



Neutral Citation Number: [2024] EWHC 3308 (Admin)

AC-2024-LON-001487

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18 December 2024

Before :

**ANDREW BURNS KC**  
**(sitting as a DEPUTY JUDGE OF THE HIGH COURT)**

BETWEEN :

**THE KING (on the application of HARTFORD  
CARE GROUP LIMITED)**

**Claimant**

- and -

**THE SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Defendant**

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**Hugh Southey KC (instructed by Aston Brooke) for the Claimant**  
**Matthew Howarth (instructed by Government Legal Department) for the Defendant**

Hearing dates: 3 and 4 December 2024

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**Approved Judgment**

**ANDREW BURNS KC sitting as a DEPUTY JUDGE OF THE HIGH COURT :**

**Introduction**

1. The Claimant is a leading UK business providing 19 care homes offering a range of residential, nursing, dementia and respite care across the south of England. Care is provided both to residents who self-fund and those who are funded by local authorities (who comprise about 35% of the residents). Most of the care homes are regulated by the Care Quality Commission and most that have been inspected are rated good or outstanding.
2. On 24 December 2021 the government added care staff to the shortage occupation list for immigration purposes. The sector was facing difficulties recruiting care workers within the United Kingdom which continued as reported by the government's Migration Advisory Committee. The Claimant's People and Culture Director, Ms Melhuish, explains that as a result the Claimant recruited many of its care workers from overseas.
3. Certificates of Sponsorship ("CoS") or, in this particular case, Defined Certificates of Sponsorship ("DCoS") are a condition for an overseas care worker to obtain leave to enter the United Kingdom to work for a sponsoring employer. The Claimant has held a sponsor licence since 30 April 2019. During about 2023 it sponsored and recruited 93 workers from overseas and integrated them into care homes within the Claimant's group of companies. The Claimant's unchallenged evidence is that there is a particular need for overseas staff recruitment because the Claimant is unable to recruit locally to achieve its objectives and fill its staffing complement. The Defendant regards the Claimant as a trusted partner under the DCoS scheme and there is no suggestion of any abuse of immigration control in this case.
4. On 4 December 2023 it was announced that new Immigration Rules would be introduced in March 2024 whereby care workers would no longer be able to bring family members with them when entering the United Kingdom to take up roles subject to a DCoS. Experienced overseas care workers are often reluctant to move to the UK without their families. The Claimant was facing a staff shortage and so saw a window of opportunity to try to recruit under the existing rules before they changed. It applied for 70 DCoS on about 9 January 2024 coupled with a recruitment trip to Sri Lanka. The trip identified 70 potential recruits, all of whom needed a DCoS to enter the UK.
5. On 19 January 2024 the Defendant wrote to the Claimant seeking additional documentation and the Claimant replied on 24 January 2024. On 29 January 2024 the Defendant rejected Claimant's application for all 70 DCoS. The Claimant did not reapply but instead on 6 February 2024 wrote a pre-action letter. On 4 March 2024 the Defendant responded substantively. On 11 March 2024 New Immigration Rules came into effect which prevented care workers bringing family members into the UK.
6. The Claimant claims that the refusal decision was unlawful because the Defendant imposed a requirement for leave that is not set out in the Immigration Rules or acted inconsistently with the Immigration Rules. Alternatively it is claimed that the Defendant failed to comply with published policy and acted based on an unpublished policy or that its decision was irrational in light of the reasoning process or the conclusion reached and/or there was a failure to conduct sufficient inquiry. The Claimant seeks an order quashing the decision and declaring that it was unlawful. By proposed amendment

(which the parties agreed I should consider and decide whether to allow as part of this judgment) the Claimant also seeks a declaration that any DCoS issued as a consequence of any reconsideration following this judicial review should be treated as if it was granted under the previous Immigration Rules and as if the relevant worker had applied for immigration status prior to the March 2024 changes.

### **The application for DCoS**

7. The Claimant's 2024 recruitment campaign involved a recruitment trip to Sri Lanka which commenced on 14 January 2024. It assumed from past experience that the DCoS would be promptly granted for the new staff recruited during the trip so that any who wanted to bring families had the opportunity to apply for leave before the new Immigration Rules came into force. If granted they could then move to the United Kingdom with their families and take up employment at the Claimant's care homes. The Claimant predicted that it would be harder to recruit care workers with the necessary experience after the Immigration Rules were amended.
8. On about 9 January 2024 the Claimant applied for 70 DCoS. That was not an unusual number as the Claimant normally applied for them in batches and had secured about 93 in the previous year. The application process initially required little information and the Claimant's past experience was that the Defendant did not normally request extensive additional information.

### **The Defendant's request for additional information**

9. On 19 January 2024 the Defendant wrote to the Claimant seeking additional documentation in support of the application. It is common ground that it sought more information than previously was common practice. The Defendant submits that the type of information that was sought was 'evolving' over time. In September 2023 when the Claimant applied for 40 DCoS the Defendant merely required a hierarchy chart showing its filled and vacant positions and a completed proforma. On this occasion it asked:

“• An explanation as to why your business needs to recruit additional sponsored workers. This explanation must be specific to your business

- A full job description, which should include the main duties of the role for which the worker is being sponsored
- Copies of current official contracts or agreements to demonstrate your business has genuine vacancies related to your current request. *These should only include contracts which demonstrate a guaranteed agreement to provide services, contracts which don't confirm specific agreements do not demonstrate a current and genuine vacancy.* You must highlight in the contracts the relevant clauses which confirm you have genuine agreements for services leading to current roles to fill. If you do not provide contracts with the relevant clauses highlighted, we may reject your request.

These could be in the form of agreements with the NHS, contracts with local councils or private contracts / agreements to provide care or other agreements. They must include a clear description of the scope of the service to be delivered; for example, the start and end date of the agreement, the nature of the service provided under the agreement, *the number of service users covered by the agreement, the number of staff required to service the agreement and*

the locations that the staff will undertake the work.

Please note we will not accept evidence of your business currently bidding for contracts, your business must already be in a position where it will have sufficient work to employ sponsored workers on a full-time basis.

- A hierarchy chart detailing who currently works for the organisation, each vacant position within your organisation and which of these vacant positions the sponsored workers will fill. You should also identify which positions are currently filled by migrant workers, identifying these workers by name
- A staff rota dating back four weeks from the date of this request to demonstrate what duties your current employees are undertaking and where they are working
- Copies of employment contracts between your business and existing workers you sponsor for each SOC code you are sponsoring migrants under. We will only accept a draft employment contract if your business has not previously recruited any migrant workers
- CQC evidence
- A fully completed additional information proforma (attached)”

10. The Claimant suggests that the additional requests reflect a change of policy, practice or requirements. It relies on evidence in the report from David Neal, the Chief Inspector of Borders and Immigration, published in March 2024. That report – “*An inspection of the immigration system as it relates to the social care sector*” - stated at para 7.42-7.43:

“... several Home Office managers told inspectors that since October 2023 the department had begun to request that social care sponsors demonstrate their need for workers by supplying evidence of contracts they have in place with local authorities for the provision of care. Such requests for extra evidence had previously been made only in cases where concerns existed and with the consent of an EO. An operational manager suggested that the team’s capacity to make requests for further evidence was limited because of pressures on time and resources. Social care organisations are now required as standard to provide such contracts when applying both for a sponsor licence and for CoS....

“...Prior to October 2023, the Home Office believed that being placed on a local authority framework or ‘dynamic agreement’ was sufficient to guarantee that a provider would receive care work and therefore have a need for workers. Senior managers told inspectors that the department had recently developed an understanding that such frameworks are “speculative” and that only a contract to provide care for a local authority demonstrates an active need for workers.”

11. The Defendant has not submitted evidence to challenge the suggestion that it adopted a new approach in October 2023 by requesting contractual information or that it required contracts “as standard”. Mr Howarth, who appeared for the Defendant, submitted that there was an “evolving understanding of the sector” and that practice was evolving rather than a new policy being introduced. The Defendant’s approach that a framework agreement with a local authority was insufficient to show a current and active need for care workers is confirmed and reiterated in the Defendant’s Detailed Grounds of Defence at paragraph 46:

“the evidence provided did not prove there was a genuine vacancy on the basis that the documentation provided (framework agreements / spot contracts) did not provide for any number of guaranteed hours of work for the claimant to provide each week. This was the basis on which the Defendant made her decision.”

12. Professor Martin Green, the Chief Executive of Care England, gave evidence in a statement. The Defendant did not challenge the factual content of his statement although it did not accept his conclusion that there was a new and unpublished policy. He said that “the Home Office has made this a mandatory requirement in every case that I am aware of a sponsor making an application for defined CoSs”.
13. In relation to the contractual information requested, Professor Green’s evidence was that “The new policy shows a complete misunderstanding of how services are commissioned in the UK. Local authorities do not commit to long-term contracts with care providers, and in the case of home care providers, often commission services by the minute. I am aware of this because I have seen a plethora contracts in my time through my role.”
14. Although local authorities have a clear need for social care services, they will not commit to long-term contracts. Mr Southey KC for the Claimant said that the standard contractual arrangements are ones whereby the Claimant (and other providers) takes the commercial risk to ensure sufficient care resources are available to staff its homes. Under a framework agreement the local authority does not have to commit to set number of users or staff and so only has to pay for the level of service it uses at any particular time. I accept the rational that a local authority wishes to retain flexibility – to have the contractual right to call on the Claimant and other providers to provide sufficient care to satisfies its variable needs, without contractually committing itself to funding a fixed number of residents or funding a defined number of care staff in the homes with which it has service contracts.
15. The Defendant denies that it imposed a new requirement to provide contracts. I do not accept that on the evidence. Indeed the Defendant asked the Claimant to provide copies of “current official contracts or agreements... [which] should only include contracts which demonstrate a guaranteed agreement to provide services”. The Defendant made clear that contracts which did not “confirm specific agreements” – i.e. framework contracts – would not be sufficient to demonstrate a current and genuine vacancy. That is consistent with the evidence of Professor Green and the findings of the Chief Inspector as to the new approach in the care sector.
16. I explored with Mr Howarth to try to ascertain the Defendant’s current understanding. He was unable to challenge the Claimant’s position that framework agreements are standard. He was not in a position to assist me as to whether the subject of the Defendant’s request (i.e. non-framework contracts) do or do not exist in the care sector. In the circumstances I accept the Claimant’s evidence that framework contracts are standard within the care sector and that there are no standard contracts containing the specific clauses that the Defendant required the Claimant to provide in the request. I accept that standard contracts in the care sector do not specific staffing levels but refer to and rely on the duties imposed on care providers by law and regulatory control to ensure ‘sufficient’ staff are provided.

17. The Defendant's approach to applications by care providers had evolved in late 2023 and early 2024, so that it was the standard practice of the Defendant to require care providers to produce contracts containing clauses which simply did not exist in the care sector. Although the Defendant's request listed "the number of service users covered by the agreement, the number of staff required to service the agreement" as "examples" of how to comply with the mandatory requirement, in fact confirmed contracts containing those provisions were mandatory in order to demonstrate to the Defendant that the DCoS was for a genuine job vacancy. A framework contract without guaranteed work in respect of a specified number of users for a specified number of staff did not satisfy the requirement under the new approach.

### **The Additional Information**

18. On 24 January 2024 responded to the Defendant's request. It completed the Defendant's Additional Information Form giving the CQC registration numbers of its homes, the care workers' job description, the one-year experience required, the salary and weekly working hours (39 hours). The Claimant provided a sample contract of employment for a full-time care assistant working 39 hours per week in accordance with a rota paid at £10.75 per hour plus benefits.
19. The Claimant provided its organisational charts showing the existing employees in boxes (as requested) and the number of job vacancies. It also provided staff rotas (also as requested) which showed the deployment of existing staff and made some reference to agency staff (although they were generally recorded on different paperwork which was not sent). The Claimant also supplied (as requested) a number of its contracts with local authorities to provide care services in response to local authority need.
20. The contract with Wiltshire Council was called "Nursing Care Flexible Framework Drawdown Agreement for the drawdown of Standard and Enhanced Nursing Services from the Care Home Alliance Agreement" and was with a subsidiary of the Claimant. The provider agreed to have "*the necessary capability, qualifications, skills and experience to undertake the Services and agrees to provide the Services to the Authority in accordance with the terms of this Contract*".
21. The definition of "Services" points to Schedule 2 – the Services Specification. In its response to the request the Claimant highlighted for the Defendant its core obligation in clause 1.2. The specification required the Services be in accordance with legal and regulatory minimum care requirements except in cases where there is a requirement for enhanced care. The core principles were highlighted to show the high quality of care required by the contract. The Claimant also highlighted for the Defendant the obligation in the Schedule to maintain certain standards:

“1. The Provider ensures the homes staffing establishment in terms of staff: to resident ratio and skill mix reflect dependency levels of the people who use the service in the home, not simply occupancy levels. Staffing rotas will provide appropriate cover at all times to ensure that people who use the service, needs are met in a timely and person-centred way.

2. The Provider ensures that the use of agency staff is minimised by ensuring permanent staffing levels are appropriate and regularly reviewed. Where agency staff are utilised, the Provider ensures that agency staff are subject to robust screening ensuring they are qualified to work in the care home and that

their training is in date.

3. The Provider ensures that staff vacancies across the home including managerial, nursing staff, care staff and auxiliary staff are kept to a minimum through firm recruitment and selection processes, opportunities for professional / career progression and consistent management and development practices.”

22. The contract incorporated Wiltshire Council’s policy which states that where the Council is organising a care home placement it will use the block contracts such as that agreed with the Claimant’s subsidiary. This reflects the framework arrangement. The Council was bound to use the Claimant where it had a need but did not commit to a specified number of users or to make use of a specified number of staff. There were no guarantees in this agreement – except the guarantee to use the framework agreement for its care needs.
23. The Claimant also provided its contract with Wokingham Council which states at para 15.1 that: *“The Council makes no guarantee to the number of placements, if any, made during the period of the Contract or to pay for quantities other than those demanded. It also states: The Provider must employ sufficient numbers of people of sufficient ability, skill, knowledge, training, or experience so as to properly provide, and to supervise the proper provision of, the Care Service”*.
24. The Claimant provided another similar contract to the Defendant. It did not inform the Defendant that local authorities only enter into contracts that are flexible and never specify the number of users or staff. The Claimant did not reply saying that the Defendant was asking the impossible: for contracts containing clauses and guarantees which did not exist in the real world. The Defendant criticises this saying that it was for the Claimant, which was the expert in the care sector, to point out any deficiencies or impossibilities in the request for additional information so that the Defendant could have assessed the DCoS applications knowing that it had asked for the impossible.

### **The decision to reject**

25. On 29 January 2024 the Defendant rejected the Claimant's application. The decision letter stated that:

“A request for further information was sent on 19/01/2024 and a response was received on 26/01/2024.

When a sponsor applies for a DCoS we must consider whether they are genuinely able to offer a vacancy as part of our assessment process.

You were asked to provide copies of current official contracts or agreements to demonstrate that your business has genuine vacancies related to your current request. Whilst I acknowledge that you have sent contracts from Hampshire County Council (three), Wiltshire County Council and Wokingham Borough Council, these are framework agreements / spot contracts and do not provide for any number of guaranteed hours of work for you to provide each week.

The contracts with Hampshire County Council state:

*4.2 The Residential/Nursing Care Provider acknowledges that it is not being appointed as an exclusive supplier of any of the Services and the*

*Council may at any time perform any part of the Services itself or procure them from a third party.*

The contract with Wiltshire County Council states in Schedule 3:

*2.4 The Provider acknowledges that, in entering into this Contract, no form of exclusivity or volume guarantee has been granted by the Authority for Services or CoSAs from the Provider and that the Authority is at all times entitled to enter into other contracts and agreements with other service providers for the provision of any or all Services, which are the same as or similar to the Services being provided under this Contract.*

The contract with Wokingham Borough Council states:

*The Council makes no guarantee to the number of placements, if any, made during the period of the Contract or to pay for quantities other than those demanded.*

I am unable to ascertain the number of service users covered by any such agreement, and the number of staff required to service it. In the absence of any other contracts or agreements submitted, I am therefore unable to confirm the reason and justification you have stated for requiring additional sponsored workers.

You have been unable to demonstrate that there are confirmed contracts currently in place where you are able to immediately provide workers with contracted employment, in line with the 39 hours per week you have stated on your request. I am therefore satisfied that the roles you are intending to fill do not currently exist at the time of your request and that instead, you intend to sponsor migrant workers prior to securing additional work for them to undertake.

I have therefore rejected your request for 70x DCoS.”

26. It is clear from the terms of this letter that the reason for the Defendant’s conclusion that the job vacancies did not then exist was the failure of the Claimant to provide confirmed official contracts showing the number of service users covered by any such agreement and the number of staff required to service it which contained guaranteed placements for each 39 hours per week employment contract.

27. On 6 February 2024 the Claimant’s solicitors wrote a pre-action letter setting out its arguments which reflect those in the Claim. On 4 March 2024 the Defendant responded. In summary it said:

- a. There was no change of policy. The requirements for genuine vacancy were set out under the sponsorship guidance policy. The Defendant requested specific contracts in order to make an assessment of whether a vacancy was genuine. This was in response to widespread evidence relating to care sector sponsors, that the sector had been sponsoring care workers who had no guaranteed work.
- b. The Defendant had not made a judgment on whether or not the contracts produced by the Claimant were typical of those used in the care sector. However, the Defendant must be satisfied any vacancy is genuine and is not obligated to change policies to reflect typical recruitment practices in any given sector.
- c. The Defendant’s policy provided for seeking more information or documents when assessing an application for DCoS, particularly if there were concerns that



the vacancy was not genuine, or the specific role was one which did not meet the role requirements.

- d. The Defendant did not dispute that the Claimant was a large reputable company that would not seek to undermine immigration control.
- e. The Defendant did not dispute that the contracts were held with local authorities. The issue was whether the vacancies were genuine. To meet the genuine vacancy requirement the Defendant required the vacancy to currently exist, not be based on expected demand.

28. The Claimant was unable to fill the vacancies that were the subject of the Sri Lankan trip and the DCoS applications.

### **The Claim**

29. The claim was issued 1 May 2024 and permission to apply for judicial review on all grounds was granted on 18 June 2024 by Deputy High Court Judge Margaret Obi.

30. On 7 November 2024 the Claimant applied to amend its grounds to claim further relief by way of a declaration as to how the Defendant should treat any DCoS issued if the initial decision was quashed. It also applied to rely on a second witness statement of Ms Melhuish in support. The Defendant objects but in response applied on 2 December 2024 to rely on the witness statement of Mr Fellgate, a senior executive officer in the Home Office, and an additional bundle.

31. CPR 54.16 provides that no written evidence may be relied on unless it has been served in accordance with any rule, or direction of the court, or the court gives permission. The Court must manage cases flexibly and in accordance with the overriding objective of ensuring that the proceedings are fair, taking into account the seriousness of the failure to take these steps earlier, whether there is a good explanation for the failure and weighing relative prejudice in all the circumstances. The Claimant's application was made late and could and should have been considered earlier. On the other hand, there was time for the Defendant to consider the proposed amendments and serve evidence and submissions in response. Time was extended for the Defendant's skeleton argument and the late application has not prejudiced or delayed the hearing. The principal objections of the Defendant were that the amendment was late and without merit. I have decided to allow the amendment and the evidence from both parties so that I can consider the amended relief in the round on the merits.

### **The Immigration Rules and Policies**

32. A requirement which someone has to satisfy as a condition of being given leave to enter or remain in the United Kingdom must be set out in immigration rules made in accordance with section 3(2) of the Immigration Act 1971 (*R (Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208). That ensures that requirements for entry (but not requirements for being a sponsor - *R (New London College Ltd) v Home Secretary* [2013] 1 WLR 2358) are put before Parliament and not contained in policy or guidance which did not receive Parliamentary scrutiny.

33. The Immigration Rules (HC 395) provide that foreign workers can gain entry clearance as workers in shortage occupations if they have sponsorship from an employer. The Defendant is responsible for approving and registering sponsors, who may apply for a licence to operate as such.

34. Paragraph SW5.1 of the Immigration Rules (which were made under s. 3(2) of the Immigration Act 1971) applies to shortage occupations and provides that: “*The applicant must have a valid Certificate of Sponsorship for the job they are planning to do ...*” Paragraph SW5.5 of the Immigration Rules applies to shortage occupations and provides that: “*The decision maker must not have reasonable grounds to believe the job the applicant is being sponsored to do: (a) does not exist; or (b) is a sham; or (c) has been created mainly so the applicant can apply for entry clearance or permission to stay.*”

35. Both parties rely on the Home Office Guidance “*Workers and Temporary Workers: guidance for sponsors*” (version 03/23 updated in April 2023) which sets out the Defendant’s policy. Part 1 deals with the applying for a licence, Part 2 gives guidance on how to sponsor a worker and Part 3 sets out how to meet the sponsorship duties and what action will take in the case of actual or suspected breach. C7.1 provides that:

“The ability to sponsor workers to work in the UK is a privilege that must be earned. When a sponsor is granted a licence, significant trust is placed in them. With that trust comes a responsibility for sponsors to act in accordance with our immigration law, all parts of the Worker and Temporary Worker sponsor guidance, wider UK law (such as employment law) and the wider public good...”

It is clear from this that the Defendant places great weight on the importance of trust in the operation of the sponsorship system.

36. Paragraph C1.44 gives the definition of a genuine vacancy. It says:

“A genuine vacancy is one which:

- requires the job holder to perform the specific duties and responsibilities for the job and meets all of the requirements of the relevant role
- does not include dissimilar and or predominantly lower skilled duties
- is appropriate to the business in light of its business model business plan and scale”

37. This indicates that the Defendant should assess whether a role is genuine taking into account the nature of the Claimant’s business needs, including its business model and plan. A business model or plan may include a higher staff ratio than the minimum needed to service a local authority contract. A business may opt for a premium service with higher staffing levels. This policy indicates that the Defendant must judge whether a job is a genuine vacancy looking at the requirements of the Claimant’s business and not only by the requirements of its clients and customers.

38. Paragraph C1.45 provides: “*We may request additional information and or evidence from you or the worker to establish this requirement has been met and may refuse the workers application if this is not provided within our deadline.*” This gives a wide discretion to request additional information relevant to whether a vacancy is genuine.

39. The parties both refer me to “*Workers and Temporary Workers: Sponsor a Skilled Worker*” (Version 07/23, updated 17 July 2023). This guidance makes clear that the

Defendant will not award points for sponsorship where there are reasonable grounds to believe that the job role being sponsored does not exist. It thus repeats and reinforces SW5.5 of the Immigration Rules. The process is described in SK12.19: “*We may check the information you send with your application before we can fully consider it – for example, if we have doubts about its validity or we are not sure if the role described on the CoS meets the requirements of the Skilled Worker route.*”

40. SK12.20 describes the process of requested more information which took place in this case: “*If we need to make any checks, we may ask you for more information or documents. You must send us any information or documents within the timescale specified in the request. If you do not, your application will be rejected and not considered.*”
41. SK12.22 reflects the Immigration Rules once again: “*We will reject any application for a Defined CoS if: ...we have reasonable grounds to believe the job is not a genuine role or amounts to the hire of the worker to a third party...*”
42. The “*Defined certificates of sponsorship (DCoS) Guidance*”, version 3 was published on 1 December 2020. This describes ‘genuine employment checks’ which are “*designed to make sure the sponsor is able to offer the job described in the application*”. It says:
  - “The checks could include, but are not limited to:
  - salary confirmation (including hours per week)
  - classification of occupation code and skill level requesting:
    - references to confirm the migrant’s experience
    - job descriptions (to compare to Appendix Skilled Occupations)
    - any additional information required to validate the application”
43. This indicates that the internal policy of the Defendant enabled it to request any addition information (in addition to salary, hours, etc) which was reasonably necessary to validate whether the Claimant was able to offer the job described in the application.
44. Mr Howarth took me to the version 4 of the DCoS Guidance published on 12 March 2024 after the relevant decision was taken. He drew my attention to the new wording on genuine employment checks which has been expanded to include “*hierarchy chart showing current employees and any vacancies that need to be filled*” (which was requested and provided in this case) and “*service contracts if appropriate to ensure the sponsor is responsible for providing a non-routine service or project*”. However it does not include any reference to the number of service users covered by any such agreement, and the number of staff required to service it as was required by the Defendant in this case.

### **Care Standards**

45. The Claimant is subject to legal and regulatory control. Regulation 3 and schedule 1 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936) provide that regulated activities are: “*... the provision of personal care for persons who, by reason of old age, illness or disability are unable to provide it for themselves, and which is provided in a place where those persons are living at the time the care is provided.*” The Claimant carries out those regulated activities.

46. Regulation 8 of the 2014 Regulations imposes “fundamental standards” in relation to regulated activity which are set out in regulations 9 to 20A. Under regulation 9 the “*care and treatment of service users must (a) be appropriate, (b) meet their needs, and (c) reflect their preferences*”. Regulation 10(1) provides that “*service users must be treated with dignity and respect*”. Regulation 18(1) states that “*sufficient numbers of suitably qualified, competent, skilled and experienced persons must be deployed in order to meet the requirements of this Part*”. These regulations require the Claimant to have proper staffing levels in order to discharge its regulated activity to the required standard.
47. The Care Quality Commission website states that: “*CQC must refuse registration if providers cannot satisfy us that they can and will continue to comply with [regulation 18(1)]. Section 12 of the Health and Social Care Act 2008 requires an application for registration to be refused if the CQC is not satisfied that the relevant requirements in the 2014 Regulations will be complied with*”. The Claimant must therefore ensure proper staffing levels in order to maintain its CQC registration and standards.
48. This legal and regulatory framework is known to all parties concluding contracts in the care sector. That context helps to explain why service contracts such as those requested by the Defendant do not and do not need to specify numbers of staff that must be deployed in relation to residents placed by a local authority. Staffing levels are controlled by the duties on the care provider imposed by law and regulation and may be higher depending on a providers’ business model, which may choose to exceed minimum standards.

### **Legal Principles**

49. The Defendant is the primary fact finder about whether a vacancy is genuine and the Court’s role is limited to a review. The Court allows the Defendant a high degree of judgement in applying and following its guidance as there is no issue of liberty or equivalent impact (*Datamatics UK Ltd v Secretary of State for the Home Department* [2016] EWHC 1780 (Admin)).
50. The Defendant’s decision to refuse the DCoS must not breach the Immigration Rules and must not be based on a secret or unpublished policy. In *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 it was held that reliance on an unpublished policy was unlawful because the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. An individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute. However there is a right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it.
51. The Defendant’s decision must not be *Wednesbury* unreasonable. *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 held that a second aspect of irrationality/unreasonableness is concerned with the process by which a decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it. Significant reliance must not be placed on an irrelevant consideration. If there is no evidence to support an important step in the reasoning, or if the reasoning involved a serious logical or methodological error, it may be subject to challenge on judicial review.

52. A sponsor such as the Claimant is given a high level of trust and responsibility under the sponsorship scheme. The Defendant is justified in monitoring and enforcing the scheme rigorously (*R (Raj) v Secretary of State for the Home Department* [2016] EWCA Civ 770). Revocation of a sponsor's licence is required where the Defendant is satisfied there are grounds (for example, if a sponsored worker is allocated a job which is not a genuine vacancy, that may be a breach of the guarantee undertaken by the licence holder). The Defendant does not have to show deliberate dishonesty, as opposed to carelessness, incompetence, or some other reason (*Experience India Ltd v Secretary of State for the Home Department* [2016] CSOH 161). In a revocation case it is for the claimant to satisfy the defendant that it is complying with its sponsorship duties. There is some parallel with this claim because it is for the Claimant to apply for the DCoS and so it is its duty to supply any information properly requested. However the focus in this case is whether it was proper for the Defendant to request the information which it requested and whether it lawfully had reasonable grounds to decide that the jobs which were the subject of the DCoS application were not genuine.
53. Public authorities are subject to a duty of sufficient inquiry (*Secretary of State for Education v Tameside MBC* [1997] AC 1014). A public authority must have due regard to the need to take steps to gather relevant information in order that it can properly take into account such information in the context of the particular decision it has to make. The *Tameside* duty does not apply to a matter which is not a relevant matter in the decision (e.g. something that the Secretary of State had not considered and was not obliged to consider: *R (One Trees Estates Ltd) v Secretary of State for the Home Department* [2024] EWHC 1644 (Admin) and *R (Prestwick Care Ltd) v Secretary of State for the Home Department* [2023] EWHC 3193 (Admin)).

### **Discussion and Conclusion on Grounds of Claim**

54. The Claimant's grounds overlap to some extent and present different aspects of the same essential mischief using various labels. The Claimant submits that the Defendant's requirement for official contracts which contained specific guarantees was contrary to the Immigration Rules. If there was to be a new requirement Mr Southey submits that it must be expressly contained in the Immigration Rules. It is common ground that the requirement for a DCoS is part of the Immigration Rules. Mr Southey argues that the imposition of conditions on the issue of a DCoS is the imposition of a condition needed for a grant of leave and therefore applying *Alvi* must be included in Immigration Rules. I do not accept that. The Defendant was not introducing a new requirement for the grant of leave. The core requirement remained the requirement to show that the job vacancy was genuine and current. What the Defendant did during late 2023 and 2024 was adopt an evolving procedural approach about how a care provider could demonstrate that it met this core requirement.
55. I accept the Defendant's submission that the evidence (including the Chief Inspector's report) does not establish that a new policy was implemented, but rather reflects the Defendant's "evolving understanding of how to best assess genuine vacancies in the care sector". The Defendant was taking a new approach that in order for the requirement in the Immigration Rules to be demonstrated, a care provider had to be able to provide confirmed service contracts containing guaranteed work provisions.

56. However this new approach was irrational and impermissible. It was irrational and *Wednesbury* unreasonable for the Defendant to require care providers to provide contracts with specific requirements for guaranteed hours of work in order to show that the job was genuine. Such contracts simply did not exist as standard contracts in the care sector. The Defendant was requesting evidence that it was impossible for the Claimant and others to provide and which had little or no bearing about whether there was a particular job vacancy within one of their care homes.
57. Mr Howarth pointed out that under SK12.13-SK12.14 of the Workers and Temporary Workers: Sponsor a Skilled Worker Policy a sponsor must specify to the Defendant the number of weekly working hours or, where they are subject to final agreement, the normally expected working hours. However that policy is directed to the number of hours in the workers' contracts of employment and not any number of hours specified in any service contract with a local authority.
58. Mr Howarth also put substantial weight on the Defendant's broad entitlement to request any information that was relevant to assess whether the job vacancies were genuine and to test the veracity of the information submitted by the Claimant. His submission was that the Claimant could not show a genuine job in the absence of a service contract showing that the workers who were the subject of the DCoS had guaranteed hours working for a local authority or similar body. He said that the admitted general shortage of care workers in the UK, the Claimant's trusted status and the other information submitted (including the employment contracts and the organisational charts showing the vacancies) were insufficient to show that they were genuine vacancies.
59. However it is clear that the sole or principal reason for the Defendant's decision that the Claimant's job vacancies were not genuine or current was the absence of contracts containing provisions mandating guaranteed hours. That was irrational and unreasonable as:
- a. job vacancies can be genuine without there being such a contract;
  - b. such standard contracts never contain the provisions that the Defendant required as they are designed to ensure a flexible provision of care workers to meet the fluctuating needs of a local authority;
  - c. a business can have genuine vacancies without any local authority demand where it is providing services to individual service users without the involvement of any local authority and irrespective of any official contract;
  - d. it is based on the false assumption that local authorities will specify their number of users or the number of staff required or otherwise commit themselves to providing guaranteed working hours to a care provider.
60. I reject the Defendant's submission that current vacancies cannot be based on expected demand. Paragraph C1.44 of the Defendant's policy is that a genuine vacancy "is appropriate to the business in light of its business model business plan and scale". That gives the Claimant the flexibility to have a business model which is not simply reactive to demand for care places. The Claimant is not restricted to a business model where it may only recruit once it is faced with having to decline local authority requests for care places. It may quite properly recruit prospectively so that it is ready to meet the expected demand or provide a greater level of care in acute cases or even so it can grow the business and

expand the number of users it is able to accommodate. Such recruitment is for genuine, current jobs.

61. This approach meant that the Defendant's decision was not in accordance with paragraph SW5.5 of the Immigration Rules and the policies cited which reflect that rule. By focussing on whether the Claimant had provided evidence of official contracts containing guaranteed hours, the Defendant was not applying the correct test. It needed to have reasonable grounds to believe the job the applicant was being sponsored by the Claimant to do simply did not exist. That was an irrational conclusion in light of all the evidence including:

- a. The fact that the Claimant is a large and reputable company with a good record and demonstrated current contracts with local authorities;
- b. The Claimant's organisational charts which showed how many current and genuine job vacancies the Claimant had at each care home;
- c. The Claimant's statutory and regulatory duty to ensure sufficient staff;
- d. The sample contract of employment showing that the DCoS applicants would be employed on a full-time basis with 39 hours a week guaranteed and on terms compliant with UK employment law.

In my judgment the Defendant principally considered an irrelevant factor which was whether the Claimant had provided official contracts containing provisions which it was impossible for it to provide.

62. I do not accept that the Defendant is compelled to confine checks to those set out in version 3 of the DCoS Guidance. The policy is guidance and need not be slavishly followed. In any event it permitted the Defendant to request "*any additional information required to validate the application*". The problem is that it requested information which was not required to validate the application in determining whether the job vacancies were genuine.

63. I do not regard the Defendant's approach to assessing whether a job vacancy was genuine as amounting to an unpublished policy. The new practice in relation to assessing whether a job was genuine was not written down or disseminated in any document or guidance. It was not in any clear, certain or unambiguous form. It seems to have spread organically by the Defendant's officers adopting the approach of managers or colleagues, but it was not formally adopted or approved in any way. Had this approach been documented as a policy then it would have been disclosed by the Defendant in accordance with the duty of candour. The approach, albeit not a policy, was not secret as it was disclosed to the Claimant in the form of the written request for additional information. The Claimant knew what was required by the Defendant – the problem was not that the requirement was hidden from the Claimant but that it was irrational and unworkable to impose the requirement.

64. It is clear that the new approach was adopted without any *Tameside* inquiry. However it was not a policy and there is no evidence that there was a decision taken by the Defendant to adopt this approach and disseminate it for application by the Defendant's staff. Therefore the *Tameside* duty did not arise at any systematic level as the practice appears to have spread organically. However in those circumstances it is important to ensure proper *Tameside* enquiry is carried out when an individual decision is taken.

65. The Defendant should have taken steps to gather relevant information before reaching the decision that the Claimant's jobs were not genuine. Had the Defendant made any sufficient enquiry of those in the care sector, it would have been immediately clear that it was irrational to take into account the lack of official contracts with guaranteed hours. The guarantee of hours was properly found in the sample employment contract between the Claimant and the care worker. That was the evidence which confirmed that the care worker was not being recruited on a 'zero hours' basis or on some other basis which did not guarantee that they would have full time paid employment.
66. The Defendant submits that the duty was on the Claimant to provide other information or to correct the misapprehension upon which the request was based, particularly where the Claimant was the expert in the care sector and in which the Defendant placed a high degree of trust. However the Claimant was not in a position to know that the Defendant would reject applications for DCoS on an irrational basis. The Claimant was entitled to expect the Defendant to take into account the evidence of genuine vacancies shown in its organisational charts, rotas and other information and not to focus on the lack of the impossible provisions in official contracts.
67. The Defendant's decision does not imply that the Claimant would deliberately abuse immigration control. The Defendant's clear submission was that this requirement was not specific to the Claimant. The approach of requiring guaranteed hours contracts was a response to widespread evidence that the care sector has been sponsoring care workers who had no guaranteed work. The Defendant has not suggested expressly or impliedly that the Claimant will abuse immigration control. It is not bound to take the Claimant's assertion of genuine vacancies at face value despite the relationship of high trust. The Defendant is entitled to check the DCoS applications of a trusted partner and require additional information such as the organisation charts to check vacancy numbers and the contracts of employment to check that it was a full-time job. But it was unlawful to judge whether the vacancies were genuine against the yardstick of whether the Claimant had official contracts containing the provisions that were requested.

### **Relief**

68. The Claimant seeks a quashing order in relation to the decision and a declaration that it was unlawful.
69. The Defendant submits under section 31(2A) of the Senior Courts Act 1981, I must refuse relief on the basis that it is "highly likely" that the Defendant would have come to substantially the same conclusion even if any of the grounds submitted are made out. I do not agree. I note this is a "backward-looking provision" (*R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534 (Admin)) and a high threshold (*R. (PSC Union) v Minister for the Cabinet Office* [2018] I.C.R. 269 at [89]). Assessing likelihood on that basis, I cannot say what the outcome would have been. Far from being highly likely that the result would have been the same, it seems to me even probable that the Defendant would have come to the conclusion that the job vacancies were genuine. But this is not a case where there is only one outcome and it is for the Defendant assess the job vacancies taking into account the relevant information including the organisation charts and rotas showing where the new recruits will work, the sample contracts on which they were be employed and the other information requested and supplied.



70. The Defendant also submits that I should refuse to grant discretionary relief as the Claimant could and should have simply reapplied for DCoS rather than claiming judicial review. I accept the evidence of Mr Fellgett for the Defendant that there is no cooling off time for a DCoS application and if rejected a sponsor can reapply on the same day. There is no mechanism to reopen applications which have been rejected but the Claimant could have reapplied immediately for the same DCoS. The difficulty with that argument is that the Defendant would have rejected any repeated application which did not contain the official contracts showing guaranteed hours. Paragraph 42 of the Detailed Grounds of Defence shows that the Defendant continued to insist that contracts without “guaranteed hours of work” was not regarded as sufficient to justify the requirement for additional sponsored workers.
71. A repeated application which did not contain the information that the Claimant knew was impossible to provide would have presented a real commercial risk to the Claimant. The Defendant’s rejection letter dated 29 January 2024 made clear:

“Please note, if you make a further request for DCoS using the same supporting information we have assessed when rejecting this request, and we are not satisfied the requests are for current genuine vacancies, we may take compliance action against you. This may result in your sponsor licence being suspended or revoked.”

72. For these reasons, it is no answer for the Defendant to say that the Claimant should have reapplied, which was repeatedly relied on by Mr Howarth. Any reapplication is likely to have been rejected and would have placed the Claimant at risk of compliance action including the revocation of its sponsor licence. Neither I am persuaded by the suggestion that rules or policy would have been applied differently had the Defendant been informed by the Claimant that what was sought was impossible to provide. In my judgment it is just and convenient to grant the quashing order and declaration initially sought.

### **Additional Relief**

73. The final issue is the further and other relief which the Claimant added by way of amendment. The Claimant applies for a declaration that “DCoS issued as a consequence of this judicial review and subsequent applications for leave must be issued and handled in accordance with the immigration rules HC395 that applied at the date of decision.”
74. At the time of the decision, the Immigration Rules permitted care workers issued with DCoS to obtain leave to reside in the United Kingdom with family members. Those rules were amended on 11 March 2024 by the Statement of Changes to the Immigration Rules so that travel and residence with family members is no longer possible.
75. By the transition provisions in HC 556, an applicant can now only apply for family members to enter “... *if an application for entry clearance, leave to enter or leave to remain, has been made before 11 March 2024.*”
76. These changes to the Immigration Rules were announced on or about 4 December 2023 and Mr Southey submits that the interim 3 months were a transition period which was intended to enable sponsors to offer DCoS enabling migrants an opportunity to apply to be admitted to the UK with their families. He says the Claimant had a legitimate expectation that the application that it made for 70 DCoSs would result in certificates that would enable family members to apply to be admitted if the application was lawful.

77. Therefore the Claimant seeks a declaration that any workers who apply for entry in reliance on any DCoS issued as a result of the Defendant's reconsideration (which follows my quashing order) should be treated as:
- a. having a DCoS on a code as would have been issued before 11 March 2024 rather than on an immigration code that applies today; and
  - b. having applied for leave to enter before 11 March 2024.
78. The Claimant relies on its inability to fill the vacancies because the persons previously recruited will be unable to travel with family members. It says that unless the additional declaration is granted, the DCoS granted on any reconsideration will be of no commercial benefit to it as the potential recruits will not leave their families and come to work in the UK. Ms Melluish points out that will mean the resources expended on its recruitment exercise will have been wasted and this judicial review outcome will be of no or limited benefit. However there is no suggestion that there could be a claim for damages in these circumstances.
79. Judicial review is intended to protect against inappropriate and unlawful uses of the executive's powers (*R (Carlile v Secretary of State for the Home Department* [2015] AC 945). Judicial review should generally result in effective relief for any illegality and that effective relief should generally result in a claimant being put in the position that they would not have been in without illegality.
80. Mr Southey relies on *R (GE (Eritrea)) v Secretary of State for the Home Department* [2015] 1 WLR 4123 at [96] as authority for me to declare that the Defendant must correct historic illegality resulting from the decision challenged. In *GE (Eritrea)* the claimant arrived unaccompanied in the UK seeking asylum as a 16-year-old child and was unlawfully determined by the local authority to be an adult. Removal steps were commenced by the Secretary of State and she did not receive her rights under the Children Act 1989 to accommodation and support. The Court of Appeal held that a former child to whom no assistance had in fact been provided, could not, on becoming an adult, be classed as a "former relevant child" under the Children Act. Therefore the local authority did not owe her a continuing duty to provide her with assistance.
81. The Court of Appeal held that even if a court subsequently determined that she had been a child at the relevant time, it could not deem accommodation to have been provided when it was not. A local authority which had acted unlawfully had a discretion to make good the unlawfulness, but there was no general rule that it had to undo its past errors fully. How any such discretion was to be exercised was a matter for the local authority to determine in the light of whatever application was made and considering all the circumstances including whether it had acted fairly and reasonably at the time and any delay. Davis LJ commented that in cases of gross maladministration and conspicuous unfairness the court could exceptionally compel such a result, but it was not suggested that *GE (Eritrea)* was such a case.
82. In this case, the Defendant may decide to grant some or all of the 70 DCoS on reconsideration following this judgment. That will give those applicants the right to apply for leave to work in the United Kingdom. There is no evidence about the circumstances of those who would apply, in particular as to their family circumstances. It

is a matter of speculation whether those recruits would have applied for immigration status prior to the 11 March 2024 changes. Even if there was the potential for the same acute unfairness as in *GE (Eritrea)*, it would be wrong to restrict the discretion of the Defendant in considering any such application and it would be too early to do so at this stage. Any such historic unfairness would be a relevant factor to take into account, but would need to be balanced with all other individual circumstances applying at the time.

83. There are significant differences between the facts of this case and *GE (Eritrea)*. However it does suggest that the Defendant has (if asked) a discretion to correct the consequences of unlawfulness That will be for the Defendant to consider if and when an application for entry is made by any care worker with the benefit of any DCoS that may be granted following reconsideration consequent upon this judgment.. It is not appropriate for me to make a declaration compelling a result in the Defendant's future exercise of discretion. This is a commercial claimant who is seeking a declaration relating to the circumstances of potential recruits who may or may not suffer unfairness to differing degrees as a result of the refusal to grant DCoS in February. Although the decision was unlawful for the reasons I have given, this is not an exceptional case of gross maladministration or conspicuous unfairness. Taking into account all the circumstances, including the merits, I refuse the additional declaration sought by the amendment.