Care Standards

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

Sitting at Milton Keynes Magistrates Court on 2nd & 3rd October 2018

Before

Tribunal Judge G K Sinclair
Specialist Member C Joffe
Specialist Member J Cross

Ms Ivy Nyantakyi

Appellant

V

Ofsted

Respondent

[2018] 3300.EY

DECISION

Representation : Ms Nana Amponsa-Dadzie BA LLB (Cilex) for the appellant
Mr Praveen Saigal, solicitor, of PS Law LLP for the respondent

The appeal

1. The appellant childminder appeals against Ofsted's notice dated 21st March 2018 of its decision to cancel her registration as a childminder.

2. Please note that as certain children and one parent are named in documents filed in connection with this appeal the tribunal makes a restricted reporting order under rules 14(1)(a) & (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to

identify the children or their parents in this case so as to protect their private lives.

Background

3. The appellant, Ms Ivy Nyantakyi, was born and educated in Ghana. Her first language is Twi (pronounced "Tchee"), but part of her education (no doubt an increasing part as she grew older) was conducted in English. She came to Milton Keynes about fifteen years ago and in 2011 undertook a childminding course. This led to her being registered as a childminder on the Early Years Register and the compulsory part of the Childcare Register in February 2012 and the first of a series of visits by representatives of Ofsted.

4. The setting, at her then home in the Downs Barn area of Milton Keynes, was inspected by Ofsted inspector Cordalee Harrison on 9th August 2012 and overall the provision was rated Inadequate.[1] Her report, at page [D6] in the bundle, observed that:

> The childminder does not meet a number of specific legal requirements relating to safeguarding children, suitable equipment and learning and development

and

> Overall, the early years provision requires significant improvement. The registered person is given a Notice to Improve that sets out actions to be carried out.

The first action listed concerns an issue that features heavily in this case, namely:

> Implement an effective safeguarding policy and procedure, for example, by increasing knowledge of safeguarding matters and the Local Safeguarding Children's Board guidance (Safeguarding and promoting children's welfare)

All of the listed actions were to be undertaken by 24th September 2012 at the latest.

5. On 10th July 2013 Kim Mundy carried out the next inspection. Matters had evidently improved, as she felt able to rate the provision as satisfactory. Nonetheless, at [D19] she explained on the first page of the report various reasons why it was not yet good. At [D23] she commented, however, that:

> The childminder has a satisfactory knowledge and understanding of the safeguarding and welfare requirements to protect children in her care....
>
> The childminder has a suitable understanding of her responsibilities to help children to learn and develop. She provides appropriate activities

[1] The categories used for assessment are Grade 1 : Outstanding, Grade 2 : Good; Grade 3 : Satisfactory (later changed to the current description of "Requires Improvement"); and Grade 4 : Inadequate

> to encourage children's satisfactory all-round development. The childminder observes the children during their play... However, when children first start, she does not obtain the views of parents or encourage further involvement in their child's learning... The childminder is aware of her responsibility to carry out the progress check for children aged two years.
>
> The childminder establishes trusting partnerships with parents. She talks to parents about their child's routine and activities each day.

6. Ms Mundy inspected again on 10th August 2016. On this occasion the provision received the same grade (3), but by then it had been altered to "Requires Improvement". The setting had also changed, as the appellant had by now moved to a new home slightly to the south west in the Conniburrow district. This report noted various strengths but set out a number of areas where the provision required improvement. In order to meet the requirements of the early years foundation stage ("EYFS") and the Childcare Register the appellant had to maintain an accurate daily record of children's hours of attendance. This was to be undertaken immediately. Other matters were recorded as necessary for the further improvement of the quality of the early years provision.

7. On 24th July 2017 inspector Amanda Perkin first visited the appellant. She was not so sanguine, and rated the provision as Inadequate. She issued a Welfare Requirements Notice ("WRN") in which the matters listed were to be implemented by 21st August 2017. One of the recorded failings, which was also an item listed in the WRN, was in fact easily remedied. The Appellant did hold a valid pædiatric first aid certificate that was not due to expire until 2019; but was unable to produce it on the day – although was evidently distracted by her inability to do so. A notice to improve ("NTI") was issued as well as the WRN. It required the appellant to ensure that the required progress check for children aged between two and three years was carried out and parents notified, and to ensure that observations and assessment of progress were carried out. The date for compliance was again 21st August 2017.

8. In August 2017 Carla Roberts, an Ofsted Early Years Regulatory Inspector ("EYRI"), first became involved with the case. After several failed attempts in late August to gain access for an unannounced visit she agreed a pre-arranged visit which, after various mishaps, took place on 7th September 2017. The purpose of Ms Roberts' visit was to monitor the appellant's compliance with the WRN. She was concerned about the appellant's poor knowledge of safeguarding, especially as she had been registered as a childminder for over five years, and wondered whether her limited understanding of English may have contributed to her seeming inability to understand the different documents and the legal requirements and processes.

9. Following a later case review with a more senior officer, Lisa Troop, a decision was taken to reissue the WRN; giving the appellant a further opportunity to improve her knowledge and understanding of the requirements while also gaining time in which to access further support from the local authority. The

WRN was issued on 15th September 2017, requiring the appellant by 20th November 2017 to gain an up-to-date knowledge of child protection issues and guidance as well as Local Safeguarding Children Board procedures, including how to report concerns about children and allegations [D89–93].

10. On 16th October 2017 Ms Roberts conducted a further monitoring visit to the appellant. On this occasion she was accompanied by Senior Officer Mandy Mooney, to ensure that her approach was being suitably fair to the appellant. As Ms Mooney was the ultimate decision-maker she also valued the opportunity to gain a first-hand impression of what was going on at the setting. The visit only confirmed past concerns, especially as the appellant seemed unable adequately to answer some safeguarding questions on issues such as FGM, or on development issues such as how to support an eighteen month old child who was not yet walking. A further case review was held on 18th October 2017, at which Ms Mooney agreed that the WRN should again be reissued, giving the appellant perhaps a final opportunity to improve her knowledge and understanding. This WRN was issued on 23rd October 2017 [D110–114], with a compliance date of 20th November 2017. On the same date an NTI was issued, requiring the appellant by the same date to improve her understanding of the progress check required for children aged between two and three years, to ensure that it is carried out and that parents are provided with a short, accurate written summary. She was also required to ensure that observations and assessment of progress are carried out to understand children's interests and levels of attainment, and use this information to plan and provide challenging activities that interest children and help them make good progress.

11. At a further monitoring visit on 21st November 2017 Ms Roberts was still dissatisfied with the appellant's understanding of safeguarding issues after she had attempted to get her to explain what was meant by "grooming", and with her understanding of learning and development issues. For example, when asked about a specific child she was unable to provide Ms Roberts with any sort of assessment, either orally or in writing.

12. Following this a case review was conducted on 28th November 2017 and the decision was taken to proceed with cancellation of the appellant's registration. A notice of intention to cancel was issued and, with no response, this was followed by a decision letter cancelling the appellant's registration. However, the appellant did respond to that; denying any knowledge of the notice of intention that had preceded it. A precautionary approach was adopted and the process recommenced in early 2018. The appellant objected to the proposal and this was dealt with by a senior officer from another region. The decision was confirmed by letter dated 21st March 2018. It is against this decision that Ms Nyantakyi appeals.

13. Finally, as part of this introductory background the tribunal should record that after her departure on maternity leave Ms Roberts was replaced by Ms Jayne Godden. She conducted what was intended as a further six-monthly inspection on 8th March 2018. On that date there were no early years children on the roll, so the inspection proceeded on the basis that it was not possible to assess the

learning and development element and only welfare matters could be looked at. With no relevant children present the outcome would have to be assessed on the basis that the requirements were either "met" or "not met". After some questioning about safeguarding issues during which the appellant said that she would check for marks by removing a child's dress because of a "need to check the bum and sensitive parts" (which she was informed was inappropriate) and alarm at seeing one child placing a large plastic bag over the head of another while the appellant sat with her back to them, the requirements were assessed as "not met". A further WRN was then served in similar terms to those previously.

Material statutory and other provisions

14. The law governing the provision of childminding services for pre-school age children can be found principally in :
    a. The Childcare Act 2006
    b. The Childcare (General Childcare Register) Regulations 2008, as amended
    c. The Early Years Foundation Stage (Welfare Requirements) Regulations 2012[2], and
    d. The Early Years Foundation Stage (Learning and Development Requirements) Order 2007, as amended

15. The regulation of early years provision is provided for by the 2006 Act, mainly in Part 3.

16. The most basic provisions can be found in sections 19, 20 and 33. Section 19 states that a child is a "young child" during the period beginning with his birth and ending immediately before the 1st September next following the date on which he attains the age of five, and by section 20 "early years provision" means the provision of childcare for a young child. Section 33, in Part 3, provides that a person may not provide early years childminding in England unless he is registered as an early years childminder in the early years register, or with an early years childminder agency.

17. Sections 39 and 40 of the Act introduce the concept of the Early Years Foundation Stage, and provide as follows :

39. The Early Years Foundation Stage

(1) For the purpose of promoting the well-being of young children for whom early years provision is provided by early years providers to whom section 40 applies, the Secretary of State must–

(a) by order specify in accordance with section 41 such requirements as he considers appropriate relating to learning by, and the development of, such children ("learning and development requirements"), and

[2] Not the 2007 Regulations, contrary to what is stated on page 11 of 14 of Ofsted's notice of decision to cancel registration dated 21st March 2018. These were repealed and replaced in 2012

(b) by regulations specify in accordance with section 43 such requirements as he considers appropriate governing the activities of early years providers to whom section 40 applies ("welfare requirements").

(2) The learning and development requirements and the welfare requirements are together to be known as "the Early Years Foundation Stage".

40. Duty to implement Early Years Foundation Stage

(1) This section applies to–

(a) early years providers providing early years provision in respect of which they are registered under this Chapter, and

(b) early years providers providing early years provision in respect of which, but for section 34(2) (exemption for provision for children aged 2 or over at certain schools), they would be required to be registered under this Chapter.

(2) An early years provider to whom this section applies–

(a) must secure that the early years provision meets the learning and development requirements, and

(b) must comply with the welfare requirements.

18. Section 43, which deals with welfare regulations, also seems highly pertinent in this case. It provides that :

(1) The matters that may be dealt with by welfare regulations include– (a) the welfare of the children concerned;

(b) the arrangements for safeguarding the children concerned;

(c) suitability of persons to care for, or be in regular contact with, the children concerned;

(d) qualifications and training;

(e) the suitability of premises and equipment;

(f) the manner in which the early years provision is organised;

(g) procedures for dealing with complaints; (h) the keeping of records;

(i) the provision of information.

(2) Before making welfare regulations, the Secretary of State must consult the Chief Inspector and any other persons he considers appropriate.

(3) Welfare regulations may provide–

(a) that a person who without reasonable excuse fails to comply with any requirement of the regulations is guilty of an offence, and

(b) that a person guilty of the offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) In this section "welfare regulations" means regulations under section 39(1)(b).

19. What of slightly older children? Section 52(1) provides that a person may not provide later years childminding in England for a child who has not attained the age of eight unless he is registered as a later years childminder in Part A of the general childcare register. By section 59 the Secretary of State may make regulations governing similar matters to those listed above under section 43. For children above the age of eight registration is voluntary, but if a childminder does elect to do so then section 67 makes provision for the making of similar regulations.

20. Section 68 deals with the cancellation of registration, the relevant parts of subsection (2) providing that :

> (2) The Chief Inspector may cancel the registration of a person registered under Chapter 2, 3 or 4 in the early years register or the general childcare register if it appears to him–
> (a) that the prescribed requirements for registration which apply in relation to the person's registration under that Chapter have ceased, or will cease, to be satisfied, ...
> (c) that he has failed to comply with a requirement imposed on him by regulations under that Chapter,
> (d) in the case of a person registered under Chapter 2 in the early years register, that he has failed to comply with section 40(2)(a)...

21. Appeals to this tribunal are governed by section 74, with subsection (4) defining the remit of the tribunal as being either to confirm the taking of the step, the making of the other determination or the making of the order (as the case may be), or direct that it shall not have, or cease to have, effect. Subsection (5) goes on to say that unless the tribunal has confirmed the taking of a step mentioned in subsection (1)(a) or (e) or the making of an order under section 72(2) cancelling a person's registration[3] it may also impose conditions on the registration of the person concerned and/or vary or remove any condition previously imposed on the registration.

22. The circumstances under which a person is disqualified from registration are explained in section 75. These include, at subsection (3)(f), if he has at any time been refused registration under Chapter 2, 3 or 4 of Part 3 of the Act or had any such registration cancelled. The consequences for the appellant if she cannot overturn the cancellation of her registration are therefore serious.

23. The Childcare (General Childcare Register) Regulations 2008 make provision for later years childminding. By regulation 6:

> A later years provider to whom section 59 of the Act applies must—
> (a) meet such of the requirements set out in Schedule 3 as are applicable to that provider, and

[3] Protection of children in an emergency

(b) in the provision of childcare have regard to the needs of each child relating to childcare.

Schedule 3 introduces requirements governing activities, including:

1. Children being cared for are kept safe from harm.
6. (1) A written statement of procedures to be followed to safeguard children being cared for from abuse or neglect, is available and observed.
8. (1) The later years provider, the manager of the later years provision and any person caring for the children for whom the later years provision is being provided—
   (a) is suitable to work with children, and
   (b) has a sufficient command of the English language to ensure the welfare and safety of the children for whom the later years provision is provided.

24. Paragraph 12 and Schedule 6 make broadly similar provision for those registering voluntarily, save that there is no specific reference to having a command of English.

25. The EYFS comprises two parts: "welfare" and "learning and development". Welfare is dealt with by the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 and "learning and development" by the 2007 Order.

26. The Regulations begin by setting out certain definitions:

2. *Interpretation* In these Regulations—
"the Act" means the Childcare Act 2006;
"the Document" means the Document entitled "Statutory Framework for the

Early Years Foundation Stage" published by the Secretary of State on 3rd March 2017 on the gov.uk website
"registered early years provider" means a person who is registered under Chapter 2 of Part 3 of the Act in the early years register...
...
"the relevant provisions of the Document" means the provisions in Section 3 of the Document that use the word "should".

3. *Specification of the welfare requirements*
(1) Regulations 7 to 9 specify welfare requirements under section 39(1)(b) of the Act.
(2) It is directed that the obligatory provisions of the Document have effect, for the purposes of specifying the welfare requirements under section 39(1)(b) of the Act.
(2A) In this regulation, "the obligatory provisions" means the provisions in Section 3 of the Document that, by virtue of their use of the

word “must”, express requirements, except for those contained in paragraphs 3.16, 3.17, 3.18, 3.52, 3.53, 3.77 and 3.78.

(3) Early years providers to whom section 40 of the Act applies must have regard to the matters in the relevant provisions of the Document in securing that the early years provision they provide complies with the welfare requirements.

5. Matters to be considered by the Chief Inspector

(1) Any allegation that an early years provider has— (a) failed to meet the welfare requirements; or

(b) failed to have regard to the matters in the relevant provisions of the Document may be taken into account by the Chief Inspector in the exercise of functions under Part 3 of the Act.

6. Proceedings under Part 3 of the Act

(1) Any allegation that an early years provider has— (a) failed to meet the welfare requirements; or

(b) failed to have regard to the matters in the relevant provisions of the Document may be taken into account in any proceedings under Part 3 of the Act.

27. Finally, the parts of the 2007 Order, as amended and currently in force, that are material to this case provide the same basic definitions as in regulation 2 of the 2012 Regulations and go on:

3. Specification of the learning and development requirements

(1) It is directed that the provisions in sections 1 and 2 of the Document that, by virtue of their use of the word “must”, express requirements, have effect for the purposes of specifying the learning and development requirements under section 39(1)(a) of the Act.

(2) Early years providers to whom section 40 of the Act (duty to implement

Early Years Foundation Stage) applies must have regard to the matters in the relevant provisions of the Document in securing that the early years provision they provide meets the learning and development requirements.

5. Requirement on Chief Inspector and early years childminder agencies

The Chief Inspector and early years childminder agencies must have regard to the learning and development requirements and matters in the relevant provisions of the Document in exercising functions under Part 3 of the Act.

6. Matters to be considered by the Chief Inspector

(1) Any allegation that an early years provider has—

(a) failed to meet the learning and development requirements prescribed in Sections 1 and 2 of the Document; or

(b) failed to have regard to the matters in the relevant provisions of the Document

may be taken into account by the Chief Inspector in the exercise of functions under Part 3 of the Act.

7. Proceedings under Part 3 of the Act

(1) Any allegation that an early years provider has—

(a) failed to meet the learning and development requirements prescribed in Sections 1 and 2 of the Document; or

(b) failed to have regard to the matters in the relevant provisions of the Document

may be taken into account in any proceedings under Part 3 of the Act.

10. Failure to comply with welfare requirements notice

(1) Where the Chief Inspector considers that an early years provider who is registered in the early years register and to whom section 40 applies has failed or is failing to comply with the welfare requirements the Chief Inspector may give a notice to the registered early years provider specifying—

(a) in what respect the registered early years provider has failed or is failing to comply with those requirements; and

(b) where appropriate—

(i) what action the registered early years provider should take to comply; and

(ii) the period within which the registered early years provider should take that action, such period to begin with the date of the notice.

(2) The registered early years provider must comply with the terms of the notice within the period specified in the notice.

(3) A notice under this regulation must be given in accordance with regulation 11.[4]

Hearing and evidence

28. In her application notice the appellant had suggested that the appeal be dealt with on the papers, with no oral hearing. Perhaps anxious that the tribunal needed to see and hear Ms Nyantakyi give oral evidence in order to better assess her English language skills and actual understanding of safeguarding issues, the respondent asked for an oral hearing. The appellant may have been motivated by her desire to minimise costs, as she had great difficulty in finding a solicitor who knows about this jurisdiction (and in any case legal aid is not available, even though the outcome could terminate her career and income). However, when it comes to a substantive appeal (as opposed to a case management decision to strike out an application) rule 23(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 is quite clear:

[4] Reg 11 sets out the different possible methods for sending or serving a notice

> ...the Tribunal must hold a hearing before making a decision which disposes of proceedings unless –
> (a) each party has consented to the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without the hearing.

29. The hearing took place over the course of two days at Milton Keynes, during which oral evidence was given and the parties' respective representatives – Mr Saigal and Ms Dadzie – made commendably brief closing submissions. The tribunal considered unchallenged written witness statements from Kim Mundy and Belinda Woodcock (a local authority officer), filed on behalf of the respondent, and Ms A (a parent of minded children) on behalf of the appellant. Ms A also attended court on the second day, with her silent presence providing some comfort to Ms Nyantakyi.

30. The tribunal heard oral evidence from the principal witnesses for the respondent and from the appellant herself. On behalf of the respondent, upon whom lay the burden of proof, the following witnesses confirmed the truth of their witness statements and were examined and cross-examined: Amanda Perkin, Carla Roberts, Jayne Godden (two statements), and Mandy Mooney (two statements). Ms Godden's second statement was adduced late but no objection had been made to its use. It concerned a recent further re-inspection of the appellant's setting on 4th September 2018, just a month before the hearing. The appellant gave oral evidence on her own behalf, and was also permitted to adduce a second statement dealing with this most recent inspection.

31. The tribunal allowed considerable flexibility in the giving of evidence in chief in order that the appellant could hear Ofsted's specific concerns being expressed orally, instead of merely reading what was contained in the lengthy statements and exhibits. Witnesses were cross-examined briefly by Ms Dadzie and also questioned by the tribunal.

32. Amongst the additional points made by Ms Perkin were that she had not, as claimed by the appellant, begun the inspection by talking about a new regime taking over at Ofsted and the old inspectors being cleared out in favour of new and more rigorous ones. Nor had she stated, or given the impression, that she was going to close down the appellant's business and make sure she could never use her home for fostering or anything else. She had no pre-determined agenda and, as a freelancer, had not met any of the other Ofsted witnesses until a matter of weeks before the hearing. No complaint had been made about her conduct at the time, with these allegations being made only in the context of the appeal.

33. Ms Perkin confirmed that the appellant was unable to produce her paediatric first aid certificate during the inspection but that, believing that she had one, the search for it greatly distracted her during the rest of the time she was there. When questioned on safeguarding she would talk of going to "the authorities",

but had no firm knowledge of reporting procedures. There was no written safeguarding policy in place and she was concerned about the apparent lack of understanding of the severity of the potential outcome. Local nurseries and childminders were expected to keep up to date with changes in policy, to adopt policies and know the signs of abuse and what to look for. To test the appellant's knowledge she gave her a number of scenarios but found her level of understanding to be very weak. She also noted that the appellant referred to her (directly and to the children) as "Madam" and that the children referred to the appellant as "grandma". She thought some of the children were bored, as the setting had few resources, and they were waiting to go out to the city (meaning to a local park). As for safeguarding concerns, she said that she had to intervene when children were throwing dominoes at each other.

34. Ms Roberts also had concerns about the appellant's knowledge of safeguarding and of the English language, which she thought might be the underlying problem. She had to rephrase questions in order to obtain a positive response, so the visit took a lot longer than she would expect. Asked by the tribunal why she was so dismissive of the use of a template safeguarding policy that may have been downloaded, she said that while some local authorities do use templates childminders are expected to adapt them to their own circumstances. The one produced to her by the appellant had not. She did not seem to know what MASH (the Multi-Agency Safeguarding Hub) was, nor LADO (the Local Authority Designating Officer). This was detailed in her policy, but when asked what she would do she made no mention of what a LADO was, nor where to go with her concerns. She seemed to lack an understanding of domestic violence, as her response related to sexual abuse instead.

35. Ms Roberts thought this was a matter of understanding and knowledge of English. Despite the appellant producing evidence that she had attended courses on safeguarding, one an online course and the other by PACEY (the Professional Association for Childcare and Early Years), her knowledge was still a cause for concern, for example when she said that to gain a child's confidence she would say to the child that she would not tell anyone else, as if they think you will tell the child will not say anything. When told that this was inappropriate she backtracked. This was something basic that she should know.

36. At a later visit she was accompanied by Mandy Mooney as she was her superior, and she was seeking confirmation (or otherwise) that she was being fair to the appellant. After questioning on both safeguarding but also on learning and development ("L&D") issues she was not satisfied that the requirements were met. So far as she was aware the appellant had not attended any further L&D courses, and support was to be sought from Belinda Woodcock of Milton Keynes Council (although she could not really provide any unless it was paid for). In order to impart some sense of urgency she told the appellant that Ofsted was thinking of cancelling her registration. A WRN was issued. Ms Clarke was of the view that the appellant cannot identify where her weaknesses lie, even though these had been explained to her. As she has not understood she has not sourced any training other than safeguarding.

37. Jayne Godden became involved when Ms Roberts was on maternity leave. The process in the handbook is that anyone rated Inadequate should be re-inspected within six months but, due to various delays in this case, she was not able to do so until 8th March 2018. On that occasion there were no relevant children on site so she informed the appellant that it would only be a "met/unmet" outcome. Upon questioning the appellant remained confused about to whom she should report allegations concerning the children and those against herself as childminder. This was the subject of longstanding concern and various WRNs. Upon being asked by Mr Saigal Ms Godden commented that the ultimate sanction for breach of a WRN is prosecution. She then related the appellant's comment and the plastic bag incident referred to in paragraph 11 above.

38. Ms Godden visited again on 4th September 2018, as recounted in her second statement. There had been active hostility to this visit, so it eventually proceeded as a pre-arranged visit. Again, there were no relevant children on the roll, so the approach would be as before: "met" or "unmet". After some questioning she was satisfied that safeguarding requirements were still not being met. The appellant was able to tell Ms Godden that if a concern were raised about a child and if against herself she was able to say that it would be MASH and LADO, but after posing various scenarios Ms Nyantakyi said she would contact Ofsted and it would come and sort it out (which is not Ofsted's role).

39. Upon asking the appellant about L&D issues she said that she had visited a childminder in London who had provided her with a list of books. Only the first had arrived, and Ms Godden said that it (the 2018 EYFS Profile Handbook) was intended for use with those at reception level. When asked how she would use it for a two year old she answered that she would help with letters. Ms Godden showed her the EYFS 2017 and she asked what this was. She was not aware of the 2017 version, and said she was still operating from the 2012 one. As the EYFS is easily available online and the onus is on the provider to keep aware of developments Ms Godden was shocked.

40. Although it was common ground that Ms Godden wrote down details of the 2017 EYFS Statutory Framework there was a dispute whether she added it as item 4 at the end of the list on page E69 or whether that was the list that the appellant had already shown her. While the two accounts could not be reconciled, what was not in dispute was that as the book had not arrived she could not be using it in her childminding provision.

41. Ms Mooney confirmed her written evidence and told the tribunal that she had not felt the need to reconsider the decision in March 2018 to cancel the appellant's registration, notwithstanding the further inspection that had taken place just four weeks before the hearing. It gave her no grounds for optimism for the future.

42. The appellant confirmed the content of her statements and expanded upon her concern at the attitude of Amanda Perkin, which she said shocked her. She

also stated that when she phoned Ofsted she could hear people laughing in the background, which she took to be laughing at what she was saying. She did not speak the Queen's English as she was born in Ghana. When Ms Perkin was there the children were Ghanaian, so they were singing Ghanaian songs. They call her grandma because she is old (sixty, she informed the tribunal) and she does not want them to call her Ivy.

43. On the difference between the roles of MASH and LADO she said she sought help from a lady at Milton Keynes Council, and spent an hour with her at her office. She booked safeguarding training and asked them to explain LADO to her. They said that if you call one of them – LADO – and it is MASH problem they will put you in touch with the other, and asked why she should be worried. As she was a childminder she could call any of them. The appellant said that she did not know what to do.

44. When it was put to her that it was her duty to be aware of any changes in the EYFS she stated that she had been told when inspected in 2017 that it was Ok to keep using the 2012 one. Asked whether she had been aware of the earlier update in 2014 she caused some surprise by revealing, for the first time, that in 2014–15 she had undergone cancer treatment, was not acting as a childminder, and was at home on crutches. She had not reported to Ofsted at the time the fact that she had been hospitalised.

45. Asked about when she first became aware of the 2017 update, Ms Nyantakyi said that she went to see a childminder colleague in Luton in July 2018, and another in London in August. She learnt about it then, when a booklist was suggested for her. She said that she ordered it from Amazon in August but only one book on the list had arrived by the time of the inspection in September. It was put to her that reference was made to the 2017 EYFS in paragraph 10 of Ofsted's Response to her appeal [A169], a document that was dated 25th May 2018 and would have been received by within days. She could not explain why the update had not come to her attention then, instead of when a colleague told her months later, and the tribunal asked her whether she really understood what the Response – a lengthy and detailed document – was saying, and whether she had sought advice on it from a lawyer or friend.

46. She had not obtained legal advice, and it also became clear that her appeal application form had been typed for her by a friend's son [unnamed]. She claimed that it was her work and she took it to him for typing, but its use of English was of a higher ability than demonstrated in her oral evidence. When the Response was received her friend's son was travelling, so was unavailable to help her with that.

47. Questioned about the documentary evidence she had sought to adduce, it was put to her that the record (apparently written in an exercise book) merely recorded attendance details and the activities in which the child engaged each day. She had not sought to produce any progress reports for any child, as required by the L&D aspect of the EYFS.

48. Asked about her safeguarding training and her current understanding about the roles of MASH and LADO her answers were initially correct, but after a little more enquiry she revealed a lack of knowledge of the current identity of the LADO in Milton Keynes or of time limits for reporting concerns. She later answered that MASH dealt with any allegation affecting a child while LADO would be involved if the person concerned were an adult, completely missing the point that LADO deals with complaints against providers like her.

49. Seeming to acknowledge her confusion, she said that she wanted to seek assistance from Acorn, which would give her a teacher. The course, for which she had already paid a deposit, would be conducted in English. Recognising that she did not at present meet the requirements for L&D (which in her second statement, at [E66 v], she admitted was "an improving area" for her), Ms Nyantakyi then argued that she needed an assistant. The role of the assistant would be to teach her... to help her.

Discussion and findings

50. When a lay appellant is faced with professional witnesses there is always likely to be a mismatch: the former may be relying upon memory alone, while the latter will have the assistance of detailed evidentiary notes prepared at the time – as the inspection is in progress. Not everything will, of course, be recorded. For example the introductory remarks alleged against Ms Perkin are unlikely to have been recorded by her, but the tribunal discounts the appellant's complaint as none was made until by way of objection to the notice of intention to cancel the appellant's registration [A51] more than seven months later, and after a series of regular inspections between then and early March 2018 had created considerable animosity and a sense of victimhood. Ms Nyantakyi may have viewed past comments through a distorted prism attributing all criticism to racial discrimination against her and harassment, but the tribunal considers that she is wrong to do so.

51. Courts and tribunals are often asked, where the evidence of A and B differs, in each instance always to prefer the evidence of one of them over the other, but in reality life is less straightforward. Thus, while the tribunal tends to prefer the evidence of Ofsted's witnesses where supported by contemporaneous notes, reports and/or WRNs, there is some uncertainty about Ms Gooden's evidence that she wrote the final entry on the booklist on page E69. Entry 4 is in exactly the same handwriting as the previous entries. It is accepted by the appellant that she wrote down the details of the 2017 EYFS Statutory Handbook – but not on this document. Ms Nyantakyi may be correct in saying that what Ms Gooden wrote down for her on a piece of paper matched entry number 4, but why would she do so if it was already on the list she had seen? However, nothing turns on this. The essential point is that even though she was under a duty to be aware of changes to policy and/or written guidance, Ms Nyantakyi was unaware of the 2017 changes to the EYFS even though mentioned in Ofsted's Response in late May 2018, was finally told about the Handbook to buy when she met a colleague in London in August 2018, and as at the inspection date had neither downloaded a copy free from the .gov website nor obtained a copy from Amazon, let alone implemented it in her practice.

52. The notice of decision to cancel Ms Nyantakyi's registration relies on three grounds:
    a. A weak understanding of the requirements relating to "child protection"
    b. A weak understanding of the learning and development requirements
    c. Lack of assurance that she has the capacity to make the required improvements, or maintain any improvements made to a suitable standard.

53. *Child protection* — The tribunal is satisfied from the evidence before it that the appellant lacks sufficient understanding of the signs of all types of abuse so that she can take the appropriate action to safeguard children. Nor is it satisfied that she understands what is or is not an appropriate means of ascertaining evidence of such abuse. She should not promise a child that she will tell nobody else, and nor should she (save in the course of nappy changing) remove clothing to conduct an examination of a child's private parts. The plastic bag incident demonstrates an inability to ensure that children are monitored properly, and to interpret signs of risk – even in her own setting.

54. Although in practice Ms Nyantakyi may not yet have needed to contact either MASH or LADO her lack of knowledge of the roles of each entity, after six years in post and after attending several courses on safeguarding and developing elements of a support network – but only recently, instead of keeping regularly up to date – her level of understanding should be much better. In oral evidence she briefly appeared to have the measure of Mr Saigal, as he was testing her in cross-examination. And then came her comment that LADO dealt with complaints involving adults, rather than complaints directed against the carer. Like the maths student who assiduously attends classes on calculus but struggles with examples, Ms Nyantakyi has attended but not yet grasped the essential concepts so that she can apply them easily in practice. This issue has been the subject of many WRNs over the years, and even as recently as 6th September 2018.

55. *Learning and development* — Ms Nyantakyi openly acknowledges in her second witness statement that this is "an improving area" for her, but after six years she is not yet able to meet the requirements. She is being over-optimistic, with the result that she now suggests engaging an assistant to help her. That would place the appellant in the roles of employer and supervisor. If anything were to stand any chance of saving her chosen career then it is she who needs a supervisor, as she half-acknowledges when she seeks someone to teach her. She has been asking for help, and to be told what to do, because she is not able to implement this.

56. Ms Woodcock from Milton Keynes Council confirms that it has no training that it can offer her, unless paid for. As a neutral party not involved with this decision, or with conducting the various statutory visits, her observations summarised in paragraph 4 of her unchallenged witness statement deserve respect, and the tribunal places reliance upon them. They include:

- it was difficult to understand the appellant's spoken English on the telephone and face to face which made it difficult to understand what she required
- There were differences in the standard of written English in emails which suggested, possibly the parent may have been writing some of them on the appellant's behalf
- [On the EYFS and the use of *Development Matters*] ...I did not feel confident about how she was going to implement the points I made during the meeting
- The appellant consistently found it difficult to explain her Ofsted actions, any improvements towards them and how she implemented EYFS practice/provision. This led me to feel that she would need a significant amount of CPD training to implement EYFS requirements and ensure high quality provision for the children.

57. No attempt was made by the appellant to adduce evidence of her written progress reports on the young children in her care, rather than attendance and activity records.

Is this because she has none, and was unable to produce any to Ofsted inspectors? By her supposed compliance with the 2012 version of EYFS (although the 2008 version was current when she was originally studying for her childminding qualification) she has also shown a lack of awareness that the regime changed not only in 2017 but also in 2014 – when, unbeknown to Ofsted, she was undergoing hospital treatment for cancer and had paused her childminding.

58. *Capacity to improve* — This is largely dealt with in the comments above. Inspections on two occasions – in 2013 and 2016, produced a Category 3 outcome, but all the rest have resulted in a finding that the provision is Inadequate, or that requirements are "Unmet". Not once has her provision been rated as Good. Despite signing up for and attending courses, and seeking assistance from the council, PACEY, Acorn and some childminder colleagues in Luton and London, she has – even while cancellation has been stayed while this appeal has been pending – not seized the opportunity of further time in which to demonstrate progress. The inspection in early September 2018 confirmed this.

59. *Generally* — Apart from her failure to notify Ofsted of her serious illness in 2014–15 and the effect it would have on her provision Ms Nyantakyi has persistently failed to comply with WRNs that stress her need to improve her understanding of safeguarding. Breach of a WRN is a criminal offence, but Ofsted inspectors have taken the commendable attitude that they should try and get her to improve – so that she can continue to provide a much-needed resource (especially perhaps to the Ghanaian and other BAME communities) - and have repeatedly re-issued similarly worded WRNs in the hope that she would take positive steps to acquire the requisite knowledge and demonstrate her ability to put it into practice. This has not worked.

60. It should be recorded in her favour that no child has come to harm in Ms Nyantakyi's care, but the plastic bag incident was a sign that matters can so easily take a turn for the worse. Safeguarding is not simply a matter of ensuring that children are safe while in the childminder's care, but also of being able to identify signs that a child may be suffering directly from, or indirectly from witnessing, domestic violence, and/or directly from child abuse of various types. This imposes a duty on the childminder to engage with the relevant child protection authorities, and knowing the difference between the entity investigating injury or harm to a child and that which handles a complaint (of whatever nature) against the childminder him or herself. Even in the witness box Ms Nyantakyi demonstrated her lack of genuine understanding here.

61. With reluctance, as Ms Nyantakyi is a well-meaning lady who genuinely loves children and would do them no deliberate harm – and (according to parent Ms A) they in turn love her, the tribunal must agree with Ofsted that while she may be a useful baby-sitter she has demonstrated over a prolonged period a persistent inability to comply with the statutory requirements of the EYFS and is therefore unsuitable to remain on the compulsory register. It is unfortunate that, whether through lack of understanding or professional advice, she has appeared to have misunderstood mention of her resigning voluntarily from the register. Had she done so, and taken the opportunity of that gap to improve her skills and understanding of the statutory requirements, she might then have reapplied for registration. While the outcome of taking such a course of action is uncertain the consequences of cancellation of her registration are not. As noted in paragraph 20 above, cancellation automatically disqualifies her from registration.

FOR THE ABOVE REASONS IT IS DETERMINED THAT:

1. The appeal be dismissed and Ofsted's notice of its decision to cancel the appellant's registration as a childminder dated 21st March 2018 be confirmed.

2. The tribunal makes a restricted reporting order under rules 14(1)(a) & (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents in this case so as to protect their private lives.

Dated 17th October 2018

Graham Sinclair
First-tier Tribunal Judge