Care Standards

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

Heard at Manchester IAC 26 and 27 April 2016

Before
Hugh Brayne (Judge)
Linda Redford (Specialist Member)
Michele Tynan (Specialist Member)

BETWEEN:

AS

Appellant

v

OFSTED

Respondent

[2015] 2569.EY

AMENDED DECISION

Representation

1. Duncan Toole represented Ofsted. AS had no representation, but was supported by her sister JL.

Restricted publication order

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

The appeal

3. AS has been registered as a provider of child care on the Early Years Register since 2003. She appeals against the respondent's decision dated 17 December 2015 to cancel her registration.

The legal framework

4. Under section 39 Childcare Act 2006 the Secretary of State must, by order, specify appropriate requirements relating to the learning by and development of children in the Early Years Foundation Stage, and requirements appropriate to governing the activities of providers. These are set out in the Statutory Framework for the Early Years Foundation Stage. The version of that Framework relevant to this appeal came into force in September 2014. In this decision we use the term EYFS requirements as shorthand to describe these requirements. Under section 40 and Schedule 1, Part 1 of the Childcare (Early Years Register) Regulations 2008 a registered provider must comply with the EYFS requirements, which are called the learning and development requirements and the welfare requirements respectively. The 2008 Regulations also require that a person be a suitable person (Schedule 1 paragraph 1).

5. The Chief Inspector for Ofsted may cancel a chidminder's registration under section 68 Childcare Act 2006 if it appears to him that the chidminder has failed to comply with a requirement of the EYFS. Section 74(1) provides a right to appeal to this Tribunal. Until an appeal is finally determined the cancellation does not have effect.

6. It is for Ofsted to demonstrate, on the balance of probabilities, the facts upon which it relies and that the decision to cancel the registration is proportionate and necessary. We must make our decision on the basis of all the evidence available to us at the date of the hearing; we are not restricted to the matters available to Ofsted when the cancellation decision was taken.

7. Under section 74(4) the Tribunal must either confirm Ofsted's decision to cancel or direct that it shall not have effect. If we decide that cancellation should not have effect, we may impose conditions on the appellant's registration.

The hearing

8. Mr Toole made a brief opening statement and we then heard oral evidence from each of Ofsted's four witnesses, all of whom took the oath. Lynn Byrne was, at the relevant time, employed by Prospects Services as a freelance Early Years Inspector. Anne Flynne is employed by Ofsted as an Early Years Regulatory Inspector in the North West Team. Sarah Dimsdale (known as Sarah Taylor during part of the period under consideration) is employed by Ofsted as an Early Years Regulatory Inspector. Helen Wood is employed as an early years advisory teacher by Rochdale Children's Services. Elaine White is Early Childhood Senior Officer for Ofsted in the North West Region. Each had provided a witness statement and, having confirmed the contents and veracity of that statement on oath, was briefly examined by Mr Toole before being questioned by AS. The Tribunal asked the witness brief questions where necessary and Mr Toole then had the opportunity for re-examination.

9. AS's witnesses were her daughter, JS, and her mother, RO. Both took the oath. Each confirmed the contents of her witness statement. AS

was given the opportunity to ask anything to bring the evidence up to date, the witness was then cross examined, briefly questioned by the Tribunal, and AS was given the opportunity to re-examine.

10. All witness evidence was taken on the first day, other than that of AS herself, who gave her sworn evidence on day 2, following the same procedure. However during the course of cross examination AS became upset and left the hearing. After a short adjournment her daughter, JS, in the presence of Mr Toole, told us she was authorised to discuss with us how to proceed. She said her mother felt she had already lost the appeal. We explained that if AS wished to stop her oral evidence at this point, and, subject to any right of Mr Toole to make submissions on that fact, she could; she was also free, if she wished, to withdraw the appeal. JS, after consultation with AS, and in the presence of AS and Mr Toole, said AS would not give further evidence and that the Tribunal should make its decision on the evidence it had. Mr Toole agreed to move to closing submissions, and when these were completed, JS made closing submissions on behalf of her mother, AS, who also from time to time added her own comments.

The history

11. The following history of inspections, visits and Ofsted decisions is not in dispute. The findings on which the decisions are based, however, are contested. We do not consider it necessary to repeat adverse findings which are purely historic.

- Investigation visit 8 November 2004, difficulty managing behaviour of a child, need for further training.
- Monitoring visit 24 January 2005, no additional behaviour management training
- Inspection April 2006 judged to be satisfactory with recommendations relating to accessibility of sharp knives, cat food and medication; AS still waiting to go on behaviour management course
- Inspection 28 April 2009, judged inadequate. Appellant did not identify or record starting points and did not discuss progress and next steps with parents to support learning at home; no daily planning; no system to ensure balance in all areas of learning; no activities and limited resources to support diversity; no risk assessment for outings in place; 17year old daughter not CRB checked.
- Monitoring visit 26 October 2009, actions raised from previous visit now met.
- Inspection 17 April 2015, judged inadequate. Inadequate knowledge/understanding of progress check for children age two to three; does not share with parents what children are learning; does not gain information regarding child's achievements and level of development at home and in their own language; does not support

children to develop and use home language in play and learning; does not accurately assess level of development and cannot plan challenging activities; insufficient knowledge of learning and development requirements; programmes not sufficiently challenging; does not ensure required records accessible; risk assessments not reviewed effectively.

- Monitoring visit 27 May 2016. Risk assessments not reviewed effectively; required records not accessible; appellant has not read EYFS and does not do planning to meet children's needs; does not assess progress in all areas; has not completed progress check between ages of two and three.
- Monitoring visit 17 June 2015. Appellant does not plan for the seven areas of learning; has not implemented accurate assessment processes; poor understanding of learning and development requirements; has not implemented progress check for children aged between two to three; not providing opportunity to use home language through play.
- Monitoring visit 29 July 2015. Failed to share safeguarding concerns with LA; has not implemented accurate assessment processes to identify gaps in attainment; no improvement in knowledge of learning and development requirements and ability to provide challenging and stimulating activities for children to monitor progress not improved; failure to implement progress check for children age two to three; no opportunities to use home language during play. Welfare requirements notice issued and notice to improve. Suspension of registration.
- Monitoring visit 5 August 2015, welfare requirements met, suspension lifted.
- Monitoring visit 26 August 2015. Appellant unable to identify gaps in attainment; no improvement in knowledge and understanding of learning and development requirements and abilty to provide challenging and stimulating activities; no opportunities for children to use home language during play.
- Monitoring visit 17 September 2015. Appellant unable to identify gaps in attainment or areas where child may need further challenge; no improvement in knowledge and understanding of learning and development requirements and abilty to provide challenging and stimulating activities.
- Inspection 17 November 2015 resulting in suspension for breaches of welfare requirements and decision to cancel registration. Unsupervised access by individual not checked by Ofsted; not all records available for inspection; teaching weak with little interaction to help child learn; poor understanding of areas of learning and how to promote learning and development; not meeting needs or helping to progress with potty training; progress check inaccurate; assessments do not identify gaps; educational programmes lack depth and challenge; fresh drinking water not available at all times;

meals and snacks not healthy and nutritious; access to hazardous materials; failure to teach children about similarities and differences between themselves and others; lack of understanding of appropriate behaviour management strategies.

- 20 November 2016 notice of intention to cancel registration.
- Monitoring visit 8 December 2015, some steps to reduce risk to children, suspension lifted.
- Monitoring visit 8 December 2015 hazardous items accessible.

12. During the period on which the Tribunal mainly focuses, AS has minded four children. There is little documentary evidence to confirm these details, but the following is what AS told us.

- Boy A was born 26 June 2012. She started to mind him in June 2014. She is still minding him full time, though he now attends nursery three mornings a week.
- Boy L's date of birth is March 2011. He is Boy A's brother. AS started to mind him in August 2014. This stopped in May 2015 when he went to live with his grandmother. She still collects L from school and looks after him until she takes both boys home at 6 pm.
- Girl L1 was born in June 2014. AS started to mind her full time just before her first birthday in June 2015. When AS was suspended in July 2015 her mother placed her in a nursery and L1 did not return to AS's care.
- In July 2015 she was known to be minding a one year old girl, whose name and date of birth do not appear in the paperwork.
- Girl L2 was age six at the relevant time. She was minded from September 2014 to November 2015, when AS was suspended for the second time. AS collected her from school, minded her until 6 pm, then drove her home at the same time as driving Boy L and Boy A home.

Tribunal's conclusions with reasons

13. The requirements set out in the 2014 Framework are intentionally demanding. The Introduction makes clear that a chid should have the best possible start in life. The standards must ensure that children learn and develop well and are kept healthy and safe. The requirements set out, amongst other things, seven areas of learning and development; assessment requirements including how progress is to be discussed with parents; and a specific requirement to check progress between ages two and three. For children whose home language is not English reasonable steps must be taken to provide opportunities for children to develop and use their home language. Providers must be alert to issues of concern in the child's life, and have in place and then effectively implement a safeguarding policy. They, and Ofsted, must check suitability of people looking after children and those who have regular contact or live on the premises.

14. We do not need to set out requirements in place before the 2014 version of the Framework. This is because, in relation to alleged failures to comply which arose before September 2014, the question for us now is not whether AS did not meet those requirements. If we find any of the 2014 requirements are not met, we have to exercise discretion in deciding whether to allow the appeal or confirm the cancellation. That discretion may be informed by any findings we make relating to AS's history

15. The parties helpfully completed a Scott Schedule of disputed issues. The above history is informed by that Schedule. Mr Toole sought the Tribunal's assistance during cross examination as to whether it was necessary to cross examine on each issue in the Schedule. We advised him that we would intend to make findings under broad headings, and that is the approach we take below. These are categories we identify ourselves after the conclusion of evidence. There appear to us to be overarching issues relating to credibility and then suitability, after which we consider what we consider to be a number of significant issues arising from the Scott Schedule, in particular safety and safeguarding.

Alleged lying of respondent witnesses

16. AS and her witnesses are firmly convinced that Ofsted and the Local Authority Advisory Teacher have lied about much of the evidence it now relies on. It is, in particular, alleged that conversations which Ofsted says are contemporaneously recorded via a laptop into what are known as Toolkits have been falsified. AS said in cross examination that the insertion of lies into the documentation extends back to a monitoring visit in 2006 and includes records of discussions with Ms Wood. If she is right the respondent's officers, including previous inspectors, together with an officer from the local authority, have been involved in what amounts to a concerted and long-term conspiracy to produce false evidence. The motivation, she states, is embarrassment at having issued two suspensions which were both withdrawn in under a week, leading to a need for revenge (finding a reasons for cancellation at all costs) and lying to save face. This explanation of events does not provide motivation for alleged lies before these suspensions. AS and JS both told us of Ofsted ruining the careers of childminders on a regular basis, and this is the only other motivation suggested, which we interpret to mean that making up evidence harmful to registered childminders is part of the Ofsted culture.

17. We cite an example. A monitoring visit took place on 29 July 2015. At some point AS's daughter, JS, became involved in an altercation with the inspector and Helen Wood, who was also present. This much is not disputed, though the actual words spoken and gestures are disputed. The contemporaneous record made by the inspector shows this exchange started before she told AS she was going to be suspended. JS gave evidence that she did not become involved until after the mention of suspension. The allegation is that Ms Dimsdale

has, either at the time of making the record, or later, changed the sequence around. It is also alleged that some of what JS is recorded as saying in this exchange has been made up. This is perhaps the most graphic example. Many of the things recorded in Toolkits of the three Ofsted witnesses or the notes of Ms Wood are said by AS to be deliberately wrong. In fact this was the explanation offered each time AS or JS disagreed with evidence from the respondent, that it was a lie, so there are numerous instances.

18. The witnesses against whom these allegations were made denied falsifying documents and deny lying on oath. The Ofsted witnesses referred to the protocols and code of conduct to which they adhere. All referred to the fact they would have no reason to make up evidence.

19. We do not agree with AS that this is what has happened. If her beliefs stem from the lifting of the suspension after a matter of days, it shows that she misunderstands the purpose and procedure for suspension under the Childcare Act. A suspension is an emergency measure which should remain in place only so long as there a reasonable belief that harm may be caused to a child, and should be in place while that risk is investigated. Once the Chief Inspector, or his area officer in his place, is aware of steps taken to avert risk or of evidence that there is no risk of harm the suspension must be lifted. AS believes Ofsted realised they were wrong and that is why they had to lift he suspensions rapidly. In reality the records clearly indicate that in each case a visit took place to check that steps had been taken to address the concerns, in order to consider if the suspension could be lifted quickly. This is routine, it is what is demanded by the legislation, and it is wholly wrong to conclude that the lifting of the suspension was recognition of Ofsted having made a mistake. There is no basis for AS's belief that Ofsted is embarrassed or sought revenge for being shown to have made a mistake.

20. We take into account that Ofsted and the local authority have, through the history, shown commitment to providing advice and support as well as carrying out, in the case of Ofsted, its regulatory function. Visits have repeatedly resulted in actions being identified which will enable AS to meet EYFS requirements, and when actions have not been met Ofsted has until November 2015 preferred to offer advice and opportunity for improvement rather than take enforcement steps. We note that Ms Wood has provided evidence of sending AS considerable volumes of material, has followed up AS's failures to respond to emails and letters with phone calls to bring matters to her attention, and has during the critical period leading up to the cancellation decision provided fortnightly visits to support her. None of this is consistent with the agenda of Ofsted and the local authority looking for or manufacturing reasons to cancel.

21. Further the way in which evidence is recorded on a contemporaneous basis by Ofsted and immediately filed and shared with managers for the purpose of decision making would make subsequent tampering very difficult and, in terms of breaks in the flow of conversation,

probably identifiable. It is only particular detail adverse to AS that is said to be fabricated, whereas if there was a systematic intent to fabricate evidence it would be more than detail which was inconsistent with her own and her daughter's recollections. We accept that AS holds the genuine and firm view that her recollection is correct where it differs from that of Ofsted's witnesses, but we find she does so, on the basis of failing to consider that it is much more likely that she is now remembering a version which suits her case. We note that no allegations of lying by Ofsted were raised before the suspension and cancellation decisions, despite a long history of adverse findings.

22. Finally, AS told us that she generally does not read documents sent to her by either Ofsted or Helen Wood. She did not, for example, read the report and the action points from the 2009 visit. She has not read the toolkits set out in the bundle. At times in her evidence she admitted that she could not remember some events accurately because of the passage of time. However when her evidence differed from the content of these documents, mostly contemporary records or derived from them, she was adamant that she could remember what was said and therefore what was recorded was a lie. We find she fails to take account of the probability that her memory may be inaccurate, and that the accuracy of her memory may has been adversely affected by the depth of her belief in the alleged conspiratorial and hostile behaviour of Ofsted witnesses.

Reliability of AS's evidence

23. Having failed to accept AS's accusations of lying as having any foundation, we are faced with the alternative possibility that aspects of AS's own evidence were unreliable and, at times, either knowingly untruthful or given without regard to truth. When questioning led to inconsistent answers, and these were pointed out, AS tended to avoid giving a clear answer as to which was the right answer. We suspect that when she then strayed into material that was irrelevant to the question put and the clarification sought she was deliberately avoiding facing up to the inconsistencies. A clear example of such inconsistency was the date on which she did the two year progress check on Boy A. We ignore, for the moment, the fact that she should have herself known it was something she had to do without being told to do it. Helen Wood recorded this, with AS countersigning, as an agreed action on 8 April 2015. AS says Ms Wood read out what she was writing, and it did not include this. She signed but did not read it then or after receiving her copy. The reference to this action point was on her evidence a lie. She says she was not aware of the need for this check because she was not told. This was an action point following the inspector's visit on 17 June. Again she denies this was discussed, and that the fact it is recorded as having been discussed in the Toolkit and then the published report does not reflect her actually being told. She also denies what is recorded in the inspector's Toolkit, that she said she did not have to do a progress check because someone else had done one. She told us she completed the progress check before the end of May 2015. It was pointed out to her that she completed and

signed a form reporting on actions completed following the April 2015 inspection stating that the progress check took place on 4th July 2015. Having said she definitely completed the progress check by the end of May, she then said it could have been the beginning of June. She gave no satisfactory explanation as to why she signed a form saying 4th July. In any event this was an action still not completed at the inspection of 29 July 2015.

24. The actual progress check does not have a date on it. This reduces its usefulness, since any third party looking at it is not reliably informed when considering, for example, the rate of progress of child A since the progress check took place. But that is a matter relevant to understanding of the EYFS requirements, not the truthfulness of the appellant. We can see no satisfactory explanation for this sequence of events, and find that AS did not complete this form before 29 July 2016. Her claim that she did is intended to mislead us.

25. A similar problem arises when considering the ways in which AS recorded when Boy A reached particular stages of development. She was reliant on Helen Wood to provide her with the template for this. When providing documents relied on for the appeal, she says she sent her only copy of this, which is why, after that date, she could not use those templates. She told us that from January 2016 she used a template where progress is registered against various expectations at particular ages which was contained both in the bundle and a supplementary bundle. This template is shaped like a flower. Moving from the centre outwards represents a child's increasing age and abilities recorded. The petal is coloured in to show achievement. The fact that AS filled both the flower-template and the template supplied by Helen Wood (the original template) retrospectively, rather than record progress at the date it was noted, is not the present concern. The concern is that AS told us that she stopped using the original template in January 2016 and not having a copy any more had to use the flower template and would later transfer the record. However when it was pointed out that, according to her colour key code, she had recorded milestones achieved for January to April 2016 she agreed that she had continued to use both systems in parallel. She had previously been emphatic that she had only used the flower system during that period.

26. Another small matter arose during her cross examination on these templates. She was asked why she recorded milestones achieved before the date on which she coloured in the relevant section, since the purpose of the record was to establish when the milestones were achieved. She told us that she wished to record all milestones achieved during Boy A's time in her care, but not those achieved before she started. Asked why some milestones were coloured which related to an earlier period, she emphatically denied doing this herself and said someone else must have done it. This appears to us to be not at all likely. There is no reason for anyone else to do so, unless she is not telling us about the involvement of some other person in Child A's assessment. She may not remember colouring in that section and to get out of what appears to be a difficult point in her

evidence preferred to deny responsibility and blame an unknown person. Why she felt compelled to do this is unclear, but it is probably because she failed to understand that colouring in retrospectively for the period she was involved or for an earlier period is equally valueless as a way of charting progress. She did not need to make up the evidence at that point as it was already clear she had missed the point.

27. As is noted below, very few of the appellant's documents relating to any particular child are accurately dated. Since she feels that planning is not important and activities should be child-led (she told the Tribunal this was the reason the plans were not dated) she may consider such documents to be of little importance. It is clear that AS does not believe in the importance of documentary trails, but that makes it more difficult for us to rely on assertions of what happened when, or for her to avoid the temptation to vary her account in an apparent, but ultimately futile, attempt to explain her actions. We find it regrettable that when faced with inconsistencies in her own evidence, or disputes with the evidence of Ofsted witnesses, she was willing to fabricate explanations on the spot. This very seriously undermines our confidence in her suitability as a childminder, as all concerned – parents and the regulator – must rely on what a chidminder says and what she records as being totally truthful. Our suspicion is that the undated progress check was in fact written much later than May 2015 or even July 2015, the dates we looked at above. It is not recognised by Ms Wood or by Ms Dimsdale from subsequent visits. It did not appear even in the original hearing bundle. It was tendered at the start of the first day of the hearing. We find the probable explanation is that it was written a matter of days before the hearing. As such it is a wholly valueless document. Boy A is nearly 4 and a two year progress check prepared for the purposes of the appeal conveys no useful information, though it seriously undermines AS's credibility in her own appeal.

28. We reach the same conclusion in relation to the scrapbook for Boy A which appeared in the same late evidence. AS says she compiled this for Boy A when he started, but not for any other minded children. Her reason is that two of the other children did not remain long with her, but if she started when the minding started, that is irrelevant. The scrapbook has no dates in it, and all pictures and captions are out of sequence, the explanation being that AS stuck in photographs wherever there is space. A scrapbook is a very good tool for making a record for the child and parents. AS says she would show it to Boy A's parents, but we are unable to understand how they could have made sense of it if every two weeks they had to look backwards and forwards to find photographs of what has happened since the last time. A far more probable explanation is that AS put together this scrapbook hurriedly from photographs available to her at the time, shortly before this appeal, and has chosen to attempt to mislead us into accepting it as a contemporaneous document.

29. A further example arises with the question of whether before or during the inspection visit by Anne Flynn in April 2015 AS informed Ofsted

that she was minding Girl L2, who was, at that time, we now know, being collected from school by AS and minded until taken home at 6 pm. There is a straight conflict of evidence, AS telling us she did tell Ofsted, the contemporaneous record showing no mention. When asked why she did not tell Ofsted about this girl, she said "Why would I tell Ofsted about four children when I had five?" (The reference to these numbers is because two older children were present as part of a private arrangement with which neither Ofsted nor the Tribunal are concerned.) In telling us that she did tell Ofsted about minding Girl L2 at the time, rather than admitting that she did not do so, we find AS's conduct entirely in keeping with how she dealt with conflicting or adverse evidence throughout the proceedings. She insisted others were inaccurate and she was correct. We find her claim to have informed Ofsted that she was minding Girl L2 is false. We accept that she had no reason not to inform Ofsted, and at that time was probably not concealing anything deliberately, but her manner of making false claims this frequently in these proceedings is cause for significant concern.

30. These are examples of AS providing the Tribunal, knowingly we find, with false information. Much of her evidence is not false but unreliable. The unreliability is caused by a number of factors. AS told us she does not read, or read fully, material Ofsted sends her, so she relies on memory as to what happened when. Most of the records she provided us with, such as attendance registers, she told us she completed after cancellation of registration, for the purpose of the appeal. Though at first she said she had complete recall, including times of arrival and departure on each day, in cross examination it turned out that on days she had been absent (in hospital then recovering) her registers showed her minding children. She fails to understand that such records, retrospective and inaccurate, are not merely worthless, but potentially harmful, as they provide an official record which, for example if a safeguarding investigation were to require evidence as to where a child was at a particular time, is false and misleading. We can only conclude that AS does not see any benefit to the children she minds in dating key documents such as attendance registers, assessment records and plans.

31. The above findings, in our view, cannot but lead to the decision that AS is not a suitable person to be registered as a childminder. A casual attitude to accuracy, consistent failure to keep written records, a willingness to fabricate evidence, and a confrontational approach leading to wholly unmerited accusations of lying against the regulator, make it impossible for the regulator to ensure that requirements are met.

32. We are also extremely concerned that AS has demonstrated no understanding at any stage of the visits, support from Ms Wood, or during the appeal itself, of the EYFS framework. On 27 May AS told Sarah Dimsdale during a monitoring visit that she had not read the EYFS. On 17 June Ms Dimsdale records that AS was unable to explain how she would plan activities to cover the seven areas of

learning. On a further visit on 29 July she found that AS was unable to name the Early Years Foundation Stage or provide any activity ideas for young children.

33. In evidence she told us she has never read it. Because we were somewhat surprised by this evidence we repeated and rephrased the question a number of times to be absolutely sure of what we were being told. AS has, she confirmed, only skimmed it, and says she has it available for reference. She told us she gets her information on requirements from other childminders. This is a serious failure for two reasons. The first is that she cannot comply with requirements about the details of which she is ignorant. The second is that she wholly fails to understand or comply with the regulatory regime established under the 2006 Act. In her evidence her attitude becomes clear when, for example, explaining why she did not provide any support or Boy A's first language. She was willing to accept it as a further action (see for example signed note of actions agreed with Helen Wood 27 May 2015) but was for a long time unwilling to implement it, saying in her witness statement: "As long as Alex's parents and teachers are happy, Ofsted is completely irrelevant and unimportant." The correct approach would be to read the requirements carefully, discuss with Helen Wood or Ofsted, and then with the parents, what is actually meant by paragraph 1.7 and the requirement to "take reasonable steps to provide opportunities for children to develop and use their home language in play and learning…" It is simply not open to a childminder to make decisions to ignore requirements altogether, and it makes it of greater concern that she appeared to agree to actions that she did not intend to implement.

34. Having reached the conclusion that AS is demonstrated her unsuitability to continue to be registered as a childminder, and that we do not accept that the evidence of Ofsted is unreliable because the witnesses have fabricated all of part of it, it is already inevitable that the appeal will fail. Some areas of dispute set out in the Scott Schedule have already been considered: failure to carry out two year progress check; failure to maintain accurate attendance records; lack of understanding of learning and development requirements; and support for use of a child's home language, in particular. We therefore deal only with major issues in the following analysis of the issues raised in the Scott Schedule which are not covered by the above findings.

35. We consider AS's two most important alleged failings to meet the EYFS requirements fall under the headings safety and safeguarding.

36. Before making findings under these headings, we note that evidence that the father of a boy and a girl both minded by the appellant during the period of the most recent inspections has confirmed he is very happy with the quality of AS's care of his children.

Safety and welfare of minded children

37. Ofsted has reported following a number of visits concerns relating to children having access to unsafe environments. Despite AS's

allegation that the inspector in 2006 did not raise with her any allegation of relating to cat food when giving feedback, and this has never been an issue before, the toolkit and written report clearly show this was raised. She continued until at least November 2015 to put cat food and cat litter where children can access it. At that inspection the children were found to have access to other hazardous materials in the kitchen and bathroom. These are listed in the report and, apart from the vodka, not disputed. The two explanations offered by AS are that the children are supervised at all times, do not go into the bathroom, and that the vodka bottle was empty not approximately one fifth full as recorded by the inspector. We have no reason to agree with AS that the inspector must have been wrong about the bottle still having liquid in it, and note that AS did not raise it with the inspector at the time; and we consider access to hazardous materials, matters raised on previous inspections, remains a serious concern even if children are supervised and told not to go into the bathroom.

38. Much time in the hearing was taken up with the question of whether it was appropriate for JS to drive the children home (AS having a broken wrist) when JS herself was in an agitated state following the first suspension in July. We do not need to make findings on this. This was a one off event and there is no alleged pattern of AS allowing children to be put in danger when being driven.

39. We have seen AS's written risk assessments, though no inspector has seen these on a visit. They were submitted as part of the late evidence. AS agreed that they are not dated or completed on a scheduled basis. They therefore cannot be relied on to demonstrate that risks are adequately assessed. Her risk assessment should have identified the hazardous materials to which the children should have access. It is no doubt because she does not know how to assess risk that Child A pulled a television onto Child L in February 2015. We note and accept the findings of the inspector, Anne Flynn, who discussed this matter with AS afterwards and noted that AS said, when asked how to reduce risks of this sort, that she had told the children not to touch the television again but she could not afford to buy a new one. She could not explain to the inspector how she would identify how she would remove or minimise hazards and risks. We agree with her conclusion that this compromises the safety of the children.

Safeguarding issues

40. These concerns arise in relation to two incidents. JS told us, and AS has previously told Ofsted, that JS's boyfriend stays in the house frequently. There is a dispute as to whether AS originally said this was Monday to Friday, but JS confirms this does happen, but the pattern varies from week to week. The boyfriend, TS, works as a football coach; he starts work at 2.30 pm, so he is in the house when children are minded. The question of whether he presents a risk to children is not the issue. We know he is DBS checked. The issue for Ofsted and the Tribunal is whether, as required, Ofsted had been provided with the evidence of the necessary DBS check. It is a requirement of the

framework that such a check has been completed, for someone over 16 living at the premises. Ofsted must be able to see the evidence and, we understand, then wishes to carry out its own advanced check. Inspector Lynn Byrne reported that this evidence was not available at the inspection on 17 April 2015. AS says she showed the DBS check to the inspector. This is a straightforward clash of evidence. Ofsted has subsequently accepted the DBS check and Ms Byrne herself, or Ofsted generally, has no conceivable reason to lie about not seeing the evidence on 17 April and then agreeing at a later date it is satisfactory. We are satisfied that the requirement to have systems in place to ensure persons likely to have regular contact with children are suitable (paragraph 3.10 of the Framework and Schedule 1 Part 2 Childcare (Early Years Register) Regulations 2008 mean AS must provide the evidence on an inspection, and has to conclude that AS has not demonstrated suitability if she cannot do so. AS has misunderstood the requirement if she believes, as she appears to have argued to us, that because TS turned out to be suitable the requirement was met. Her belief that paperwork is not important undermines her abilty to demonstrate compliance.

41. The other matter is even more significant. A provider must comply with official and local guidance in relation to safeguarding (Framework 3.4). During the short period that Girl L1 was being minded by AS, according to the inspector's records, AS told inspector Sarah Dimsdale (visit of 29 July 2015) that the baby's father was on bail with a condition not to go near the family home. AS is recorded as telling the inspector she believed the father was breaching these conditions, and that AS was not concerned. What she is recorded as saying on that visit to the inspector is now denied and described as a lie. But if we accept Ms Dimsdale's evidence, AS then accepted advice (including advice from her own daughter JS, who now denies this) to contact social services with her concerns. There is no evidence, in fact, that AS ever did contact social services, and in her subsequent evidence to the Tribunal she continues to deny that she should have done this. For reasons set out above, we accept the inspector's evidence in preference to the denials of AS. We also take into account that, on her own evidence to the Tribunal, AS believed should not report such matters as a father has a right to access his child and the involvement of social workers in this case would be inappropriate.<u>Learning and Development requirements</u>

42. We have already made findings that AS is knowingly providing childminding services without being familiar with the EYFS Framework, and not abiding by actions or steps recorded as having been agreed with Ms Wood or inspectors because she does not read the documentation sent to her recording these actions and denies them being spoken. She has denied planning activities, and confirmed that the plans now in place (which were written after cancellation) are not dated because she prefers to follow the child's preferences. We have already found compelling reasons to discount the reliability of any evidence she gave us where there is evidence to the contrary. The

Scott Schedule reflects clear contemporaneous and, in our view, reliable reports of the consequences of this approach. On most visits there are reports including activities being limited in scope, progress not being assessed, or insufficient challenge. It is the respondent who has the burden of proof and the contemporaneous documentation of their evidence on which the conclusions are based is firm. This is in contract to AS's response to specific incidents where such evidence is denounced as lies. AS simply refutes this evidence but without any alternative evidence other than the satisfaction of the parents, assertions as to Boy A having improved "1000%" and having known nothing before AS became involved. We find the evidence of the respondent more than satisfies the burden of proof that AS does not understand, does not see the importance of, and does not comply with the Framework in respect of each and every allegation relating to learning and development raised in each and every inspection and visit report and toolkit before us.

Other requirements

43. It will be apparent from the above discussion that AS does not comply with requirements relating to documentation. Belated production of insurance and DBS documents is not, given the many other failings and the repetition of these failures, acceptable, and, where it is not the result of simple ignorance of requirements, demonstrates at times a wilful defiance of such requirements. The fact that a vehicle is insured does not of itself meet the requirement to maintain documentation.

44. Allegations relating to failing to provide drinks or a varied diet, or of admitting putting a child in a car as punishment, and other allegations which are too numerous to list, are all supported by contemporaneous records and subsequent denials and allegations of lying are insufficient to displace this evidence. Those allegations are accepted as demonstrated on the evidence. In fact, for the avoidance of doubt, we find that Ofsted has satisfied the burden of proof on all allegations of failures to comply with the 2014 framework.

Appellant's submissions post-hearing

45. The Tribunal received further submissions from AS via email dated 29 April. By the time of receipt the panel had determined the appeal and drafted this decision, save for this paragraph and paragraph 46.

46. AS quotes parts of the EYFS Framework and the Ofsted Inspection Handbook. Judge Brayne has considered whether, as part of the overriding objective of fairness and justice, the fresh submissions should now be the subject of further submissions from the respondent and then a fresh decision of the panel. It is Judge Brayne's opinion that none of the matters raised justify soliciting the respondent's comments and reconvening the panel to consider the appeal afresh. There is no reason why the matters raised in the email could not have been mentioned at the hearing. Further, the possibility that the content of these public documents, which are in any event known to the panel, would have affected the Tribunal's decision is remote. The concluding

comments which follow are as drafted by the full panel before receipt of these submissions.

Concluding comments

47. AS, at a point where she was upset and left the hearing, was heard to say that no-one takes seriously the needs of this little boy, and words to the effect that "everyone is against us and it is a stitch up." It may well be that on reading this decision AS considers the process to have been unfair. We take this opportunity to address one matter which may be raised. At three points in the hearing, when substantial admissions were made by AS – the most important of which was that she had never read the EYFS Framework – the Judge paused proceedings and pointed out that this was an important matter which would carry weight in the Tribunal's deliberations. He said no conclusions would be reached until all evidence and submissions were heard, but made AS aware that at any time if she felt the case was not going as she had hoped she could consider her right to apply to withdraw the appeal. We consider this was a fair and reasonable matter to draw to her attention, and something an experienced legal advisor might have discussed with her had she obtained representation. We did not at that time have any view on the overall merits of the appeal, other than to point out the significance of these items of undisputed evidence.

48. The order below is made because we find AS to be an unsuitable person to be registered as a provider under the 2008 Regulations and has failed to comply with requirements imposed on her by those Regulations. We therefore confirm under section 74(4)(a) Childcare Act 2006 the Chief Inspectors decision to cancel registration.

Order

1. **The appeal is dismissed.**
2. **The Chief Inspector's decision to cancel registration is confirmed.**

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

Date Issued: 09 May 2016
Date Issued under Rule 44:17 May 2016