Care Standards

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

Heard on 4, 5, 6 and 7th December 2017 at Walsall County Court, Walsall

BEFORE

Helen Clarke Judge
Jennifer Cross Specialist Member
Sallie Prewitt Specialist Member

[2017] 3057.EY

BETWEEN

Mrs Nasim Rashid

Appellant

-v-

Ofsted

Respondent

Representation

The Appellant was not legally represented, but she attended and was assisted in putting her case forward by her husband Mr Rashid (Mr R)

The Respondent was represented by Mr Toole (Counsel)

Reporting order

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

2. The Appellant appealed under S74 of the Childcare Act 2006 (the 2006 Act) against a decision of Ofsted dated 7June 2017 to cancel her registration as a child minder. On 1st July 2016 Ofsted notified the Appellant of its intention to cancel her registration. The reason for the cancellation of her registration was because Ofsted no longer believed that the Appellant

was suitable to remain registered as a childminder, because of a number of concerns including:

a) The decision by Birmingham City Council (BCC) on 5 October 2016 to deregister the Appellant and Mr R as registered foster carers, because of serious concerns about the emotional welfare of a child (RH) who had been fostered by the Appellant and Mr R until he was removed from their care in December 2015.

b) The Appellant on a number of different occasions including in conversation with Ofsted referred to RH as "it" instead of using his name and continued to do so despite being advised that it was unacceptable to do so.

c) The limited emotional bond between the Appellant and RH which had been witnessed by RH's social worker (PB) and RH's Family Support Worker who both gave evidence to the Tribunal. This limited emotional bond in turn caused RH on occasions to "freeze" at the sight of Appellant and to sometimes be reluctant to return home from school.

d) The Appellant's lack of involvement with and contact with RH's school, and the inability of the Appellant to use the card and symbol system that the school had introduced to help RH's communication difficulties.

e) The lack of receipts or any accounts to verify that the Disability Living Allowance claimed for three years had been spent on RH

The Law

3. The legal framework for the registration and regulation of childminders is to be found in Part 3 of the Childcare Act 2006. (the 2006 Act).The requirements are prescribed by the Childcare (General Childcare Register) Regulations 2008 (as amended) (the General Regulations 2008) and include, that the person registered is suitable. Section 68 (2) of the 2006 Act enables Ofsted to cancel a person's registration if it appears that this requirement cannot be satisfied. Section 74 (1) of the 2006 Act provides a right to appeal to this Tribunal.

4. The legal burden remains vested with the Respondent to prove on the balance of probabilities all those facts and matters it relies upon to justify cancellation as at the date of the hearing.

5. The process of cancellation of the Appellant's registration as a child minder also constitutes an interference with her Article 8 right to privacy and a family life and any interference with that right must be both in accordance with the law and necessary. The Tribunal must be satisfied that the decision to cancel registration is a proportionate response by the Respondent to the matters proved.

6. The decision must be made on the basis of all the evidence available to the Tribunal at the date of the hearing, and is not restricted to the matters available to Ofsted when the cancellation decision was taken.

The Tribunal Proceedings

7. The Tribunal bundle consisting of over 2,000 pages of documents was considered by the Tribunal including late written evidence submitted by both parties The Tribunal heard oral evidence from 8 witnesses for the Respondent; the Appellant's husband Mr R and briefly from the Appellant. All the witnesses were asked to give their evidence on oath or to affirm. On the fourth day of the hearing as the Appellant (who had asked to affirm) was asked to read the affirmation statement, it became immediately apparent that the Appellant was unable to read English. The Appellant then confirmed directly to the Tribunal that she was unable to read English.

8. To try to gauge the level of the Appellant's understanding of English and her ability to speak English the Tribunal asked the Appellant some simple open questions about the food RH liked, his favourite toys and the television programmes that RH liked to watch. The Appellant was able to understand and respond to most of the questions the Tribunal asked but her replies consisted of short statements rather than complete sentences and her vocabulary was limited.

9. The Tribunal was surprised and concerned about how the Appellant's illiteracy would impact on the Tribunal proceedings and decided to have a short recess to consider the matter and reached the following initial findings:

a) In her original appeal application form to the Care Standards Tribunal the Appellant did not request an interpreter or indicate that that she could not read English.

b) The Tribunal was acutely aware that it had already heard over three days of oral evidence and that the only witness left to give evidence was the Appellant. The Tribunal unanimously agreed that without an independent interpreter to if necessary translate individual pages of the 2000 plus pages of the Tribunal bundle it would be almost impossible for Counsel for the Respondent to cross examine the Appellant , as asking the Appellant to look at the minutes of meetings , schools records and review meetings would be meaningless unless translated. The Tribunal would be faced with a similar problem if it wished to ask any questions of the Appellant which required the Appellant to refer to the Tribunal bundle.

c) The Tribunal considered and unanimously concluded that the impact of the Appellant being unable to read English was so serious that it must consider applying Regulation 8(4) (c) of the Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the Tribunal Rules) which enables the Tribunal to strike out the Appeal on the grounds that there is no reasonable prospect that the Appeal will be successful.

d) The Tribunal also reminded itself of Regulation 5 the Tribunal Rules which states that in respect of a decision to strike out the application under Regulation 8(4) (c) of the Tribunal Rules it must first give the applicant an opportunity to make representations in relations to the proposed striking out.

The Application for Strike Out

10. The Tribunal then explained to both parties that the Appellant's inability to read and write in English was so fundamental to the question of the suitability of the Appellant to be a registered child minder that it was proposing to strike out the application. Mindful that the Appellant was a litigant in person and was being represented by her husband in the Tribunal, both parties were asked whether they needed an adjournment to have time to prepare any representations they wished to make to the Tribunal proposal.

11. Unsurprisingly Counsel for the Respondent did not want an adjournment. Mr R said that the Appellant did not want an adjournment and that he wanted to make his submissions to the Tribunal and for the Tribunal to make an immediate decision. The Tribunal was concerned as whether Mr R understood the importance and consequences if the appeal application was struck out and so repeated again that if the Tribunal's decision was to strike out the appeal would end and Ofsted's decision to cancel the Appellant's registration would be upheld. Mr R again confirmed that he did not want an adjournment to prepare his submissions and that he wanted the decision to be made on that day. The Appellant also then spoke directly to the Tribunal and said that she wanted the decision to be made on that day. The Tribunal then retired to allow both parties to prepare their submissions.

The Respondents' Submission

12. Counsel submitted that the Respondent wanted to make an immediate application for an order to strike out under Rule 8 (4) (c) of the Tribunal Rules. The Respondent sought to rely on the General Regulations 2008 as amended by The Childcare (Welfare and Registration Requirement) (Amendments) Regulations 2014, which requires that anyone operating as a child minder under the Later Years regime must have an effective system in place to ensure that any person caring for children has sufficient command of the English language to ensure the welfare and safety of children. Counsel submitted that it was not only about being able to speak and to have a command of the English language; a childminder also needed to be able to read and write in English in order to understand and implement the statutory child minding policies and regulations specified by Ofsted. If the Appellant is unable to read the details and information contained in the policies how could the Appellant implement them as required under the General Regulations 2008 Schedule 3, including delivering written copies of the policies to the parents if necessary?

13. Counsel submitted that a problem could arise if a parent or the school sent a letter or a written document to the Appellant about the safety of a child or some other welfare issue as the Appellant would be unable to read it and then act immediately. Mr R could read the document or note and then inform the Appellant, but he is not the registered childminder and he might not always be available to assist the Appellant.

14. The Appellant would also be unable to make a formal written record in English of any discussions and disclosures made by the children whilst in her care.

15. Counsel referred the Tribunal to case of Rebelo v Ofsted 2015 2480.EY (a copy of the decision was provided for Mr R) and whilst acknowledging that the facts were different and

concerned a child minder registered on the Early Years Register , Counsel submitted that the case was by analogy relevant , specifically para 10 of the judgement which states:

> *10. There is a further express Requirement in paragraph 3.26 of the Welfare Requirements which states "Providers must ensure that the staff have sufficient understanding and use of English to ensure that the well- being of children in their care. For example, settings must be in a position to keep records in English, to liaise with other agencies in English to summon emergency help, and to understand instructions such as those of safety of medicine or food hygiene."*

16. Counsel observed that it was very disappointing that the Appellants' inability to read English had been discovered so late in the proceedings.

17. Counsel said the test for cancellation of registration as a childminder was the suitability of the person and the Appellant's inability to read English and the impact that would have on her child minding responsibilities made her unsuitable to be registered and that there was no reasonable prospect that her Appeal would be successful and so the Appeal should be struck out.

Appellant's submissions

18. Mr R began by stating that he agreed with all the observations made by the Respondent's Counsel, "specifically about reading and writing". However Mr R then questioned what was meant by having "sufficient English" and stated that they had passed their first aid training and had completed other training courses.

19. Mr R then directly appealed to the Tribunal with a request to help him to ask Ofsted "how we can move forward" from this situation. The Tribunal explained that it did not have the power or authority to negotiate or mediate on his behalf with Ofsted.

20. The Tribunal then asked Mr R whether, as he agreed with Respondent's submissions about the importance of a childminder being to be able read and write in English, he accepted that the appeal should be struck out. Mr R replied no as he did not think the appeal should be struck out.

21. The Tribunal then retired to consider the submissions. The Tribunal unanimously agreed to strike out the Appeal. The Tribunal orally informed the parties of its decision to strike out the appeal and stated that the written reasons for the decision would follow.

The Tribunals findings and reasons

22. The Tribunal heard oral evidence from the witnesses over a period of almost 4 days including PB who was RH's allocated social worker in 2015, DWH who is an Independent Reviewing Officer, who was employed by BCC to review RH's case and KJ who is an Ofsted Regulatory Inspector who visited and interviewed the Appellant in February and March 2016 after Ofsted's initial decision to suspend the Appellant's registration as a child minder. Concerns had previously been identified by BCC and Ofsted about the Appellant's

inappropriate use of the word “it” instead of RH’s name and PB , DWH and KJ all gave credible accounts to the Tribunal of hearing the Appellant on a number of different occasions refer to RH as “it” rather than by his given name.

23. The Tribunal takes into account that the Appellant was under stress when she was asked questions by the Tribunal, but she had already decided to give evidence to the Tribunal and the questions asked by the Tribunal were not in any way challenging. There is no formal test or assessment of the level of English that a child minder must achieve to satisfy the General Regulations 2008 (as amended). Based on the Appellant’s evidence to the Tribunal and Mr R’s acknowledgment that Appellant’s English is poor the Tribunal finds that the Appellant has a limited command of the English language which in turn restricts her ability to communicate except in the most basic terms, although the Tribunal accepts she may be able to comprehend far more than she is able to speak. Mr R in his oral evidence to the Tribunal acknowledged that “her level of English - it is poor” and that she has a problem with English grammar.

24. The Appellant’s lack of vocabulary and command of the English language means that she would find it difficult to understand and communicate any complex emotional , medical or educational issues in English to either the children in her care or adults without assistance from Mr R. The complexities of modern life mean that parents, the school and social care and health care professional increasingly communicate by letter, text and email as well as by telephone. The Tribunal considers that it is essential that anyone who takes on the responsibility of caring for another person’s child must be able to read and respond to written communications which might concern the child’s safety health or emotional well-being. Mr R stated that he was always the point of contact for any concerns raised by the school and for any educational needs that might be raised, but he is not the registered child minder.

25. Mr R in cross examination concerning the Appellant’s use of the word “it” instead of RH’s name said that he had tried to correct the Appellant on occasions. Mr R said that the Appellant had received no formal education, she had taken some English lessons, but she had found English grammar difficult. Despite Mr R’s acknowledgement to BCC and Ofsted as well as to the Tribunal that the Appellant had previously taken some English lessons but was still struggling with the English grammar, no one from BCC, RH’s school or Ofsted appears to have noticed or even raised the possibility that the Appellant was unable to read English, which the Tribunal finds surprising.

26. Mr R in his evidence to the Tribunal stated that if a child being minded had a problem with their schoolwork “we were always willing to assist and help with homework or spelling we would do that “.The Tribunal finds Mr R’s response in particular the use of the word “we” misleading and inaccurate as the Appellant clearly could not help the children (who spoke English when they were in her care) with reading or spelling in English.

27. The Appellant has been a registered child minder since 1996 and was originally registered on both the Early Years Register as well as the compulsory part of the General Register for older children, and during that time the standards and expectations including in relation to the English language have increased. General Regulations 2008 Schedule 3 (8) was amended in 2014 and a new requirement relating to the childminder’s command of the English language was inserted:

a) *(7) In paragraph 8—*

b) *(a)in sub-paragraph (1)(a), at the end add "and";*

c) *(b)for sub-paragraph (1)(b), substitute—*

d) *"(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."; and*

e) *(c) Omit sub-paragraphs (1) (c) and (1) (d).*

28. This requirement is to ensure the welfare and safety of the children and is an essential component of a person's suitability to be a childminder. The Tribunal finds that the Appellant would be unable to read the medication labels for any child in her care who is taking medication either on a long or short term basis. If a child had an unexpected medical emergency for example a seizure or collapsed the Appellant's limited vocabulary and poor grammar would seriously impede her ability to give a detailed account of the event to the emergency services or healthcare professionals. Mr R would of course assist her if he were present but the Appellant as the registered childminder also needs to satisfy the requirement as she cannot guarantee that he would always be available in an emergency.

29. Mr R told Tribunal that "they" (meaning Mr R and the Appellant) had completed the necessary first aid training and that this was evidence that the Appellant had a sufficiency in English. The Tribunal Bundle does not include copies of any certificates or independent verification relating to the completion of a first aid course. There is a reference to the completion of a First Aid Level 3 course in the witness statement of Mr R dated 13 August 2016 (the statement) which was prepared in connection with the proposed removal of Mr R and Appellant from the BCC Foster Panel. In the statement Mr R refers to courses that "my wife *or* I have attended" which the Tribunal does not accept as evidence that the Appellant had a sufficiency in English as it cannot be confident that the Appellant actually attended to the course.

30. The Tribunal also considers that the Appellant's inability to read English and her limited vocabulary must impact on her ability to play and engage with the children as she is unable to read with them or to play games which involve the written word and this in turn could impact on the children's welfare and well-being.

31. The General Regulations 2008 require that the children being cared for must be kept safe from harm. The Tribunal finds that the Appellant's complete reliance on Mr R to read any documentation, medicine labels, safety instructions and her heavy reliance on Mr R to communicate with the schools and other third parties places the children being minded at risk of harm especially if for any reason such as illness or an unexpected emergency Mr R was not available.

32. The Tribunal is aware that in reaching its decision particularly where Rule 8(4)(c) is invoked the decision must be proportionate.The Tribunal is also aware that child minding is the Appellant's way of earning a living and so a decision that the cancellation should be upheld must be proportionate. However the General Regulations 2008 were amended in

2014 and as a consequence there is a statutory requirement for the child minder to have a sufficient command of the English language which must be satisfied.

33. The Appellant had been registered as a child minder for a long time, but had not been inspected by Ofsted since 2009 partly because she had chosen to be removed from the Early Years Register in 2013 and so she was less likely to be inspected unless any concerns were raised to Ofsted. Once Ofsted was notified in December 2015 by BCC that they had removed RH from the care of the Appellant and Mr R on the grounds that RH was at risk of harm, Ofsted issued a notice of suspension and began its own investigation. Ofsted subsequently cancelled the Appellant's registration and initially relied primarily on a number of findings of the BCC Foster Panel review to support its view that the Appellant was unsuitable to be on the Compulsory Childcare register.

34. The issues raised by Ofsted during the first three days of the hearing concerned serious allegations that had been raised by BCC during its investigations which subsequently led to the cancellation of the Appellant's registration along with that of Mr R as foster carers with BCC on the grounds that child RH was at risk of harm. Faced with this information it was entirely appropriate that Ofsted suspended the Appellant's registration and instigated an investigation.

35. The safety and well-being of the children in the care of a childminder must be paramount. Ofsted need to have confidence that the registered childminder would be able to act quickly and effectively especially in the event of an emergency. The Appellant's acknowledged inability to read English, plus her poor vocabulary and her ability to only communicate in brief statements mean that the children would be at risk in the event of an emergency unless Mr R was present and that cannot be guaranteed. The fact that a complaint or incident regarding any of the children being minded has thankfully not occurred does not negate the risk.

36. Having considered the evidence, the submissions and taking into account reasons set out above, the Tribunal is satisfied that the Appellant's command of the English language is not sufficient to ensure the welfare and safety of the children being minded by her and the Tribunal finds that there is no reasonable prospect that her Appeal would be successful.

ORDER

The Appeal is struck out pursuant to Rule 8 (4) (c) of the Tribunal Procedure Rules on the basis that there is no reasonable prospect of the Appellant's case or part of it succeeding.

Helen Clarke
Tribunal Judge
Care Standards
First-tier Tribunal (Health Education and Social Care)

Dated: 22 December 2017