

Care Standards

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

Sitting at Ashford on 4 March 2013

B E F O R E:

**Upper Tribunal Judge Mark Rowland
Mrs Claire Trencher
Ms Janice Funnell**

JS

Appellant

-v-

OFSTED

Respondent

(No.2)

[2012] 2021.EY-SUS

The Appellant appeared in person.

The Respondent was represented by Mr David Northfield, barrister, of Field Fisher Waterhouse LLP.

DECISION

It is directed that no person may disclose or publish any document or matter relating to these proceedings that is likely to lead members of the general public to identify children minded by the Appellant or their parents.

The Appeal is allowed. The suspension of the Appellant's registration as a childminder shall cease to have effect.

Reasons

The background

1. The Appellant has been a registered childminder since 2007. She has served on the committee of her local childminding association and has produced letters from members of the committee and other childminders, as well as from parents of children she has minded, commending the quality of her child care. On the other hand, Ofsted has received information from other childminders raising issues of concern and it has also had its own concerns arising from inspections. In 2010, the Appellant was twice issued with welfare requirement notices and she was also formally warned, and then formally cautioned, for failing to comply with her conditions of registration by overminding (*i.e.*, caring for more children than permitted). On 5 November 2012, she was inspected by Ofsted and rated “satisfactory”, subject to two action points. On 15 November 2012, she was issued with a warning for failing to inform Ofsted of a man residing in her home.

2. On Friday, 23 November 2012, there was an unannounced inspection of her premises as a result of concerns generated by information that had been received by Ofsted. There is a considerable amount of dispute as to what exactly was seen and heard on that occasion. However, it is not disputed that there were seven children present under the age of five, whereas, in the absence of an assistant, there should generally have been no more than three under that age although a single childminder may mind up to six children in all. The inspector also formed the view that the Appellant had initially not been honest as to how many children were present and was concerned that two children wandered out of the house when the Appellant first answered the door. She was also concerned that four of the children were unsupervised and two of them had managed to gain access to face-paint and glitter. One of the children was sleeping in a utility room that she considered unsuitable. There was also a man on the premises whose presence as a resident or as an assistant had not been notified to Ofsted.

3. Following this visit, an emergency case review took place by telephone and the decision was made to suspend the Appellant’s registration as a childminder forthwith for six weeks. She was visited that day and informed of the suspension but the documentation was not available until Monday, 26 November. The inspector seized information and records but some were not available, which the Appellant said was due to a fault on her computer. There are allegations that the Appellant continued to mind children after the suspension. Ofsted also received further information relating to the Appellant overminding, to her using assistants not notified to Ofsted, to an incident in September 2012 when a minded child left her house unsupervised and was returned by the police and to incidents when she had used a mobile telephone while driving and had transported a child on the floor of her car.

4. The first period of suspension, from 23 November 2012 to 3 January 2013, went unchallenged. A second period of suspension was then imposed from 4 January 2013 to 14 February 2013. The Appellant appealed, but her appeal was dismissed on 1 February 2013 (*JS v Ofsted* [2013] UKFTT 70 (HESC)). A third

period of suspension was imposed on 14 February 2013, to expire on 27 March 2013. It is against that period of suspension that this appeal is brought.

5. On 21 February 2013, Judge Hillier issued case management directions, in which she stressed the interim nature of a suspension and identified as the only issue not before the First-tier Tribunal on 1 February 2013 an allegation that the inspector who conducted the inspection on 5 November 2012 had assured the Appellant that she could care for additional children when their mothers were ill providing a risk assessment was in place, that the Appellant had relied on that information but now understood it to be wrong and that she would act within the law. In the event, we have not pursued that issue. Mr Northfield said that, even if we accepted that the Appellant had been acting on an innocent understanding or misunderstanding, it was still Ofsted's case that a suspension was justified and we accept that there are bigger issues in the case.

6 In our judgment, the more important new factor for us to consider is that Ofsted has concluded its investigation and, since the imposition of the suspension and unknown to Judge Hillier, has issued a notice of intention to cancel the Appellant's registration under section 68 of the Childcare Act 2006. The notice was dated 20 February 2013. The Appellant has objected and an objections hearing took place on 28 February 2013. No notice of decision had been issued by the time of the hearing before us on 4 March 2013.

7. The notice of intention to cancel the registration is a lengthy document, setting out a considerable number of grounds, with detailed particulars. The grounds, paraphrased, are –

- Failure to notify Ofsted of changes to members of your household
- Failure to notify Ofsted of changes in the persons aged 16 years or older living or working on the childminding premises
- Failure to notify Ofsted of a child leaving the premises
- Failure to inform Ofsted in a change of the childminder's health
- Childminding while suspended
- Breach of the requirement to ensure that only suitable people look after children
- Breach of the requirement to maintain staff: child ratios
- Overminding
- Breach of requirements regarding use of assistants
- Breach of requirement to inform parents about staffing arrangements
- Breach of requirement of safety by allowing children access to hazardous items
- Breach of requirement to ensure that children do not leave the premises unsupervised
- Breach of requirement to have adequate risk assessments
- Breach of requirement to keep children safe while on outings
- Breach of requirement that vehicles in which children are being transported must be adequately insured
- Breach of requirement to have records easily accessible and available

- Breach of requirement to have records containing information about children
- Breach of requirement to have a written procedure for dealing with concerns and complaints
- Breach of requirement to keep a daily record of the children being cared for on the premises and their hours of attendance.

8. We accept that, at least on paper, Ofsted has a case for the cancellation of the Appellant's registration. However, the Appellant has a case too. She denies some of the allegations and argues that others are not sufficiently serious to warrant cancellation. It is not necessary for us to determine the strength of the respective arguments on issues of fact; we must merely decide whether or not the current suspension of registration should continue in force.

The legislation

9. Section 68 of the Childcare Act 2006 provides for the cancellation of registration on the ground, *inter alia*, that there has been a failure to comply with a condition imposed on the registration or a requirement imposed by regulations or with learning and development requirements. Section 72 provides for the cancellation of registration on the ground that a child is suffering, or is likely to suffer, significant harm. Whereas, by virtue of section 73(8), a decision to cancel registration under section 68 is made by Ofsted but does not take effect until the time for appealing expires or an appeal has been determined by the First-tier Tribunal, a decision to cancel registration under section 72 must be made by a justice of the peace and takes effect immediately, remaining in force unless and until an appeal is allowed by the First-tier Tribunal.

10. Section 69(1) provides that regulations may provide for registration to be suspended for a prescribed period in prescribed circumstances. Regulations 8, 9 and 10(1) to (3) of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (SI 2008/976) provide –

“8. The registration of a registered person may be suspended by the Chief Inspector, by notice, in the circumstances prescribed in regulation 9 for the period prescribed in regulation 10.

9. The circumstances prescribed for the purposes of section 69(1) of the Act are that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.

10.—(1) Subject to paragraph (2), the period for which the registration of a registered person may be suspended is six weeks beginning with the date specified in the notice of suspension given in accordance with paragraph (4).

(2) Subject to paragraph (3), in a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the

Chief Inspector's power to suspend registration may only be exercised so as to give rise to a continuous period of suspension of 12 weeks.

(3) Where, however, it is not reasonably practicable (for reasons beyond the control of the Chief Inspector)—

(a) to complete any investigation into the grounds for the Chief Inspector's belief referred to in regulation 9, or .

(b) for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9, .

within a period of 12 weeks, the period of suspension may continue until the end of the investigation referred to in sub-paragraph (a), or until the steps referred to in sub-paragraph (b) have been taken.”

11. The relationship between these regulations and section 72 of the 2006 Act was considered in *Ofsted v GM* [2009] UKUT 89 (AAC). The regulations clearly permit the suspension of registration while a concern is being investigated with a view possibly to taking action under section 72. However, it is equally plain that registration is not to be suspended just because cancellation under section 68 is being considered or is actually being taken. That would be to undermine section 73(8) and, indeed, the limitation of suspension to 12 weeks save in limited circumstances would usually be inconsistent with cancellation under section 68 given the time that is likely to elapse in the event of an appeal. Regulation 10(3)(b) provides for suspension while a particular risk is eliminated or reduced but the word “reduced” itself makes plain that suspension is not required merely because there is some risk. It was held in *Ofsted v GM* that, although regulation 9 provides a low threshold, the mere fact that the threshold is met does not require there to be a suspension.

12. Thus, it seems to us, the legislation requires the likelihood of a risk materialising to be balanced against the desirability, recognised in section 73(8), of a childminder not having his or her livelihood take away before his or her case is heard. Plainly if a risk is such that a child is *likely* to suffer harm – the section 72 test – suspension will be justified if for some reason Ofsted has not applied to a justice of the peace (perhaps because it does not expect the cancellation to be challenged or because there is an isolated deficiency that can be put right fairly quickly). But a lesser risk requires careful scrutiny before it can be found to justify suspension. In particular regard must be had to regulation 10(3), which, once an investigation is complete, does not contemplate a suspension save for the purpose of removing a removable risk. If the risk is not removable, the regulation seems to contemplate that there will instead be an application to a justice of the peace under section 72. That suggests to us that, if, as in this case, the investigation is complete but it is said that there is an irremovable risk, suspension is not appropriate unless it can be said that the risk is such that a child is likely to suffer harm. “Likely” in this context does not mean more likely than not; a better paraphrase might be that harm would not be unexpected. Importantly, a decision under regulation 8 requires consideration only of the short-term risk during the period of suspension or, perhaps more realistically once an investigation has been concluded and it has been decided to consider cancellation under section 68, until any cancellation will take effect. A decision by a

justice of the peace under section 72, or a decision by Ofsted under section 68, can take into account long-term risks.

Consideration

13. We have before us detailed statements from a senior officer in Ofsted's Compliance, Investigation and Enforcement team, from the inspector who visited the Appellant on 5 November 2012 and the inspector who visited her on 23 November 2012 and who was also able to give evidence about subsequent events. Exhibited to those statements were notes of meetings and other relevant documents. We did not hear oral evidence from those witnesses. Mr Northfield was able to assist us with some details but the case does not really turn on disputed issues of fact. It is clear from their statements what Ofsted's concerns about the Appellant are and how the inspectors have come to be concerned.

14. We also have before us written evidence from the Appellant with supporting letters and other documents. In addition, we heard some oral evidence from her, partly because it is difficult to draw a clear line between evidence and submissions where a person is self-represented.

15. The question for us is whether the matters that legitimately cause Ofsted concern are such that it can be said that children are at a risk of harm sufficient to justify suspension. This issue is not really addressed in the suspension notice, where failings or concerns are given as the reason it is considered that there is a risk without any analysis as to what the risk actually is.

16. For instance, there are the related issues of failing to notify Ofsted of people living in the Appellant's household and the failure to obtain approval for assistants. Plainly, there can be a risk if a person having access to, or caring for, children has, say, a history of violence or committing sexual offences. However, in this case, the man in respect of whom the warning was issued on 15 November 2012 is no longer living in the household and therefore, to that extent, any risk has been removed (quite apart from it being the Appellant's case that she did notify Ofsted of his presence and had asked for him to be checked so that he could act as an assistant). More serious, though, is the allegation that the Appellant allowed him to assist in childcare without Ofsted having indicated its approval. While he is not approved, he presents a risk. On the other hand, the man who was present on 23 November 2012 had formerly been approved as an assistant to the Appellant and had only been removed from Ofsted's records because he had left the area to live with the Appellant's daughter. Even if his return should have been reported to Ofsted, it is hard to see that there is really any risk to the children in him being present or assisting in caring for them. Nor do we consider that there was any great risk involved if any of the other people with whom it is said the appellant left children did care for them for a while. One was an approved assistant to another childminder, one was a registered nanny and the other was the Appellant's husband, who was known to Ofsted and had been approved by them as a member of the household and whose childcare abilities were presumably known to the Appellant. These are not instances of unknown recruits being involved in childcare. We do accept, however, that there was a risk, which should have been avoided, when children were

left alone with the childminder's assistant who did not have a first-aid certificate. Moreover, it should not be thought that we do not consider that what appears to be at best a lax approach to regulatory requirements is relevant to the question whether the Appellant's registration should be cancelled.

17. However, these people are all now known to Ofsted. The Appellant is now even more well aware than she was before of the need to have Ofsted's approval of a person as an assistant before that person is allowed to care for children. The question is whether she can be trusted to conform to that requirement until a final decision has been made on whether her registration should be cancelled.

18. Similarly, in relation to overminding (including a failure to maintain required staff:child ratios), the question is whether the Appellant can now be trusted to comply with the requirements to keep within numbers. Overminding is liable to give rise to a risk because it is more difficult to exercise adequate supervision over larger numbers of children. However, that risk is removed if there is no further overminding. Moreover, in some instances the overminding appears to have been the technical result of the Appellant being assisted by an unapproved assistant. On the other hand, there may have been other occasions when there was overminding that have not come to Ofsted's attention.

19. We do not consider that the breaches of safety requirements independently suggest a current risk sufficient to justify suspension. Since the child let herself out of the front door, the Appellant has kept the door locked with the key being on a hook nearby. We doubt that the children wandering out of the house when the inspector arrived on 23 November 2012 were actually at risk. Since the face-paint and glitter incident, the art trolley has been moved. The child being carried unrestrained in a car was the Appellant's own child and she has made arrangements to ensure that she always has a taxi fare or bus fare to give to him so that he will not be carried in the car in that way. There appears to be no evidence that there were children in the car when the mobile telephone was used. However, two of those incidents show the importance of adequate supervision and therefore not overminding and the illegal carrying of an unrestrained child in a car and the illegal use of the mobile telephone in a car are examples of the appellant's willingness to disregard rules.

20. The other alleged breaches of regulatory requirements would not in themselves justify suspension, but the evidence in respect of them is relevant insofar as it also shows a disregard of rules or a lack of honesty and therefore raises questions as to whether the Appellant can be trusted to comply with important requirements in the future. Mr Northfield, in his clear and helpful submissions, relied in particular on the evidence that the Appellant had been childminding while suspended and had misled an Ofsted inspector in that regard. There is also evidence that she has sometimes been less than open with parents and Ofsted is also concerned about apparently inconsistent answers given in relation to their enquiries. Much of this is in dispute. In particular, it is the Appellant's case that she has not acted illegally while her registration has been suspended and that, insofar as she has assisted with looking after children, it has not been for reward.

21. It is also part of the Appellant's case that she has been a victim of malicious complaints by other childminders. We see no evidence of malice. Any citizen is quite entitled to draw to Ofsted's attention to behaviour of a childminder that they consider puts children at risk of harm and other childminders will be particularly aware of what is expected. It may be that some reports turn out to be misconceived because the observer has not seen the whole picture, but that does not indicate malice. Even if the Appellant has not been acting illegally, it may have been inappropriate and unwise for her to have had any involvement in arrangements for childcare during a period when her registration was suspended on the ground that "the continued provision of childcare by [her] to any child may expose such a child to a risk of harm".

22. Mr Northfield submitted that Ofsted cannot be expected to monitor the Appellant on a daily basis and that the suspension is necessary because the Appellant cannot be trusted to comply with the conditions of registration and other requirements if she is not monitored closely. We certainly accept that Ofsted should not be expected to monitor the Appellant on a daily basis or even a weekly basis. However, the question is then whether we are satisfied that, with only light monitoring, the Appellant will comply with the conditions of registration and other requirements at least to the extent that it is not likely that a child will suffer harm.

23. We think it important to have regard to context. Whatever the rights and wrongs of the Appellant's conduct while suspended, the question of her childminding or making other unsatisfactory arrangements while suspended would obviously not arise if the suspension were removed. More importantly, even if it is accepted that the Appellant has acted, or failed to act, in disregard of statutory or other requirements and has on occasion been dishonest, it does not necessarily follow that she cannot be trusted to comply with the requirements that primarily concern us between now and whenever any decision to cancel her registration takes effect.

24. This is not a case where there is a particularly serious concern about general standards of child care. Our primary concerns are with overminding (including a failure to maintain required staff:child ratios) and, to a lesser extent (because with one exception the unapproved assistants used hitherto appear not to be people presenting significant risks), the use of unapproved assistants. It is relatively simple to comply with the relevant requirements. The Appellant has had a clear reminder as to what they are. She has every reason to comply with them if she wishes to keep her registration. Having heard the Appellant, we are satisfied that she now appreciates that the mere fact that a parent has what the parent regards as an emergency is not a good reason for overminding. She is entitled to say "no" and to explain that she would be committing a criminal offence if she were to accept the extra child. If she wishes to be helpful, she can give the parent the telephone number of another childminder. From now on, a claim that there has been an emergency is unlikely to impress Ofsted or the First-tier Tribunal or a magistrate. She also knows that she must regularise the position of any assistant *before* making use of them. On balance, we are satisfied that it is not likely that the Appellant will overmind or use unapproved assistants until a final decision is made as to whether to cancel her registration. Whether there is such a likelihood in the longer term will be an issue when that decision is made.

25. We therefore allow this appeal.

26. We stress that, in the event of new material coming to Ofsted's attention, it might well be entitled to impose a new period of suspension or, if no further investigation is required, to ask a justice of the peace to cancel registration with immediate effect under section 72. We also stress that nothing we have said is to be taken as indicating one way or the other whether the appellant's registration should be cancelled or whether she should be prosecuted.

Comment

27. In our view, Chapter 5 of Part 3 of the Childcare Act 2006 is not a wholly satisfactory piece of legislation because the provisions for the cancellation and suspension of registration do not fit together quite as well as they might. Given Ofsted's power of suspension, it seems anachronistic to require it to seek an order from a justice of the peace for an immediate cancellation of registration. It might be simpler, and at least as fair, if Ofsted were itself entitled to cancel registration with immediate effect on the section 72 ground provided that, in the event of an appeal, the First-tier Tribunal had the power to suspend the cancellation pending a full hearing of the appeal and then had the power to confirm the decision on section 68 grounds if not satisfied that the section 72 ground had been made out. The issues arising when considering whether to suspend a cancellation in those circumstances would be rather different from those that arise when considering whether a registration should be suspended while cancellation under section 68 is being considered.

Reporting restrictions

28. During the hearing, we said that we would impose reporting restriction in the same terms as those imposed by the First-tier Tribunal on 1 February 2013. However, upon reflection, we do not consider that we should completely prohibit publication of matters that might identify the Appellant, not least because that would prevent her from referring to the decision herself. In our view, her interests are adequately protected by mere anonymisation of the decision document, which is usual in suspension cases. If either party wishes to press for additional reporting restrictions, she or it may do so by applying in writing for the reporting restrictions to be varied.

**Judge Mark Rowland
Judge for the Upper Tribunal**

Dated 6 March 2013