

Care Homes Briefing

Number 44

Care home closures

Decisions made to close private care homes, in contrast to homes run by the NHS, were until recently generally regarded as not being susceptible to challenge by reference to public law principles and thus to a resident challenging such a decision by way of judicial review. However, some cases that have come before the Courts since the enactment of the Human Rights Act 1998 have called this into question.

The question of how Courts will treat private care homes will rest largely on whether the organisation running the home can be held to be a “public body”. The main approach Courts have taken to date is to consider whether a public body, such as an NHS Trust, could divest itself of its obligations by contracting out its obligations to a voluntary sector (or private) provider; in such a case the Court may well construe this as a public law issue in order to protect the rights of residents (under the Human Rights Act 1998) who might otherwise receive less protection than equivalent residents in NHS homes.

Cases that have come before the Courts in recent years suggest that if a private care home provider is exercising any statutory powers then it is more than likely to be construed as carrying out public functions. This approach is illustrated in a case that came before Mr Justice Keith which involved a judicial review challenge to a private psychiatric hospital who was proposing to change the focus of one of its wards¹. The Judge held that the private hospital was carrying out a public function with reference to the role of Hospitals Managers who had statutory responsibilities under the Mental Health Act 1983 for the detention and discharge of patients from the hospital. The Judge concluded that the Managers of the

hospital were a “functional public authority”, being under a statutory duty imposed by the Nursing Homes and Mental Nursing Homes Regulations 1984 which imposed a duty on the hospital to provide adequate professional staff and adequate treatment facilities. The statutory duties were imposed directly on the hospital by the Registered Homes Act 1984, which has since been repealed by the Care Standards Act 2000. Many care homes will be under a similar statutory obligations under the 2000 Act with regard to their responsibilities for the delivery of care to patients in nursing homes.

This is a complicated area of law and we suggest it is worth seeking legal advice if there is any doubt about the implications of public law responsibilities that might apply where the closure of a nursing/care home is anticipated.

In the event that a nursing or care home does fall within public law requirements and is held to be carrying out public functions, those responsible for running the home will need to take various steps before a final decision can be made about the proposed closure of such a home. The following considerations will apply:

Consultation

There will be a duty to act fairly imposed on a private organisation that runs a home that is found to be a public body. This will require consultation with the residents/patients regarding the proposed closure. A duty to consult will arise on the basis that the resident/patient enjoyed a benefit from which he/she is now being deprived. Such “benefit” is often associated with representations made to patients that they will be provided with long-term care and/or a permanent home.

¹ R(A) v Partnerships in Care Ltd

If it was only intended that a nursing home provide care on an interim basis then this will not give rise to a duty to act fairly.²

If consultation is necessary, patients must be informed about proposals to close the home and meetings following this up should be arranged with residents/patients and their families. Patients and their families must be given the opportunity to express their concerns and to discuss future plans regarding their placements in alternative environments.

Assessment of Residents/ Patients

Public duties require the assessment of residents/patients, their needs and wishes where there have been

promises/representations to the patients/residents about a “home for life”. This means that there should be a full assessment of the patient’s needs to include occupational therapy, medical and nursing assessments, as well as consideration of the psychological effect of uprooting the patients/residents from such a home. These assessments should be carried out taking into account possible alternative placements for the patients/residents in the light of the proposed closure of the home.

RadcliffesLeBrasseur has been involved in a number of cases dealing with the closure of hospitals and care homes. We have experience in advising clients on steps that should be taken in preparation for a home closure, to minimise the risks of litigation.

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September 2006

² R v Brent Kensington Chelsea and Westminster Health NHS Trust ex-parte C