applications, there had been shortfalls at the date of application. Ofsted had a bias towards them and should have let them withdraw the application and put in another application. During the hearing and in closing Mr Gabula acknowledged that they had not always got it right, but that they had now complied with the Regulations and would work with Ofsted. During the evidence he acknowledged that he should have evidenced the financial situation of each home, given more personal oversight to the applications, and made sure Mr Cholwe declared his conviction. In his closing statement he emphasised a strong record of working with Local Authorities, LADOs and other bodies. Ofsted had no basis to challenge his integrity and should provide support but instead had taken a punitive approach.

23. Mr Cholwe agreed that he had failed to declare his conviction in 2012 for an offence of fraud against an employer. Over an extended period, he had signed off on work sheets for work he had not done. He received a 16 month sentence of immediate imprisonment. It also meant that he was dismissed from his employment as a nurse and struck off by the Nursing and Midwifery Council. His case was that he had always intended to reveal this but wanted to do so in person at interview, so that he could explain the circumstances. If he did not do this, his previous experience was that he would not make it to the interview stage.

Documentary evidence

24. The documentary evidence, including a skeleton argument from both parties and a Scott Schedule was provided in a consolidated bundle of 2911 pages divided into 10 sections. The Tribunal read this in advance

25. We refer to the key evidence in more detail if needed to support our conclusions and provide only a summary of the role and areas covered by each witness.

Oral Evidence

26. We first heard evidence from **Sarah Billett** who made two witness statements. She has been employed by Ofsted since September 2016 as a Social Care Compliance Officer and since February 2021 as an SC Inspector. She has a background in social work and qualified as a Social Worker in 1998.

27. She set out the background to Ofsted's knowledge of this provider since 2016 and the circumstances in which the 6 'cease and apply' letters were written, because the settings were being run as Children's Homes not as Supported Living Accommodation. We noted that in relation to one setting in 2016 it was agreed by Ofsted that the setting did not meet the requirement to be registered.

28. The most recent concerns were in 2019. Ofsted passed on their concerns but did not always know the outcomes. She set out the detail of the cases where concerns were passed on to placing authorities both about the fact that the age and level of care meant that the child was being cared for in a unregistered children's home and concerns that the Inspectors had about the physical conditions and quality of care in the homes.

29. On 18 December 2019 Ms Billett undertook a visit with another inspector to 29 Minstead Road B24 8PS, the subject of one of the applications. The visit was undertaken because of the information received that the same staff who were the subject of the earlier concerns were still working there and that enquiries with the police and Birmingham Children's Trust identified that there was a 14-year-old had been living at this address since July 2019, which the documents inspected confirmed. The police had been called to the home on 13 November 2019 as the child had smashed up the home. During the visit it was identified that the young person was on 2-to-1 supervision and 24-hour staffing was required, which indicated that care was being provided. A "cease and apply" letter was sent on 18 December 2019. Information

came to light the child was still living at the address in March 2021. The child then made a number of serious allegations about members of staff, who denied them. The LADO and police took no further action and noted that the restraint records were recorded diligently and thoroughly.

30. In February 2020 Ms Billet visited 71 Nash Square with two other inspectors and found a 14-year-old child living at the address staff and 2-to-1 supervision ratio and a 3-to-1 supervision ratio had been considered due to the child's behaviour. Again, this was indicative of care being provided. There were concerns about the home's conditions.

31. The main thrust of Mr Gabula's argument and justification for running unregistered children's homes appeared to be that LA's were regularly placing children and young people with Mr Gabula in the full knowledge that the homes/accommodation were not registered with Ofsted. Ofsted acknowledged this could happen on an emergency basis and was reflective of the shortage of children home placements. Whilst it was correct that decisions about where to place a child rested with the local authority, that did not absolve the provider from being registered. Failure to register was an offence.

32. **Ms Louise Battersby** has been employed by Ofsted as a Social Care Regulatory Inspector since 2015. She is also a registered social worker. She was the allocated officer for the registrations of both Cramlington House and Minstead Road. She made two statements, together with **Mr Ricky D'Arcy** SSCI, who made site visits and worked with her at the Fit Person Interview stage.

33. Ms Battersby, set out the processes to be followed on registration. She set out in detail documents reviewed and summarised that there were serious shortfalls in the documents. They did not offer the staff the correct consistent guidance and were not child focused. Risk assessments were inadequate. In particular, some policies did not appear to be written for a Children's Home, but related to a Supported Living Arrangement. When she spoke to Mr Gabula he did not seem to recognise the level of their concerns and referred to the mistakes being 'typos'.

34. During a visit to Cramlington House on 8 July 2020 the inspectors were concerned that the home was not furnished to a good standard with paint splats on a chest of drawers in the Child's bedroom, graffiti on a bedside cabinet and a false fingernail inside a drawer, there was no wardrobe and the carpet was badly fitted. The windows had damaged restrictors on them. The fridge had mould in it. There was loose brickwork in the garden, easy access to the neighbour's garden due to the poor fencing and easy access to the roof. Some of these defects were remedied, for the most part, once Ofsted had pointed them out and the improvements acknowledged. However, easy access to the roof at one of the properties had not been resolved.

35. There were also concerns about hazards inside and outside Minstead House again relating to flooring, no wardrobe in the child's bedroom and marked drawers, with no dining room table for the child to sit and enjoy meals. The home had CCTV which was not covered in the statement of purpose and whilst it might be appropriate in a supported living home was not appropriate in a children's home. Mr Gabula said

it had been installed at the request of the police. On a return visit it was still in place even though the cameras were on magnets. There were loose bricks in the garden.

36. Both Ms Battersby and Mr D'Arcy independently conducted a review of 4 staff files at each home. Both had major concerns in relation to each, which we set out in our conclusions.

37. During the registration visit to Cramlington House on 8 July 2020, Mr Gabula said that he did not know the detail of Mr Cholwe's conviction, which he had discussed with him some time ago. He was told that he was expected to know and he said it related to running a company in Liverpool providing staff for agency work. That conflicted with Mr Cholwe's answer that he had timesheets signed off for work he did not do. This conviction had not been declared and details were not given on his application form. Mr Gabula's view, confirmed in his statement and in oral evidence, was that it would be discriminatory not to give him a chance. He maintained the conviction was not relevant as it did not relate to the abuse of children.

38. On 9 July 2020 Ms Battersby and Mr D'Arcy completed the Fit Person Interview (FPI) with Mr Gabula and Mr Cholwe. Again, we set out in the evidence in our conclusions.

39. We read three witness statements and heard oral evidence from **Ms. Karen Wareing** who is the senior HMI and decision maker. She issued notice of Proposal to refuse registration.

40. On 5 August 2020 Rodor applied to withdraw the applications. Ms Wareing applied paragraph 312 of the Social Care Compliance Handbook which states that Ofsted should not accept withdrawal of an application after the NOP has been issued *'if they are concerned about the providers or managers ability to safeguard the welfare of children. This may be due to a lack of integrity, safeguarding practice/knowledge, any relevant offences committed or other relevant information'*. In her view the widespread concerns brought to her caused her to conclude that this was the case

41. In order to give the provider, the best possible opportunity to evidence the claims of improvement, Ms Wareing asked for two more site visits to be conducted. Mr D'Arcy said in his evidence that on the two site visits he made, following the refusal for Rodor to withdraw, that *'both were encouraging visits'*, but there were still shortfalls, eg access to low pitched roof and CCTV cameras.

42. Having considered the feedback and all the other evidence including the representations made to the NOP, Ms Wareing moved to refusal. Her reasons were probed in evidence and recited in our conclusions. An essential point was that Rodor was required and therefore bound to comply with the regulations. She accepted that there had been some improvement in the physical conditions of the two properties and that policies had been amended but not completely. Some young people and local authorities had provided positive references, but against this a number of children were removed by their placing local authorities due to concerns.

43. Mr Gabula filed two witness statements and attached a number of exhibits. He set out in his evidence in rebuttal and to support that Rodor was now compliant. This included unaudited accounts, a five year business plan and updated risk assessments and policies. He accepted that Mr Cholwe had not declared his conviction, as he thought everybody deserved a chance. In his supplementary statement he included a number of positive references from young people and local authorities.

44. Mr Cholwe filed one statement and a number of exhibits setting out his CV, qualifications and training certificates. He did not send in representations to the Notice of Proposal, although Mr Gabula thought this had been done via the solicitors. Ofsted had raised that Mr Cholwe had been investigated in relation to two disciplinary matters and he exhibited evidence that this was not a disciplinary matter but an informal warning. Mr Cholwe had authorised a member of staff to use a company owned vehicle and they had been picked up by the police with drugs paraphernalia. His response to questions from Mr White and the Tribunal, was that he knew that he would have to disclose the conviction but wanted to wait until his interview. When he was released from prison, he had found it very hard to get a job and on two occasions when he had declared his conviction he did not even get to interview.

Conclusions and Reasons:

Approach to evidence generally

45. Before turning to our findings under the specific Regulations we set out our broad assessment of the witnesses who appeared before us.

46. We find that the professional witnesses called by Ofsted provided honest evidence, supported by notes written and photographs taken at the relevant time or soon thereafter. They were all prepared to acknowledge improvements made by the Appellants in relation to the physical premises and written policy documents.

47. Having very carefully considered all the written and oral evidence the Tribunal do not accept that Ofsted had a bias against Mr Gabula. From 2016 to 2019 they had concerns but as the homes they visited were not registered, they could only pass this on to the placing authorities and issue notices to 'cease and apply'. Given that they, for example, found a 14-year-old child with 2 to 1 care including waking night staff it is difficult to see how this could be described as 'supported living'.

48. Mr Gabuala made great play on Ms Wareing using Rodor's previous history of running unregulated premises and the issue of 'cease and apply' notices. His case was that Ofsted had used this as a benchmark on which to judge future performance that caused bias against them at the outset. Our conclusion is that the benchmark was the point where Mr Gabula applied to withdraw the application, agreeing with Ofsted's position and grateful for their input pointing him in the right direction to rectify matters. He then failed despite several attempts, to submit documents that met the regulations; a few were finally met, but a substantial amount was still outstanding at the point of refusal.

49. Ms Battersby said in her evidence that that an applicant usually acts to withdraw their application before they receive the 'Proposal to Refuse' notice. The inference being that an applicant can see the way things are going and withdraws. Mr Gabula did not appear to be aware of the significance of the shortfalls in their application, until spelt out to him by Ofsted's 'Proposal to Refuse'. We agree that Ofsted had strong reasons to refuse to allow him to withdraw at that point. They had real concerns around safeguarding and the persons put forward to be registered.

50. The ultimate decision was made by a decision maker, Ms Wareing, who played no active part in the site visits and on consideration of the documents and after discussion with the inspectors. Overall, the Tribunal concluded that the evidence on behalf of the Ofsted was balanced, reliable and evidence-based.

51. Mr Gabula impressed the Tribunal, over the 5 days that we heard him, as a capable individual. Unfortunately, that capability did not lead him to examine what the relevant regulations required and what needed to be done. He had no firm grasp of the detail and delegated to others without recognition that as the 'responsible individual' responsibility lay with him. He blamed others for the lack of compliance, to ensure that regulations were met, including blaming members of staff and his legal team. He was reactive not proactive. The Tribunal considered Mr Gabula's emphasis was wrongly placed in relying on positive references and improvements to the premises. The improvements were acknowledged, but which still fell short of him to complying with all the relevant regulations.

52. In his evidence and closing submissions, Mr Gabula acknowledged that he should have paid more attention to the application and made sure Mr Cholwe set out his conviction and his work history. However, he still sought to argue that he had the integrity, skills and knowledge to be the 'responsible individual' with overall management of the two homes, without saying how things would be different.

53. A conviction is not, in and of itself, fatal to an application to be registered as a manager by Ofsted. Much may depend upon: the nature and/or extent of any offending/adverse history; how long ago it had occurred; the circumstances regarding any offending: any mitigation; the relevance of past offending to the role; the applicant's insight and attitude to the offending i.e. what the applicant has learnt from the past offending and/or how this has been put into practice. The above is not exhaustive of the factors relevant to the risk assessment in such matters.

54. Mr Cholwe saw himself as a victim who had been discriminated against because of his conviction. He is an unreliable historian who despite being asked about this a number of times, only gave the bare detail when asked direct questions by the Tribunal. Neither he or Mr Gabula understood that he had to set out the details of his offence, which can only be regarded as a serious one and then proceed to show how he had rehabilitated himself and how he had the skills and qualifications to be a registered manager. In that role, trust and ability to give an honest account and keep accurate records are key. When those points were put to him by the Tribunal he

avoided the question and again repeated that he wanted to wait until his FPI interview to declare his conviction, an answer he repeated many times, and he could see nothing wrong in this approach.

55. At the heart of this this case is the care provided at what were agreed to be some of the most vulnerable children in our society. The reasons that cause them to be placed in in a sole children's home inevitably mean that many will present with complex needs and challenges. Safe staff recruitment and a culture of open and honest transaction must be the core of good safe practice as well as a requirement of the Regulations. Ms Wareing, in her evidence, said she was pleased that Rodor had applied for registration – she saw this in a positive light, in that they had recognised they were providing care to children and were seeking registration against a background of national shortage.

56. The Tribunal reached its conclusions after very careful consideration of all the evidence, both written and oral. Despite hearing oral evidence over 4 days, which gave us a full opportunity to assess the witnesses, the evidence for the Appellants only raised further concerns rather than satisfying us that they now met the requirements of the regulations even if they did not at the date of the decisions.

Specific Findings of Fact

57. All the allegations in the Scott Schedule are denied but some concessions were made and we set out our findings on each stage of the registration process and each Regulation.

Applications to Register :

58. The submitted SC 1 was, as the First Appellant accepts, had not been completed with sufficient care, because they included the category of 'learning disability'. That was not corrected by a resubmitted SC1 form, which was blank. The Tribunal spent some time investigating the claim by Mr Gabula that his solicitors had resubmitted a completed form. Mr White said he had queried at the time if there was a further SC1 form. In order to assist the Tribunal he checked back with his paralegal and confirmed that all documents submitted were in the bundle. It seems, even when interviewed at the FPI interview, Mr Gabula was confused about what he was actually offering, as he didn't specifically make clear they would not offer short breaks, which appeared inconsistent with a sole use Children's Home.

59. The concerns summarised at paragraph 60 of Ms Wareing's first statement were:

- a) Employing Mr Cholwe, who did not meet the required standard.
- b) Not taking the time to fully assess conviction and striking off from the fitness to practice panel of the Midwifery Nursing Counsel (NMC).
- c) Not ensuring the homes were at the required standard.

- d) Not having an understanding of the concerns previously raised during visits in relation to running unregulated services.
- e) Not having the insight to understand how CCTV cameras in the home could make a child feel. CCTV might be appropriate for supported living not a children's home.
- f) Not demonstrating safer recruitment practice.
- g) Not demonstrating that staff are qualified and skilled to work with children.
- h) Submitting key policies that are failed to meet the required standards, not once but twice. or more

60. The documents originally submitted showed major shortfalls. These are very basic and included for example that the 'missing from home policy' referred to out of date legislation. Safeguarding should be at the heart of good practice but the policy didn't set out the types of abuse or how to recognise it. Ms Battersby told us that out of approximately 20 applications she had dealt with, this was the only one that she had such major concerns with. Others had only needed a '*small tweak*' before being passed. This underpins how major the failings were.

61. The Tribunal bear in mind that a registration visit can inevitably only be a snapshot. However, it was not just a view of Ms Battersby but also her inspector colleague. For the first time in oral evidence Mr Gabula suggested that a child had '*trashed*' the room. But this explanation was not offered at the time of the inspector's visit and, on balance, we do not accept that as a credible explanation.

62. In the Appellants' favour the shortfalls were remedied in relation to the premises and some of the policies were remedied but only when they were pointed out. This should not have been necessary. There are still some deficits in a range of policies but there was an improvement.

Regulation 32 : Fitness of Workers

63. This Regulation is overarching and requires the registered person to recruit staff using procedures designed to ensure children's safety. The issues found showed that Mr Gabula had not put rigorous enough protocols in place around safer staff recruitment, this despite having engaged the services of a professional organisation to assist in recruitment of staff. Ofsted's position, and Mr Gabula said nothing that mitigated it, was that necessary checks were not undertaken to ensure staff employed to work with children are safe to do so and not place children at risk of harm. We agree. This is such an important issue, as Rodor were intending to provide 'care and accommodation' to children with complex needs, so requiring a sole placement, who are amongst the most vulnerable in society.

64. It is a serious concern that on the first registration visit at both homes major shortfalls are identified on the four staff files inspected. The shortfalls were major and

basic including unexplained work history gaps, blank references, one from a work friend and another was signed by a different company stamp. When asked about this at the time Mr Gabula said this was a *'learning curve'* and that there were *'different expectations'*. He did not deny this. It fits with his lack of grasp of the need for the most careful scrutiny of persons employed to work with vulnerable children and showed a lack of attention to detail.

65. Having considered all the evidence, the Tribunal reject any suggestion that Mr Gabula fully explored Mr Cholwe's conviction. He did not. There are no records that he did so. Mr Cholwe only revealed his conviction when was he was interviewed by the service manager, who then spoke to Mr Gabula who said it had nothing to do with children so there was no problem. He failed then and now to understand that this was a protected profession. He failed to consider the things he should have considered and to an undertake a detailed assessment of risk.

66. The subsequent risk assessment, carried out by the person brought in to work on recruitment issues, was of little value because there was no explanation as to how they reached the view that the Second Appellant was a "low risk".

67. Mr Gabula and Mr Cholwe cannot rely on their claim that Mr Cholwe had an exemplary work record. He did not. No formal disciplinary actions were taken against Mr Cholwe, but Mr Cholwe had received a written warning. Mr Cholwe did not follow policy procedure in authorising a staff member to use a company car. The staff member was then picked up by the police with drug paraphernalia in the car. For a person trying to show that they were rehabilitated and ready to take on the responsibilities of a manager, the Tribunal would have expected to have seen some formal supervisions and appraisals evidencing this. It was not clear what role Mr Cholwe was employed in and how office-based his work was. Heavily redacted documents were provided in the evidence bundle by the Appellants; they did not assist in helping the Tribunal understand staff training and appraisal.

Regulation 47 -Financial Position.

68. Some time was spent on this in oral evidence. The situation in relation to Rodor Housing and Support was more complicated than it appeared in the written evidence. In oral evidence Mr Gabula told us that the company had three intended children's home and eight other domestic properties which they let out. The rent from those commercial lettings came into the company, but the management and repairs on them were carried out by another company owned by Mr Gabula. He volunteered that he ran two other companies. That inevitably lead us to question how he could spend time on the children's homes. His response was that he delegated tasks. That fitted with his explanation that the original documents for registration had been completed and submitted by the office manager. He agreed he should have overseen the process himself.

69. Some time was spent on the financial history of the company, including charges on three houses. Receivers have previously been appointed. Mr Gabula said that there were financial issues, but that the insolvency proceedings had been resolved. The Tribunal concluded that we needed to focus on the central issue. This did not

require a financial background. Mr Gabula failed to provide a straightforward explanation that the homes he seeks to have registered will be financially viable for the purpose of achieving the aims and objectives as out in the statement of purpose. The concern is obvious, namely that vulnerable children are at risk of unnecessary/detrimental moves if they are left without a placement.

70. The Regulations do not state precisely what is required, but the guidance suggests that as a minimum they would expect to see a business plan covering background information; a marketing plan; and operational plan; cash flow forecast and annual accounts. Acknowledging that any new children home may be slow to start and rely on funds being drawn from other sources within the company, there was not a cash flow forecast, as the guidance suggests, setting out projected monthly income and expenditure for the first 12 months of operation.

71. The concern was what was submitted, was a five year business plan for the whole company with no simple breakdown of profit and loss in relation to each home. This was still not remedied by the date of the hearing. During the oral evidence that Mr Gabula appeared to appreciate for the first time what was required.

72. The oral evidence only compounded our concerns about the financial viability of the two homes. These are sole use homes which inevitably attract very high fees, sometimes around £6000 per week. There was a limitation of two members of staff at each of the Children's Homes imposed by the requirements of planning permission given by the local authority. Mr Gabula was not clear about how the staffing levels would be implemented to include a Registered Manager and how this would impact on the fee that could be charged. Any projections done would be on the basis of one manager across two homes when the Regulations require each manager to have an on-site manager.

Regulation 12- the protection of Children standard

73. This Regulation requires children to be protected from harm and unable to keep themselves safe. Possible hazards should be monitored regularly.

74. We can deal with this Regulation shortly as these issues were essentially practical ones, so more easily remedied. The issues identified by Ofsted were not challenged, but they should have been picked up by the Appellants in their first application. We studied photographs of the low-level flat roof at Cramlington Road and agree that as it was 'sunk' into the back garden it would be possible for a child to jump on this and get to the upper roof.

75. The risk assessment did not consider how they would manage that risk. Mr Gabula's answer, repeated in oral evidence was that they would be aware of children who posed a risk of climbing via the risk assessment process they went through with placing authorities. That ignores that vulnerable children may well present with volatile and unpredictable behaviours. A domestic home clearly cannot have the same restrictors as say a secure unit. In response to a question from the Tribunal, Mr. D'Arcy said he would have dug a trough around the extension to lower the ground level and

raise the height to make the flat roof less accessible. That is one possibility, but our concern is that the risk was not even considered. Other risks had to be pointed out by Ofsted before they were remedied.

76. It was common ground that an improved Safeguarding Policy had been submitted to Ofsted but it was not clear whether the safeguarding lead remains employed.

77. Despite the policy having been submitted to Ofsted three times there was still not a clear explanation to children and staff, including the manager and responsible individual as to how an issue could be raised and how it would be dealt with. Safeguarding must be embedded in good practice. This goes far beyond staff confirming they have read it. There were handwritten sheets submitted by Rodor to confirm that they had up until November 2019 but we were then told there was now an online system of signing off by staff that policies had been read. The staff matrix submitted was another blank document. The Tribunal had no confidence that Rodor were able to properly safeguard children from risk or harm.

Regulation 16 - Statement of Purpose.

78. The First Appellant, Mr Gabula, accepted that the original application was defective and that it inadvertently referred to plans to work with children with learning disabilities. In interview, he didn't make it clear whether or not they would be providing short breaks or clarify the circumstances where they might do so as the provision was for the placement of a sole child in the Children's Homes. This again underpins his lack of knowledge, attention to detail and not being on top of material submitted in support of application even when being called for his FPI.

79. Another example of Mr Gabula's careless approach is the ages of the children they intended to work with. In the original application it said children 8 to 15 years, in the children's guide sent on 26 October 2020 it said 9 to 16-year-olds, in the amended statement of purpose it was for 9 to 18-year-olds. It was misleading to refer to the manager as a registered nurse, when in fact Mr Cholwe had been struck off by the Nursing and Midwifery Council. The concern has to be that this could mislead placing it authorities into believing that they were highly qualified staff on the premises.

80. An outstanding issue at the date of the hearing was in relation to CCTV installed inside the homes. Despite Ofsted inspectors being told they had been removed; Mr D'Arcy saw the system on his follow-up visits with one additional camera. If the premises were to be used as supported accommodation, the Tribunal can accept that Mr Gabula was told by the police to install CCTV. He should have appreciated that this was not appropriate in a children's home. Instead, what Mr Darcy saw was an additional camera attached with a held in place a magnet.

Regulation 7 Children's Wishes and Feelings:

81. The young person's guide was still defective, but Mr White did not press this. Standing alone it might be remediable. We agree.

Regulation 46 - Review of premises

82. Despite being submitted a number of times, locality risk assessments were still defective. The views of others had not been sought and the particular risks of the location of the two homes were not considered e.g being close to a major motorway junction. Even on the third attempt, we accept the evidence of Ms. Battersby that they still did not meet the relevant regulation. This is yet another example of poor attention to detail.

Regulation 35 - Behaviour management policies records

83. Again this has been submitted on three occasions. The first time it appeared to relate to supported accommodation, but it is significant the policy in its resubmitted state continued to state that physical restraints could be used on children to improve "behaviour". Regulation 20 states that restraint should be a last resort for preventing injury to any person or serious damage to property. Again, Mr Gabula seemed to understand that when interviewed, but continued to refer to the use of a 'straddle position' which should never be used. Mr Cholwe's 'Team Teach' training was out-of-date as it should be renewed every 2 years. These are lesser points, which on their own might be remediable. The main concern is that the powers and circumstances in which physical restraint holds could be used are not clearly set out and understood.

84. We then turn to the overarching Regulations which are the core of our concern. These are the issues that cannot easily be remedied.

Regulation 13 - the Leadership and management standard

85. Regulation 13 requires that the leadership and management standard is one that enables, inspires and leads a culture in relation to Children's Homes. This helps children aspire to and fulfil their potential to promote their welfare. Despite three opportunities being given there is no clear record of staff training. Training goes beyond taking courses. We have no confidence that either Mr Gabula or Mr Cholwe would themselves be a model of good practice for more junior staff to follow and emulate.

Regulation 28- Fitness of Manager

86. The case advanced by both Appellants manifestly fails to meet this requirement.

87. On the Rodor Housing and Support recruitment files, there were conflicting dates about when Mr Cholwe arrived into the UK. This indicated that safer recruitment protocols had not been followed by the company. They did not record anywhere the prison history of Mr Cholwe in his recruitment file. There was a risk assessment for the conviction, but on the records of recruitment with no explanation of how it was assessed as 'low risk'.

88. Mr Cholwe accepts that he deliberately left off his registration form that he had a conviction. However, he signed the form to say it was accurate and that he understood that knowingly to give false information was an offence. He signed to say that there were no other circumstances that he knew about which might affect his application. He said in oral evidence he did not see that as dishonest. His repeated answer to this and other questions, was that he felt he was under a stigma and if he could get to interview, he could explain. Mr Cholwe deliberately lied on the form SC2 about his conviction/employment history. It was clear from the evidence he gave to the Tribunal that it was meant to hide gaps in his employment history and his time with the organisation he had defrauded.

89. In oral evidence, Mr Cholwe stated he had been pressed for time when completing his questionnaire form for the FPI interview; this was offered as an explanation as to why his answers had been short. Given the delay in submitting the documents, there should be no reason for Mr Cholwe to be under pressure. Mr D’Arcy said in his experience applicants would give a very fulsome account on the form, in preparation for the FPI interview to become a registered manager, but this had not been the case with Cholwe.

90. His difficulties in the FPI were not just around his work history, but his poor knowledge of the required standards and regulations.

91. The only satisfactory aspect of Mr Cholwe’s oral evidence was that it enabled the Tribunal to clarify the facts of the offence for the first time. He was aged about 31 at the date of the offence, so a mature adult. It was an offence of fraud perpetuated over an extended period, whereby he signed off timesheets for work he had not done. The sum involved he said, was about £20,000. In his one statement he said he’d not been able to attend the disciplinary hearing as he was in prison. Using its knowledge of regulatory processes, the Tribunal queried that. Only then did he agree that he had not sought to make representations, because he knew that a strike off was likely. That was in October 2012. In March 2013 he said he had been dismissed from his employment as a nurse at the Royal Liverpool Hospital.

92. We appreciate that Mr Cholwe had difficulties gaining employment after he was released from prison. However, that cannot excuse him giving an inaccurate work history which he did on a number of occasions. Neither he or Mr Gabula appreciated, as they should have done that he was applying for protected employment and had to declare this conviction. Neither understood that the FPI was part of the registration process, which all applicants would be required to attend. It could not be compared to a selective employment round. Even at the hearing, Mr Gabula thought that after 5 years his strike off as a nurse would lapse. It would not; it just meant he could re-apply to be registered as a nurse.

93. The FPI was not only about his conviction. The process was designed to probe his knowledge. He failed to demonstrate that he had skills and knowledge necessary to be a manager. That was not just because he got the regulations wrong, but he did not seem to understand what the role required. Mr D’Arcy told the Tribunal that he had conducted 7 of these interviews and we see why he described this as *‘bottom of the*

pile'. Both he and Ms Battersby said that even absent the conviction, Mr Cholwe would have been refused for registration as he did not demonstrate his suitability.

94. In oral evidence to the Tribunal, Mr Cholwe's did not answer questions directly and was evasive. The Tribunal was concerned that if he could not be honest in filling in an application form, how he could be trusted to keep an accurate record or give a true report about the potentially difficult situations that would arise in Children's Homes. In response to questions from Mr White, Mr Cholwe continued to maintain that he was discriminated against because of his criminal record "*I did not think it was dishonest because I could declare that during the interview*". When challenged about his failure to provide a complete employment history, Mr Cholwe was evasive in his answer.

95. The Tribunal does not Mr Cholwe's reference to the Social Care Common Inspection Framework was simply a slip of the tongue. He should have been applying them so regularly that he knew them even if, for example, he didn't always get the exact regulation correct

96. in summary, we find that Mr Cholwe failed to demonstrate his honesty and integrity in that failed to:-

- a) Disclose that he had a conviction for fraud as an adult which resulted in an immediate 16month custodial sentence imposed by the Crown Court.
- b) He failed to declare that have been dismissed from his employment and struck off as a nurse by the Nursing and Midwifery Council due to the conviction.
- c) Stated he was working as a nurse until 2013 when he was in fact in prison
- d) Falsely said that the reason for leaving his position as a senior nurse was "a change in career" when he was in fact imprisoned and struck off.
- e) Gave an inconsistent and unclear work history which omitted that whilst working as a nurse, he also worked, for Alternative Futures the subject of the fraud offence. In his statement of Mr Ricky D'Arcy said that five, requests were made between 20 May – 29 June 2020 for an accurate employment history of Mr Cholwe to be provided prior to the FPI. interview.

97. Even accepting Mr Cholwe wanted to move on and rehabilitate himself, he had still failed to discharge the burden of proof to show that he now had the necessary skills and experience to be a manager. Specifically he:-

- a) Submitted an inaccurate work history as stated above.
- b) No clear record of what work he had done at Rodor since 2016.
- c) No clear record of working towards being a manager of a Children's Home, for example, in relevant roles which were the subject of appraisal and supervision.
- d) Not being fully aware of the content and how to implement policies and procedures which he admitted at FPI he had not read all of. It would have been reasonable for him to have a good understanding of them because it would be expected that he had been implementing these policies regularly.

e) Not being aware of the relevant regulations for registration.

98. The Tribunal examined whether Mr Cholwe had recently achieved a Level 5 qualification, or equivalent that included managing a residential Children's Home. There was no evidence from the accrediting bodies that he had. Mr White did not pursue this matter, as under the Regulations, he still had 2 years to gain one. The Tribunal comments that whilst he submitted a number of training certificates, they were all recent – several completed on the same date – and many provided by Peninsula HR Services and all courses were online and none demonstrated he had a good and embedded knowledge.

99. The Regulations require each Children's Home to have a registered manager, but the guidance suggests that there may be exceptional circumstances where a manager could be allocated to 2 homes. An example of that might be where they were next door. Mr Cholwe has failed to demonstrate that he could not manage one home, let alone two homes which are about 5 miles apart.

Registration 26 - fitness of registered provider

100. Mr Gabula did show a willingness to acknowledge his mistakes and to work with the Regulator going forward. What is required of a registered provider is a person who is honest and transparent in their work and who complies with Regulations. Mr Gabula has not done that; he failed to declare on the SC2 that he had been declared bankrupt in respect of a Children's Home he previously ran. He allowed Mr Cholwe to put forward a dishonest account of his history.

101. Mr Gabula allowed some of his supported living settings to operate providing care for children without being registered. The Family Court had to issue an order in respect of Rodor's provision for a child, instructing Mr Gabula to register the setting with Ofsted, as they were clearly providing 'care and accommodation'. Mr Gabula put a different interpretation on the outcome of the court hearing. His perception was that the court order was in their favour. We do not accept that. The judge wanted to avoid the Local Authority having to move the child, which would be detrimental, because the provision was unregistered when it should have been, as they were providing care as well as accommodation. The court hearing was in February 2020. Mr Gabula did not submit an application to register with Ofsted until April 2020, the long gap was because prior to this, he had submitted a number of incomplete applications which were returned to him.

102. Mr Gabula has failed to demonstrate that he has the capacity, experience and skills to supervise the management of the homes. Indeed, he failed to establish that he would have the time to fulfil the responsibilities of such a role. The Tribunal have set out the many significant shortfalls, which he failed to remedy, despite numerous opportunities to do so. We have accepted that he made some practical changes to the premises and policies, but only after the shortfalls have been pointed out by Ofsted.

103. Mr Gabula did accept during the hearing that he went wrong. We give him credit for that but he did not demonstrate how things would be different in future. He seemed to think of things for the first time. For example, no mention was made by either Mr Cholwe or Mr Gabula at the FPI, or in the bundle, that Mr Cholwe was going to be peer mentored by other manager(s) of Children's Homes to give him support and guidance in his role. No detail was given by Mr Gabula as to which homes had been approached and who these persons or person were to be, so it appeared like something he had just thought of. Just as he said 'pupils' had been mentioned in a document as they had intended to provide education on the premises. The Tribunal does not find that plausible. The likelihood appears that much of the documentation – was written for a different setting.

104. Mr Gabula has relied upon his previous experience of supporting young people and what he says has been positive relationships with local authorities, but that is not sufficient to discharge the burden of proof.

105. As the Second Appellant, Mr Cholwe, failed to demonstrate that he can meet the requirements of Regulation 28, therefore it follows that the First Appellant failed to demonstrate that he can meet Regulation 26 and will continue to meet the requirements for registration. He has not been able to put forward a manager that is suitable.

Conclusion

106. Ofsted's registration as a children's home provides an endorsement to the placing local authorities and the public that they can provide a good standard of care to some of the most vulnerable children in our society. This is a sector that is highly regulated in order to promote the welfare and well-being of such children. The bar must be set high for that reason.

Proportionality

107. In considering whether the refusal of registration Ofsted was proportionate, we balance that for Rodor Housing this is a source of income and for Mr Cholwe his only source of income. Mr Cholwe has said that he wishes to re-establish his credentials to work in a caring profession. Both Appellants have put forward some positive references. Mr. Gabula did recognise that they had made mistakes and he did make efforts to remedy them. There is a national shortage of children's homes.

108. Whilst the First Appellant, Mr. Gabula, has sought to address weaknesses and make improvements, the approach has been reactive and not proactive. The improvements have not translated into sustainable good practice, where either have demonstrated that they, as at the date of the hearing, have the required integrity, skills and knowledge. We do not consider that the imposition of conditions are appropriate or practicable, when the Appellant has already been provided with numerous

opportunities to comply with actions. The condition cannot be that he comply with regulations that he must comply with.

109. Taking all these factors together we conclude that the refusal of both applications for registration was and is appropriate and proportionate.

Decision

The following decisions of Ofsted are upheld.

- a) Decision dated 26 November 2020 to refuse the registration of Rodor Housing and Support to register as a provider of a children's home, namely Cramlington House. 156 Cramlington Road, Birmingham B42 2EG.
- b) Decision dated 26 November 2020 to refuse registration of Rodor Housing and Support to register as a provider of a children's home, namely Minstead House. 29 Minstead Road, Birmingham B24 8PS.
- c) Decision dated 26 November 2020 to refuse registration of Joseph Cholwe as manager of Cramlington House
- d) Decision dated 26 November 2020 to refuse the registration of Joseph Cholwe as manager of Minstead House

**Ms. Melanie Lewis
Tribunal Judge**

First-tier Tribunal (Health, Education and Social Care)

07 July 2021