

Care Standards

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

Heard on 6 November 2014 at Blackburn Magistrates Court

BEFORE

**JUDGE HUGH BRAYNE
MRS DENISE RABBETTS
MS BRIDGET GRAHAM**

BETWEEN

SM

Appellant

-v-

OFSTED

Respondent

[2014] 2234.EY

DECISION

Representation:

The appellant was not represented

The respondent was represented by Ms Birkes, Solicitor

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 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.

2. There is a risk of one or more children being identified if we refer to the appellant, members of her family, or professionals working in the town where she lives, by their full names, and we therefore refer to them by initial only.

The appeal

3. SM appeals against a decision of Ofsted dated 17 April 2014, to refuse to register her on the Early Years Register, including both the compulsory and voluntary parts of the Childcare Register.

Hearing

4. The appeal was heard over the course of a full day on 6 November 2014. We directed, given the fact that identities of children would probably be discussed, that the hearing should be in private. The parties agreed. We permitted, with the consent of the parties, an observer from Ms Birkes' firm to observe the proceedings.
5. The parties had helpfully worked together to prepare a comprehensive bundle of documentary evidence. We subsequently received two additional documents: a family tree drawn up by SM, and an attendance note from Ms Birkes' firm (referred to later in this decision).
6. All witnesses took the oath.
7. It was agreed that we should hear the appellant's evidence first. SM had nothing to add to the various written submissions she had made in the course of preparing the appeal, and was therefore cross examined by Ms Birkes, after which the panel asked brief questions. SM had provided witness statements for her father Mr S and her husband Mr M. Only Mr S was asked to answer oral questions, first in cross examination, and then those of the panel. Mr M did not give oral evidence.
8. Three witnesses for the Respondent had submitted witness statements: Mr M Jeffs and Ms A Law, both of whom are Early Childhood Regulatory Inspectors, and Ms S Will, Senior Officer in the Compliance, Investigation and Enforcement Team. Ms Law had in fact submitted two further witness statements before the hearing. Mr Jeffs did not attend and his evidence is not contested.
9. The evidence-in-chief of Ms Law and Ms Will is contained in their witness statements, and we were able to proceed directly to cross examination, to the extent SM felt able to do so, and the Tribunal's own questions. SM did not wish to cross examine Ms Law, but she had brief questions for Ms Will. Both witnesses were briefly questioned by the Tribunal and briefly re-examined.
10. We heard helpful closing submissions from Ms Birkes and SM before reserving our decision, which we now give with reasons.

Legal Framework

11. The legal framework for the registration of childminders is to be found in Part 3 of the Childcare Act 2006.
12. An applicant must be registered if she meets the prescribed requirements (sections 35, 54 and 62). These requirements are prescribed by the Childcare (Early Years Register) Regulations 2008 and include the requirements that “the applicant is an individual who is suitable to provide early years childminding”, and that she will comply with the early years foundation stage welfare requirements.
13. The early years foundation stage welfare requirements are now found in the March 2014 *Statutory Framework for the early years foundation stage*, effective from September 2014. Amongst other requirements providers must take all necessary steps to keep children safe and ensure the suitability of adults who have contact with children. Providers must have and implement a policy to safeguard children. They must take all reasonable steps to ensure children are not exposed to risks and must be able to demonstrate how they are managing risks.
14. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal.
15. Ms Birkes referred us to the Court of Appeal decision in *Peter Jones v Commission for Social Care Inspection* [2004] EWCA Civ 1713. Although this authority refers to different legislation and a different regulatory body, we agree with Ms Birkes that the requirement of being a fit person to manage a care home is analogous to the requirement of suitability for child minding. The Court of Appeal confirmed the principle that it is not for the regulatory body to prove to the Tribunal that the applicant is not a fit person; it is for the applicant to prove that he is a fit person. However in the present case, the Respondent made clear in its decision that its concerns relate, in particular, to specific allegations of untruthfulness. It is for the party raising such factual allegations to prove those allegations on the balance of probability.
16. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the registration decision was taken. We have therefore considered the issue of suitability afresh and in light of all the relevant evidence. We must take into account the new statutory framework, in force since September 2014, referred to above, not the framework in force when the appealed decision was made.
17. The Tribunal must either confirm Ofsted’s decision not to register or it must direct that it shall not have effect. If the Tribunal decides Ofsted’s decision not to register should not have effect, it may impose conditions on the appellant’s registration. However neither party proposed that we consider conditions and we do not do so.

Issues

18. The appellant is 31 years old. She has been a qualified nursery nurse since 2003. She told us that her most recent employment was managing a 120-place nursery in which she was responsible for safeguarding. Ofsted rated this provision good. Her evidence and excellent references relating to this career history are not challenged.
19. SM has a brother, DS, who in 2008 was convicted of rape and sexual assault of a girl aged under 13. He is therefore a registered sex offender. It is not disputed that any children minded by SM must be protected by appropriate measures from the risk of any contact with DS. It is also common ground, clearly articulated in evidence by Ms Will, that SM's own suitability is tainted by having a brother with such a history. We are confident that she has at all times been judged on her own record and suitability. In fact, according to Ms Will, who was responsible for Ofsted's decision to refuse, the issue is not, in essence, related to the risk DS presents. Ms Will clearly told us in answers to SM's questions that SM is considered not suitable because she lied to Ofsted about her brother's whereabouts, and the result would have been the same if she had lied about any other matters of importance. The primary issue, therefore, is whether SM lacks the integrity, because she cannot be trusted to tell the truth, to carry out childminding duties.
20. It seemed to us that the issues on which findings of fact would be required were the following:
 - (a) Did SM deliberately mislead Ofsted about the whereabouts of her brother?
 - (b) Did SM, when questioned, demonstrate a tendency to lie about any other matters?
 - (c) Is there any other reason to conclude that SM would not comply with the EYFS requirements?

The allegations

21. SM applied for registration on 28 March 2013, and it is the refusal of this application which is appealed. This application was her third application. The first application was withdrawn because SM had a career opportunity in a nursery. No allegations arose in relation to this application and its withdrawal. She withdrew the second application, she told us, on advice from Mr Jeffs, because her brother was living too close.
22. It is common ground that SM's brother, DS, was convicted of rape in 2008. The identity of the victim is now agreed, though initially Ofsted said it was the daughter of SM's partner. Enquiries have now confirmed that SM was correct and the victim was the partner's niece. SM has

previously stated that the conviction was for sexual assault, not rape, but she agreed at the outset of the hearing that the record of conviction for rape must be correct, and, when later giving evidence, said that, having been in court when he was convicted, she had been sure it was not rape, but she must have misunderstood.

23. The property in which DS was living at the time of SM's second application was in the same street as, two doors away from, SM's home address. This address was and still is the address where she would carry out child minding once registered.

24. We set out Ofsted's allegations. In the letter setting out the decision, on 17 April 2014, the reasons are the following:

We have decided to refuse your registration because we believe you have not been wholly truthful with Ofsted during the application to register process, which calls into question your integrity.

Whilst you disclosed to Ofsted that your brother is a registered sex offender who lived next door but one, on the same street as you in your application form dated 28 March 2013, we do not believe that you provided Ofsted with the whole truth. You stated in writing that your brother 'has since moved out of town'. When interviewed by Ann Law on 31 October 2013 you stated 'My brother moved away January/February this year'. During the course of our enquiries we have information, from the Dangerous and Sex Offender Unit (DASOU) at [D] Police Station, that your brother was resident at [name of street in which SM lives] until 17 June 2013. Whilst we appreciate dates can become muddled, we do not believe that a period of four to five months from winter to summer can become confused.

When interviewed by Ann Law on 20 November 2013 you stated 'I do not know where he is living'. The information we received from DASOU is that your brother lives in sufficiently close proximity to your home that we believe it is highly improbable that you do not know where he lives. The Police Officer from DASOU knows your brother's address on [name of street where SM lives] and his new address and stated to Ofsted they 'couldn't believe you wouldn't know where he is living'.

We also obtained information from the Fostering and Assessment Team who know both of your brother's addresses. The social worker stated to Ofsted they 'find it hard to believe that you don't know where your brother lives'.

The social worker also informed Ofsted that your brother goes to bingo with your parents. At Ann Law's visit to your home on 31 October 2013 your parents visited your home; therefore, as both

you and your brother have contact with your parents we believe it is highly improbable that your parents have not told you or mentioned where your brother is living.

You informed Ann Law in interview on 20 November 2013 that 'I do not want to know where my brother is living;. We find this concerning as he poses a serious risk to children. As a mother of two small children, you should want to know where he lives in order to protect your children. Furthermore, in December 2012 your brother who is classed as a high risk sex offender was able to walk into your home when a child was present.

On the balance of probabilities we believe you do know where your brother lives, and you have lied to Ofsted (a)bout this and the date he moved from St John's Street. This calls into question your integrity and we do not believe that you are suitable to provide early years childminding.

25. Allegations are not confined to the reasons set out in the above letter. In the reasons for opposing the appeal Ofsted made additional allegations. We set these out, omitting those which simply repeat information from the decision letter.

4. Whilst a social worker and member of the Local Authority .. fostering team were at the Applicant's house on 20 December 2012, the Applicant was caring for a child that was not hers for a settling in period when the parent was not there. She would not provide details of the child to the social worker and member of the fostering team. During the visit her brother simply walked into the house without knocking...

5. During her interview with Ofsted's Regulatory Inspector on 21 December 2012, she had stated that at no time would her brother be able to access her home as the doors were always kept locked. She stated that her brother only calls at the house during the evening and that he telephones first as he cannot be around her own children whilst unsupervised...

10. On 18 November 2013 a case review meeting was held in which the decision was taken to identify whether the Applicant's brother had indeed now moved house. During the course of the Respondent's enquiries, information from ... DASOU revealed that the Applicant's brother was resident at [the street where SM lives] until 17 June 2013, and that he now lived just around the corner from the applicant (at [name of adjoining street])....

14. An objection meeting was held on 31 March 2014. The meeting considered that there were significant risks in the Applicant's ability to keep in touch with the whereabouts of her brother and thereby safeguard children...The Applicant's brother

did not leave his property until June 2013 and yet the Applicant had told Ofsted's Inspector that he had moved out early in 2013. The meeting considered on the balance of probabilities that the Applicant would have known where he was living or seen him in the area. They also found it difficult to accept that as a member of a close extended family she would not have been made aware of his circumstances and living arrangements over that period. In any event, if the Applicant did not know where he was living then the decision not to find out would be a cause for concern, in that the decision not to take account of a possible known factor of a person of risk residing in her community calls into question her understanding and willingness to apply principles of safeguarding in all instances. The meeting was concerned about the Applicant's ability to separate the relationship she has with her parents and extended family from the actions and decisions she must make as a registered childminder....

26. On behalf of Ofsted, at the hearing Ms Birkes raised additional allegations of untruthfulness. These relate to the identification, as required by the Tribunal's directions of 14 August 2014, of an agreed case summary. As directed by the Tribunal, Ms Birkes tried to get agreement on this summary. She herself was away from the office at the relevant time, and SM was asked to contact a colleague. Unfortunately SM's email setting out that there remained issues on which she did not agree was sent to Ms Birkes, and not seen by the colleague. This had the result that there was a telephone conversation between Ms Birkes' colleague and SM less than two hours before receipt of the summary was required. There is a dispute as to what SM actually said in this conversation. The attendance note, and the letter to the Tribunal, are said to set out what SM identified as the disputed facts, but SM's evidence is that what she said in this phone call has not been accurately recorded. It is Ms Birkes' submission that this is evidence of lying.
27. The actual dispute relates to point 3 of the letter from Ms Birkes' office to the Tribunal, dated 4 September 2014. However, before looking at this in detail, it is noted that one of SM's objections to the statement is accurately recorded in this letter. Ofsted was wrong about the identity of the victim of DS' rape, and SM, when this point was checked, was right.
28. Point 3 relates to the incident of 20 December 2012 which was reported by social services to the LA's Designated Officer for Child Protection (LADO), and thence to Ofsted. The account of what SM is recorded as telling Ms Birkes' colleague in the telephone conversation of 4 September 2014 about the errors in the statement for the Tribunal about this incident reads as follows:

The child that was present at her home on 20 December 2012, whilst a social worker and member of the local fostering team were in attendance, was her nephew [M]. Her brother was at the premises already on the telephone in her garden. Her sister in law, KB, was also present in the property; she is the mother of the child [M].

29. SM told us that this is not exactly what she said. She told Ms Birkes' colleague during this phone call that one social worker was present, to discuss the proposed fostering of DS's daughter by SM, not a social worker and, additionally, a member of the fostering team. SM told us that she had explained that KB was not the mother of child M. KB was present, but it was the child's grandmother who had dropped the child off with SM. Ms Birkes put it to SM in cross examination that this was an example of SM lying, which SM denied.

The Tribunal's findings and reasons

Does SM show a tendency to lie on issues other than her brother?

30. The question of whether SM has lied to Ofsted led to the refusal and to this appeal. It is, by far, the most important question for this Tribunal.
31. There are a number of background factors which we consider of assistance in weighing the conflicting evidence relating to the allegations of untruthfulness. We have noted that the burden of proof of demonstrating suitability is on the applicant, but that in relation to specific allegations it is a burden the party making that allegation must discharge.
32. It is, in that context, regrettable that the respondent did not choose to provide the Tribunal with the best available evidence of the facts on which the allegations are based, or even to request clarification of that evidence. The information available to the Tribunal comes from two sources: SM, who was there; and Ofsted, who obtained it via what Ms Law described as quite a long chain of transmission. The social worker, BE, would have notified the LADO, who notified an officer in Ofsted, who made a written phone record which was later available for those making the decision. The first time an officer from Ofsted spoke to BE in person was a year later. It is not known whether, during that conversation, BE relied on memory, contemporaneous notes, official file records, or any other source.
33. In relation to what happened on 20 December 2012 it has been clear to Ofsted that there is a factual dispute, starting with the number of social workers present. The Tribunal, as an expert Tribunal, is aware that aspects of how a fostering assessment is approached. If, as we have no reason to doubt, BE, the social worker, was in attendance at SM's home to discuss the fostering arrangement for DS's daughter, BE would have attended on her own. The practice of visiting in pairs for

such purposes is not known to this Tribunal, and SM's recollection much more likely to be correct. The identity and recollections of the second witness of fact, if such a person had been there, could have been obtained. We are confident that a transcription error arose at some point, where the social worker's role as member of the fostering team has been misunderstood and written down as involving two separate people, has been perpetuated. A simple check would have resolved this. This explanation is far more likely than the assumption that SM is lying. She has, in any event, no reason at all to lie about whether one or two social workers were present.

34. Further the idea that, as recorded in some parts of Ofsted's case, that SM refused to tell BE the identity of the child concerned is not at all probable. BE was a social worker who was carrying out a detailed fostering assessment, who recorded her very positive views of SM's suitability and even said she did not need safeguarding training after this encounter. She was working closely with the family. SM had no possible motive for misinforming this social worker as to her relationship with child M or the identity of M's mother. Unlike the allegations of withholding information about the whereabouts of her brother, a convicted sex offender, where we can understand there may be a motive for concealment, the motive for lying about these particular details are simply not evident.
35. The respondent now raises concerns about whether SM said she was settling in a child. SM says that if those words were used it was because the child needed to be settled during the course of BE's visit. We agree there are some inconsistencies in the accounts SM has given, though these are to be understood in the context of no concerns being raised at the time, Ofsted making a positive decision that SM was not carrying out childminding activities, and BE reporting very favourably on SM's suitability for fostering. BE's evidence and her contemporaneous records were not available to assist the Tribunal, and we find the quality of Ofsted's evidence on this event, on which great reliance was placed, unsatisfactory.
36. Our conclusion is that any doubts about what happened on this occasion are firmly resolved in favour of SM's account being accurate, and that one social worker visited, a child was present whose identity was not withheld, and that child had been dropped off by his grandmother.
37. We have addressed this incident in some detail, because cross examination on this took longer than on any other issue. It is therefore an important indicator, at least to the respondent, of SM's overall credibility. The incident of 20 December 2012 is also relevant to the question of safeguarding. While SM was looking after a child on an informal, unpaid, basis, her brother attended the property. However, Ofsted examined those concerns at the time and appeared content with SM's proposals in relation to supervision and security.

38. Before turning to the detailed analysis of what SM knew about her brother's whereabouts, we note that we cannot formally resolve the question of why the solicitor's letter of 4 September, and the associated attendance note of Ms Birkes' colleague, record SM telling the colleague factually wrong information. Were we to have real doubts as to SM's veracity about other parts of her account of what happened on 20 December 2012, this inconsistency would detract from her credibility. The overall picture, however, which we find in relation to the various accounts of what happened, is that SM has remained a credible witness. If the purpose of the lengthy examination of this issue at the hearing was to establish a tendency to lie, which would then support the more serious allegation about lying about SM's brother's whereabouts, it has not had that result.

Allegations that SM lied about her knowledge of her brother's whereabouts.

39. The respondent's evidence as to what police officers and others who did not testify found credible and not credible, recorded above in the discussion of issues, is not in itself persuasive. We must form our own views.

40. Ofsted does not find credible that SM did not keep track of her brother's whereabouts, since she kept in contact with her parents who did know where he was living. Having now heard from SM's father, Mr S, whose evidence on this point was not challenged in cross examination, we now know that in fact SM's parents knew less about DS's whereabouts than Ofsted previously assumed. Mr S confirmed to us that DS was living in SM's street until the end of January, in a property occupied in his partner's name. He had himself seen the landlord's eviction notice; he and SM's mother had accommodated DS and his partner for one night following the eviction, but had refused to allow DS to stay longer. He told us that SM then had no fixed address for some time. Mr S did not himself know where DS was then living, but would hear from him occasionally, particularly when DS wanted money.

41. Mr S said he became aware that DS and his partner moved into a property in the street next to SM's street. The date would tally with Ofsted's evidence of when SM started to live there, around June 2013. He saw DS there on one occasion.

42. There is no evidence from any police, DASOU officer, social worker, or anyone other than Mr S, of visiting or seeing DS January 2013 onwards at either of his addresses where he was required to reside and these agencies believed him to be living. It would not be safe to assume that because a convicted sex offender was required to live at a particular address he actually did so. We cannot conclude that SM

would necessarily have seen her brother after he had moved his registered address to the adjoining street.

43. SM's case has always been that she had a big row with her brother at the end of December 2012. It arose, she told us, because his presence nearby had led to her having to withdraw, on Mr Jeffs' advice, her second application to register as a childminder. She wanted him to move away. A row developed. DS kicked open a door she had tried to close against him, causing injury to SM's daughter, and leading to SM's decision to have nothing more to do with DS. The respondent finds it not credible that she reached this decision, though when SM gave this evidence orally no detail of it was challenged. We found the evidence credible. SM was, in our view, still shaken by what happened, and the effect on her daughter. She still appeared to be very angry with her brother. She told us that she now accepts that she may have been unwise not to take steps to keep track of where he was living, because of her childminding application, but that she believed at the time – and Ofsted appears to have fully accepted that this was adequate – that her safeguarding arrangements, given that he had moved away, were adequate. We note that, prior to drawing the conclusion that SM had been untruthful about not knowing where her brother was, Ofsted did not at any time ask her to find out where exactly he was living, and themselves took no steps for nearly a year to ascertain this from DASOU. We also note that there is consistent evidence that whenever SM has been advised to take a particular step, she has followed that advice, and we have no reason to doubt that, had she been advised that she needed to keep track of her brother's whereabouts, in so far as she was able, she would have tried to do so.
44. SM's own account of her brother's eviction is broadly consistent with the facts on which her father gave unchallenged evidence. She may have been wrong in her belief that it was DS, not DS' partner, who was evicted, but she believed he had left the address in her street at the end of January 2013. In our view this was an accurate belief. She and her father both confirm they did not discuss DS' whereabouts. Mr S himself had difficulties maintaining contact with DS, and we do not have reason to reject as untrue what he told us.
45. This analysis points us to the clear conclusion that SM did not knowingly lie about her brother's whereabouts. In fact she was right to think he had moved out of the same street at the end of January 2013. Indeed, from Mr S's evidence, DS may well have been out of town from late January to June 2013. The authorities keeping tabs on him failed to find out where he was actually living, which during that period was not at the registered address. Mr S did not know where DS was living. We accept the evidence that no-one told SM that DS and his partner had moved to the neighbouring street in June 2013. The probability of SM and her brother then bumping into each other is a matter of guesswork. We know nothing of his lifestyle, and he had minimal contact with his parents. It was, of course, open to Ofsted to seek

more concrete information from those charged with keeping tabs on DS' whereabouts and to present that evidence to this Tribunal.

46. This was the essential allegation against SM and we have found it wholly unpersuasive. We find her a truthful witness. We turn to the remaining allegations.

Are there any residual safeguarding concerns?

47. The allegation that SM is too close to her brother necessarily fails because we have now accepted her evidence that she has completely broken with him. We have already noted that the evidence shows SM is willing to accept advice given to her about particular measures which might provide additional safeguards. SM and her husband have suggested a number, such as 24 hour CCTV. These have not been subject to any criticism. Given SM's unblemished previous professional history, and exemplary references, which include her experience of safeguarding, and the absence of specific and detailed questioning or reasons for refusal relating to ability to safeguard, other than proximity to her brother, we are confident that with SM's truthfulness having been accepted, the respondent can, and should, now revert to the positive discussions it was engaged in with SM about the detail of the steps she should take in relation to safeguarding children in her care. We do not envisage any difficulties if such discussions include discussions as to how, or the extent to which, SM should monitor her brother's arrangements.

48. It would be possible to go into further detail examining particular issues which arose in the course of the respondent's decision making, and this appeal, such as SM's firm, but erroneous, belief that her brother was not convicted of rape, or the question of whether she did or did not tell a social worker that she was "settling in a child". These concerns, taken on a freestanding basis, are not sufficient to warrant further investigation. In any event, taking these two examples as illustrations of what the result would be, SM accepts that while she is convinced of what she heard when she attended court when her brother was convicted, she must be wrong. And in relation to the "settling in" allegation, no action was taken by Ofsted or social services on this issue in its own right, and it was relevant only to truthfulness in this appeal.

Conclusion

49. The Tribunal does not have a power to order the registration of SM. That is a matter for Ofsted. However the present allegations do not provide a reason for refusal. SM is, we find, not prone to lying, and has a very good history and understanding in relation to safeguarding. She is likely to follow advice offered in relation to any concerns which may remain about risks presented by DS.

Order

50. The appeal is allowed.

51. The Respondent's decision of 17 April 2014 to refuse registration shall have no effect.

Judge Hugh Brayne
First-tier Tribunal (Health Education and Social Care)

Date Issued: 13 November 2014