NCN: [2018] UKFTT 592 (HESC)

# Care Standards

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

Heard at the Royal courts of Justice on 23rd, 24th, 25th, 26th, 30th, 31st July & 1st & 2nd August & 14th September 2018

**BEFORE**
**Judge Gillian Irving QC**
**Specialist Member – Mr M Flynn**
**Specialist Member – Ms C Joffe**

**BETWEEN:**

**Mr Saula Ogunkoya (Bright Steps Nursery & Daycare)**
**Appellant**

**v**

**Ofsted**
**Respondent**

**[2018] 3253.EY**

## DECISION

1. REPRESENTATION.
The Appellant was represented by Mr Simon Butler of Counsel, [By the hearing on 14th September this was on a pro bono basis].

The Respondent was represented by Ms Juliette Smith of Ofsted Legal Services.

2. WITNESSES FROM WHO EVIDENCE WAS HEARD.
The following witnesses gave live evidence:
For the Appellant: Jennifer Gee, Seema Parmar, LADO James McMillan; Christine Davies, Penny Fisher, Josephine Geoghegan, Linda Du Preez, Nataliia Moroz, Laura Brewer, Abiola Odukale, Anthony Emmanuel, Samantha Calderwood, Elizabeth Coffey, Anne Allen.

For the Respondent: Terry Gould, Saula Ogunkoya, Maria Ogundalu and Kolawole Ogundalu.

When the case was adjourned in August the Appellant requested but one further day for the reconvened hearing. He indicated through his advocate

that he did not intend to call any further evidence and none of the other witnesses who had filed statements on his behalf would be required.
On that basis a day was allocated.
Subsequently, during the week the case was to be concluded in September, the Appellant indicated he now wished to call several of those witnesses. That was opposed by the Respondent but in any event, given the manner in which his case had been put, clarification was sought about their necessity. Upon the Appellant realizing that if the case went off again it would not be until January 2019 when the panel could reconvene, he resumed his previous position and no application was pursued to facilitate those witnesses giving evidence.

In addition to the oral evidence that it heard the tribunal had before it over 3000 pages of evidence to consider.

3. APPEAL.
This is an appeal brought by Saula Ogunkoya pursuant to Section 74(1) (e) of the Childcare Act 2006. The appeal lies against the decision of Ofsted dated 25th January, 2018 to cancel his registration to provide childcare on non-domestic premises at Bright Steps Nursery and Daycare on the Early Years Register and both parts of the Childcare Register, under Section 68(2){c} of that Act on the grounds that he has repeatedly failed to meet the requirements imposed upon him by regulations including the statutory framework for the Early Years Foundation Stage and the Childcare (General Childcare Register) Regulations 2008.

4. THE LAW
The purpose and aims of the Act are to be remembered, the Childcare Act placed duties on local authorities in 3 main areas – improving the outcomes for young children, securing sufficient childcare and providing information to parents. It established the Chief Inspector of Education, Children's services and Skills as the authority for the regulation of child minding and childcare on domestic and non-domestic premises in England. The intention was that the Act and Regulations would assist in the implementation of the aims set out in "Choice for Parents, the best start for children, a ten year strategy for childcare", published on 2/12/2004, which set out the Governments plans for the future of children.

5. Section 32 of the Child Care Act 2006 requires the Chief Inspector to maintain 2 registers; the Early Years Register and the General Childcare Register.
The Early Years register is for all providers working with children aged from birth to 5 years. The Child Care Register is a register of providers who are registered by the Respondent to care for children from birth to the age of 17 years. It has two parts: the compulsory part which requires providers to register on this part if they care for 1 or more children following their fifth birthday until they reach their eighth birthday. The Voluntary part is for providers who are not eligible for compulsory registration who may choose to register on this part.

6. The 2006 Act is accompanied by Regulations namely, The Childcare (Early Years Register) Regulations 2008 and The Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008. In short they set out the requirements with which providers must comply and against which their provision is regulated. We do not propose to set out other than the fact we have read and reminded ourselves of the content of Schedule 2 referred to in Regulation 3(2) and Regulation 4 (2) of the Early Years Regulations 2008 which set out the prescribed requirements for registration. We have also had regard to The Childcare (Early Years Registers) Common Provision Regulations 2008 and The Early Years Foundation Stage (Welfare Requirements) Regulations of 2012. Unsurprisingly prominent within the regulations is the requirement that the applicant is "suitable" to provide early years provision. No definition of suitable is provided but common sense dictates it should be given its ordinary everyday meaning in the context of the principles which the legislation seeks to promote.

7. Section 68 of the Childcare Act 2006 deals with cancellation of the registration of a provider registered on the early years register or either part of the general childcare register. It requires the Inspector to cancel registration if a person becomes disqualified from registration and allows him to cancel registration where requirements are not met, conditions are not complied with or fees are not paid.

8. Section 73 sets out the procedure for taking certain steps. Subsection (2) requires the Inspector to give notice of his intention to the registered person of the step he intends to take, sub-section (3) requires the notice provide the Inspector's reasons for proposing to take the step and inform the person concerned of the person's rights under the section.

9. For ease the sections are set out below.

> **Section 68,** Cancellation of registration
>
> (1) The Chief Inspector must cancel the registration of a person registered under Chapter 2, 3 or 4 if it appears to him that the person has become disqualified from registration by regulations under section 75.
>
> (2) The Chief Inspector may cancel the registration of a person registered under Chapter 2, 3 or 4 if it appears to him—
>
> (a) that the prescribed requirements for registration which apply in relation to the person's registration under that Chapter have ceased, or will cease, to be satisfied,
>
> (b) that the person has failed to comply with a condition imposed on his registration under that Chapter,
>
> (c) that he has failed to comply with a requirement imposed on him by

regulations under that Chapter,

(d) in the case of a person registered under Chapter 2, that he has failed to comply with section 40(2)(a), or

(e) in any case, that he has failed to pay a prescribed fee.

(3) The Chief Inspector may cancel the registration of a person registered as an early years child-minder under Chapter 2 if it appears to him that the person has not provided early years child-minding for a period of more than three years during which he was registered.

(4) The Chief Inspector may cancel the registration of a person registered as a later years child-minder under Chapter 3 if it appears to him that the person has not provided later years child-minding for a period of more than three years during which he was registered.

(5) The Chief Inspector may cancel the registration of a person registered as a child-minder under Chapter 4 if it appears to him that the person has provided neither early years child-minding nor later years child-minding for a period of more than three years during which he was registered.

(6) Where a requirement to make any changes or additions to any services, equipment or premises has been imposed on a person registered under Chapter 2, 3 or 4, his registration may not be cancelled on the ground of any defect or insufficiency in the services, equipment or premises if—

(a) the time set for complying with the requirements has not expired, and

(b) it is shown that the defect or insufficiency is due to the changes or additions not having been made.

**Section 73**

(1) This section applies if the Chief Inspector proposes to take any of the following steps under this Part—

(a) refuse an application for registration;

(b) impose a new condition on a person’s registration;

(c) vary or remove any condition imposed on a person’s registration;

(d) refuse to grant an application for the variation or removal of any such condition;

(e) cancel a person’s registration.

(2) The Chief Inspector must give to the applicant or (as the case may be) the registered person notice of his intention to take the step in question.

(3) The notice must—

(a) give the Chief Inspector's reasons for proposing to take the step, and

(b) inform the person concerned of his rights under this section.

(4) The Chief Inspector may not take the step until the end of the period of 14 days beginning with the day on which he gives notice under subsection (2) unless the applicant or (as the case may be) the registered person notifies the Chief Inspector that he does not wish to object to the step being taken.

(5) If the recipient of a notice under subsection (2) ("the recipient") gives notice to the Chief Inspector that he wishes to object to the step being taken, the Chief Inspector must give him an opportunity to object before deciding whether to take the step.

(6) An objection made in pursuance of subsection (5) may be made orally or in writing and in either case may be made by the recipient or his representative.

(7) If the Chief Inspector decides to take the step, he must give the recipient notice of his decision (whether or not the recipient informed the Chief Inspector that he wished to object to the step being taken).

(8) The taking of a step mentioned in paragraph (b), (c) or (e) of subsection (1) does not have effect until—

(a) the expiry of the time within which an appeal may be brought under section 74, or

(b) if such an appeal is brought, the time when the appeal is determined (and the taking of the step is confirmed).

(9) Subsection (8) does not prevent such a step having effect before the expiry of the time within which an appeal may be brought if the person concerned notifies the Chief Inspector that he does not intend to appeal.

(10) If the Chief Inspector gives notice to an applicant for registration under Chapter 2 or 3 that he intends to refuse his application, the application may not be withdrawn without the consent of the Chief Inspector.

(11) In this section and in section 74, "a new condition" means a condition imposed otherwise than at the time of the person's registration.

**Section 74 Appeals**

(1) An applicant for registration or (as the case may be) a registered person may appeal to the Tribunal against the taking of any of the following steps by the Chief Inspector under this Part—

(a) the refusal of his application for registration;

(b) the imposition of a new condition on his registration;

© the variation or removal of any condition imposed on his registration;

(d) the refusal of an application to vary or remove any such condition;

(e) the cancellation of his registration.

(2) An applicant for registration or (as the case may be) a registered person may also appeal to the Tribunal against any other determination made by the Chief Inspector under this Part which is of a prescribed description.

(3) A person against whom an order is made under section 72(2) may appeal to the Tribunal against the making of the order.

(4) On an appeal the Tribunal must either—

(a) confirm the taking of the step, the making of the other determination or the making of the order (as the case may be), or

(b) direct that it shall not have, or shall cease to have, effect.

(5) Unless the Tribunal has confirmed the taking of a step mentioned in subsection (1)(a) or (e) or the making of an order under section 72(2) cancelling a person's registration, the Tribunal may also do either or both of the following—

(a) impose conditions on the registration of the person concerned
(b) vary or remove any condition previously imposed on his registration.

10. On appeal the burden of proof rests with the Respondent and the standard of proof applied to the matters in issue is the balance of probability, namely is something more likely than not.

11. When we have considered the evidence in this case we have reminded ourselves that cases must be decided on evidence and inferences which can be properly drawn from it. Cases should not be determined on the basis of speculation and suspicion.

12. We have also imported the principles articulated in the case of "R v Lucas",[1981] QB 721 an authority oft cited in criminal and public law family cases. The Lucas direction reminds us that people can tell lies for a variety of reasons, for example, in an attempt to bolster a case, or out of shame, or out of a wish to conceal disgraceful behavior. Just because a person lies about one matter does not mean that they have lied about all.

13. This Tribunal can only make findings against the Appellant. Much time was spent during the hearing by the Respondent alluding to allegations relating to a lack of integrity on the part of the Appellant's sister CO and to a less extent his wife, T. Neither of those individuals were interveners in this appeal. We heard from the sister CO, but briefly, and only in relation to the lease of the premises. It would be neither fair nor just for this Tribunal to make any findings in relation to either persons suitability in the absence of them fully participating in the appeal and being represented. Although it was part of the submissions made by Mr Butler that the Tribunal could consider as an alternative to cancellation, the imposition of conditions, including a condition that the sister CO did not attend the premises, inherent within such a condition would be an adverse finding against her and for the reasons set out above we do not consider it properly open to us. Everyone has a right to a fair trial and such a course would clearly offend Article 6 ECHR.

14. Finally, at all times when reaching its decision the Tribunal has had regard to the Overriding objective as set out in Rule 2(2) of the First Tier Tribunal (Health, Education and Social Care Chamber) Rules 2008 as amended.

15. LEGAL ISSUES ARISING FROM THE CASE ADVANCED ON BEHALF OF THE APPELLANT.

It is the Appellant's case, as set out in the helpful skeleton argument prepared by Mr Butler dated 9/7/2018, that (i) the Respondent is confined to advancing the issues raised in the Notice to Cancel dated January 2018. It is his submission that the provisions of section 73(3) the 2006 Act do not permit the Respondent to expand or rely upon reasons not set out in the Notice to Cancel or in the absence of an amended or addendum Notice to Cancel. He prays in aid of this submission "R v Westminster City Council, ex parte Ermakov" [1996] 2 All ER 302 (ii) Secondly, that the Respondent is estopped from relying on issues which it has historically chosen to deal with by means other than cancellation such as the issue of a welfare notice.

16. For its part the Respondent rejects each and every one of those submissions and specifically avers that the rules and practice permit the Tribunal to take into account all relevant matters before and beyond the date of the notice to cancel.

17. Frequently a provider shall continue to provide services up to and during the Tribunal process. It is well established from previous authority that the Tribunal can and should take into account any improvement or deterioration in the circumstances of the provider since notice to cancel was

issued. To do otherwise would not only be unfair but would defeat the underlying purpose of the legislation and the overriding objective.

18. In this case following an alleged incident in January 2018, registration was suspended. That suspension was upheld by the Tribunal at an appeal hearing on 8/2/2018. The suspension has continued to be renewed without further active challenge.

19. We immediately acknowledge that the delay and hardship occasioned to the Appellant and his staff caused by the failure to achieve an expeditious final hearing is unsatisfactory. That situation was worsened when the hearing listed for 10 days in July was curtailed following an application for an adjournment at the beginning of the second week of that hearing due to the Appellant's ill health. He had previously made an application for permission to withdraw the appeal on 30/7/2018 after the conclusion of the Respondent's case and after we had heard from Mr Gould, who purported to be an Independent expert instructed on behalf of the Appellant. That was opposed and we refused the application, the matters and practice being of such concern that they required a judicial determination. Thereafter an unsatisfactory application for an adjournment was made on 31/7/2018 with an illegibly signed Statement of non-fitness to work provided in support. We declined the application but gave the Appellant time to file a more detailed document in support of his application. The Respondent offered to fund a private consultation. This was declined. The following day a further certificate emerged which was not much better signed by a Dr Odeyale. Both Mr Butler and Ofsted sought further and better particulars from the GP who was asked to assist the Tribunal either by telephone attendance or otherwise. She declined and wished to consult with the MDU. In those circumstances and with very considerable hesitation the Panel gave the Appellant the benefit of the doubt and granted his application. He had been in attendance throughout the first week of the hearing and there was a real sense that attempts were being made to deliberately delay proceedings following the refusal of the application to withdraw the appeal. A written explanation was sought from the GP and in response a letter was received from Adrian Scully, Solicitor with the MDU dated 03/09/2018. The content of that letter adds nothing to the issues in this case

20. THE CASE ADVANCED ON BEHALF OF THE RESPONDENT.
At the invitation of the panel Ms Smith was asked to set out in a concise document the findings sought by the Respondent and which were relied upon by it in support of its case that the appeal should be dismissed. Previously we had an extensive and unwieldy Scott Schedule containing a plethora of allegations, [152 in all going back to 2012] It no doubt must have taken many hours to draft but it was unhelpful and disproportionate and frankly if each and every allegation had been pursued the time estimate would have been wholly inadequate.
The findings now sought can be condensed under 7 headings:

Since registration in 2012 there have been numerous breaches of the requirements for registration, namely, (i) the Appellant has failed to identify

risks of harm, issues of health and safety, and to implement appropriate and safe child-handling practice; (ii) the Appellant has repeatedly failed to manage children's behavior appropriately; (iii) the Appellant has repeatedly failed to meet the requirements in relation to child protection procedures and safeguarding; (iv)the Appellant has historically and repeatedly failed to meet the learning and development requirements of the EYFS; (v) the Appellant failed to ensure the suitability of staff, specifically his sister C; (vi)the Appellant failed to notify Ofsted of the police investigation into CO; (vii) the history demonstrated the Appellant is unsuitable to remain registered. He is unable to sustain compliance with requirements imposed by the regulations.
In respect of the last allegation the Respondent makes reference to an alleged incident in January 2018 when a child was allegedly smacked whilst on the nursery premises and the Appellant's response to the investigation that then flowed from it.

21. Despite his position, as advanced in cross examination, namely that the Appellant admitted many of the failings, when asked to indicate which if any of the facts he was prepared to concede in this document, he declined to accept any. Previously the case for the Appellant had concentrated upon the issue of proportionality and whether the response of cancellation was indeed appropriate or whether an alternative mechanism for ensuring compliance could be considered. For the avoidance of doubt the Appellant has always strenuously denied the alleged events of 3/1/2018.

22. THE REGISTRATION HISTORY.
The history of Notices issued was not challenged.
The Appellant has been registered as a child-care provider since 2012. He is registered under both the Early Years Register and the Childcare Register. He provides day care from non-domestic premises at 33A Bexley Road, Erith in Kent. The nursery provision is known as Bright Steps Nursery and Daycare. Prior to his tenure the nursery was run by his sister CO, she resigned in November 2012.

23. Whilst CO was operating the nursery Ofsted had a number of concerns and several Compliance, Investigation and Enforcement cases were opened. Following her resignation CO continued to work at the nursery until February 2017 when she was suspended. She is also the owner of the lease of the premises and now the owner of the yard which provides access to them. She leases adjacent properties and it is clear that she remains involved in its operation, best evidenced by her attendance at the nursery when Terry Gould attended for an inspection of it in May 2018. She has also financed the purchase of the yard outside and the cost of the erection of a safety fence in the last 12 months.

24. Temporary planning permission to use the premises at 33A Bexley Road as a place of worship and a non-residential education and training centre was granted in March 2012 until 31st March 2014. An application should then have been made to extend the permission, it wasn't. It would appear that between 31/3/2014 and September 2018 there was no planning permission for the premises to be used as a nursery. It is likely that this would

impact upon the validity of any public liability insurance then held. The matter has now been resolved, although some issue remains about the fence erected adjacent to the highway which requires retrospective permission.

24. Between January 2013 and December 2016 there were announced and unannounced inspections, together with follow-up and monitoring visits, [often made in response to complaints and /or concerns expressed by third parties]. Those visits resulted in the following notices'/steps being taken:

2013

(i) 19th March 2013. The inspection identified the provision as inadequate and a Welfare Requirements Notice was issued.

(ii) In October 2013, an unannounced visit to the setting took place, Jennifer Gee was the Inspector, the Appellant was issued with a Notice to Improve, a Welfare Requirements Notice and an initial warning letter.

(iii) Subsequent monitoring visits took place on 7th November 2013 by Jennifer Gee and Karen De Lastie and on 5th December 2013 by Jennifer Gee and Mandy Mooney. They led to the service on the Appellant of 9 further Notices to improve.

2014.

(iv) A monitoring visit was made on 20th January 2014 by Jennifer Gee and Mandy Mooney.

(v) On 5th February 2014 Jennifer Gee and Mandy Mooney conducted a monitoring visit, the Appellant was issued with 2 Welfare Requirement Notices and 3 Notices to Improve.

(vi) On 11th March 2014 a monitoring visit by Jennifer Gee and Mandy Mooney found that all actions had been met.

(vii) In April 2014 the premises were inspected and the provision rated as Good.

(viii) On 22nd May, 2014 an unannounced inspection was made and the Appellant was issued with further Welfare Requirement Notices. The inspectors were Linda Du Preez and Karen De Lastie.

2015.

(ix) An unannounced visit was made on 31/3/2015 but no breaches were identified.

(x) On 4/6/2015 an unannounced visit was made to the premises which resulted in a number of Notices to Improve being issued.

(xi) On 16th June, 2015 an unannounced monitoring visit took place by Sian Extence and Linda Du Preez. Improvements had been made

It does not appear that any visits took place in 2016.

The Appellant hasn't sought to go behind the issue of these notices nor suggest they were wrongly issued. However, it is a fact that he has made several complaints in the past about the manner in which inspections were carried out.

THE EVENTS OF 2017.

25. (i) An inspection took place on 10/1/2017, the outcome of which was inadequate with Notices to Improve issued.

(ii) On 09/2/2017 the registration was suspended following a referral from Greenwich Children's services concerning allegations that the Appellants children had been left in a situation which exposed them to a risk of harm. The suspension was lifted on 17th February, 2017.

(iii) On 10/2/2017 an unannounced visit was made by Christine Davies and Debra Davey to ensure the Appellant was complying with the notice of suspension.

(iv) An unannounced visit was made on 31/3/2017 by Christine Davies and Debra Davey.

(v) An unannounced visit was attempted on 4th April 2017 by Christine Davies and Josephine Geoghan.

(vi) Christine Davies and Jennifer Gee visited the premises on 25th April, 2017. A warning letter was issued for failure to notify Ofsted of a significant event and a Notice to Improve.

(vii) On 3/5/2017 an inspection took place. The officers conducting the inspection were Josephine Geoghegan and Penny Fisher. The provision was judged inadequate and 3 Welfare Requirement Notices and Notices to Improve were issued.

(viii) On 7/06/2017 a monitoring visit by Josephine Geoghegan and Christine Davies determined that the Welfare Requirement Notices had been met. Importantly a case review determined that Ofsted would not proceed to cancellation of the registration but would give the Appellant further time to make improvements and the premises would be revisited within 6 months.

(ix) A follow up inspection took place on 5/10/2017 and the provision was again rated as inadequate.
The inspectors were Linda Du Preez and Nataliia Moroz.
Welfare Requirement Notices were issued.

(x) A monitoring visit was undertaken on 2/11/2017 by Linda Du Preez and Nataliia Moroz. Some of the WRNs had been met some not. Further Welfare Requirement Notices were issued on 13th November, 2017 with the requirement that they were complied with by 20th November, 2017.

(xi) On 10/11/2017 a decision was made to issue a Notice of Proposal to Cancel Registration.

(xii) On 21/11/2017 a monitoring visit was undertaken by Samantha Colderwood and Laura Brewer. The provider was cautioned for failure to meet the WRN. The outcome of that visit was that the registration was suspended.

(xiii) On 28th November, 2017 an unannounced visit was made by Samantha Colderwood and Laura Brewer. The Appellant was complying with the notice of suspension and the premises were closed.

(xiv) On 13/12/2017, at a time when the registration was suspended a further visit took place by Samantha Colderwood and Laura Brewer with the outcome that the suspension was lifted on 14/12/2017.

26. THE EVENTS OF 2018.

(i) Following a referral from the LADO on 5/1/2018 concerning the alleged slapping of a child whilst on the nursery premises on 3/1/2018, Ofsted suspended the Appellant's registration on 11/1/2018 and the registration remains suspended. An appeal to the Tribunal, heard on 8/2/2018, was unsuccessful.

THE EVIDENCE AND DISCUSSION.

27. We do not intend to go behind the enforcement history for the period 2012 to 2016. Those matters speak for themselves about the history of compliance and are clearly relevant when considering proportionality of cancellation and the capacity of the Appellant to sustain improvements.

This judgment specifically addresses the problems which arose in 2017, specifically, given the evidence of Jennifer Gee, the period from June 2017 to the point of cancellation.

We shall deal separately with the alleged incident in January 2018.

28. The witness Jennifer Gee was the first witness from whom we heard. She is an Early Years Senior Officer. She gave fair and balanced evidence which we have no hesitation in accepting. She told us that the nursery came to her attention again in early 2017 following a decision by another officer to suspend its registration. It is clear from her statement that initially she and other members of Ofsted had not been provided with accurate information by whoever was supplying it because Ofsted believed that the Appellant's sister had been given a caution for leaving the Appellant's children in a car unsupervised for an unsubstantiated period of time. She and others were also under the impression that a Section 47 Children Act investigation into the Appellant's care of his children was underway as a consequence. Neither fact

was true as was clear not only from the papers subsequently disclosed by the Metropolitan Police but from the evidence of the LADO James McMillan

The papers from the Metropolitan Police show that on 26/9/2016 the Police received a call from a third party who explained that there were 3 young children left alone in a car outside a local supermarket and that they had been there for almost half an hour by the time the Police arrived. We should say that this is disputed by CO who never gave evidence on this point. We should also observe that the complainant subsequently declined to give a statement to the police. The children were in the care of the Appellant's sister CO who had gone shopping in a local store. When spoken to by the police the papers record that she initially declined to give any details of who she was and where she lived and then gave incorrect details in relation to her name and address. It also transpired that she did not have a valid driving licence or insurance. It is clear that the Police thought initially that the children were hers. She wasn't arrested at the time but in October she was visited at home and arrangements were made for her to be interviewed on 2/11/2016. That interview took place on either the 2/11or 3/11/2016. We don't have a transcript of it. She told the Police the children were not hers but her brothers. On the same day the Appellant was spoken to by the Police by telephone. There is nothing in the notes to suggest he wasn't other than helpful and co-operative with them. He and his wife and children were living with his sister at that time having lost their home. The child N was spoken to at school the following day and was objectively well and happy. Ultimately the file was sent to the CPS who did not make a charging decision until December, 2017. The decision was that no further action should be taken.
The case was closed later that month.

29. The Appellant did not seek to challenge the assertion that he failed to inform Ofsted about the incident in September, 2016. In his oral evidence he denied that he was obstructive and anxious about engaging with the Respondent about it. He did suspend sister CO from working at the nursery but not immediately as he should have done [in his statement he says he knew about the incident in August but as it did not happen until September this must be an error]. He did not suspend her until February despite being aware that there was an ongoing police investigation into her conduct. We have little doubt that had the incident not been brought to the attention of Ofsted by other than the Appellant he would never have disclosed its occurrence. If as he says he was living with his ?(another) sister he was in a difficult position but his duties and obligations as a provider had to come before any family loyalty. There should have been a referral to the DBS and it was incumbent upon him to assist both Ofsted and the DBS investigate the matter. Having heard the evidence, where his evidence differs from that of the Ofsted Officers we prefer their evidence to that of the Appellant. Paragraph 91 of his May 2018 statement provides an accurate reflection of his defensive attitude. It portrays no sense of collaboration.

30. In cross-examination Ms Gee told us that she considered carefully whether cancellation of the registration should be pursued in May 2017 when the provision was again judged inadequate and welfare notices issued. At that

time, she felt that despite the history of problems the Appellant should be given a further opportunity to prove he could sustain improvements. She did not believe that there was clear and compelling evidence as at June 2017 to cancel which is the point when she became detached from the case. This is important evidence from our perspective when considering whether the decision taken in November to cancel the registration was a proportionate one.

31. This does not mean that we do not accept and have ignored the evidence of Penny Fisher, Christine Davies or Josephine Geoghegan who carried out inspections in early 2017. We heard from them all and regarded each of them as witnesses who gave fair and balanced evidence. The evidence of Penny Fisher in particular was persuasive and disturbing, we accept her account of her visit on 2nd May, 2017 without exception. It is perhaps testament to the quality and fairness of their approach that cross–examination of them was limited. There was really no substantial challenge to the accounts they provided. We find that the response of the Appellant to their feedback on 2nd May was demonstrative of an on-going lack of insight and understanding of what was required of him. We accept he was aggressive, defensive and hostile to the Inspectors and, consistent, with his approach, pursued a complaint against them following the feedback.
Again, where his evidence differs from that of these officers we prefer their evidence to his.

32. Linda Du Preez gave evidence about the inspections she conducted in October and November 2017 with Nataliia Moroz. It is noticeable that the Appellant fails to address their concerns in any detail in his statement. These Inspectors were witnesses who gave their evidence carefully and moderately. We were impressed by them. For the avoidance of doubt we accept their evidence and find the following: (i) the person who was taking the children to school did not have any experience of the school routine and failed to have the required first aid kit with her. We reject the Appellants evidence that she had a first aid kit with her at all times. (ii) There was a failure to supervise the children properly both when outside the premises and inside the premises,(iii) behavior management was partial,(iv) physical handling techniques were still deficient ,(v) there was no adequate risk assessment of trips to the local area and the hazards that existed,(vii) behaviour management was inconsistent and did not promote learning. There were also concerns about hygiene and allowing young children to eat whilst walking.

33. The witness Nataliia Moroz had been optimistic about the capacity of the Appellant to change and improve the deficiencies that were found. She told us she would have given him another chance in November and would not have then moved to cancellation. She stressed in her evidence the positives she had observed as well as the negatives. The Appellant had tried to implement changes that had been identified and was on the face of it willing to learn and improve but there were still several breaches of the requirements. We accept this evidence. This inspector had addressed with staff their knowledge of safeguarding and child protection procedures. She looked at the

nursery policy which was not in line with that in operation by the local authority.
She also looked at staff files, one in particular stood out because that member of staff was taking what is known as an anti-psychotic drug, namely olanzapine. The Appellant hadn't explored why this was being taken, what symptoms it was being administered for and whether he needed to risk assess that person's suitability to work in the nursery. The inspector felt that in October the Appellant seemed willing and amenable to what they had to say and was hopeful that change may result.

34. Following the issue of the welfare notice the inspectors returned in November but as soon as they arrived we accept their evidence that they encountered a different attitude from the Appellant. We accept the description that he was difficult to engage and unhappy to see them. He could not understand why they were there as he said he did not think that the October inspection had thrown up anything serious. This is an indication of a lack of insight and understanding that the requirements were not negotiable. They were necessary and he did not appear to appreciate that he had to comply with them. Some improvements had been made, policies had been updated. However, questioning of staff revealed that they still did not understand child protection procedures. On that occasion the Appellant was seen to lift a child inappropriately.
Behaviour management remained a concern as did the response to the personal needs of the children. The description of the little girl with the wet tights as set out in paragraphs 33 and 34 of the statement of Ms Moroz, which was not challenged, is of concern. It was unacceptable.

35. When feedback was provided we accept the evidence that the Appellant was aggressive and resistant to the criticisms made. The evidence we heard did not suggest that the Appellant was willing to work collaboratively with the Respondent. He was hostile and defensive.

36. At this point we remind ourselves that when one looks at the history of difficulties the Appellant must indeed have felt under stress and perhaps under siege but he does not seem to grasp that he has to comply with the requirements of the regulations and he has to work with the Respondent.

37. We heard evidence of the subsequent follow up visits from Samantha Colderwood and Laura Brewer. Samantha Colderwood told us that on her first visit she spent a lot of time in the yard where the children, or some of them played. The respondent rightly had concerns about this as it wasn't- until exclusive use was granted- a very safe area. Other premises and vehicles had access to the yard, people would come and go, it was next to a busy road. All sorts of hazards were prevalent.
Lifting and handling of children was still deficient. When this witness invited the Appellant to look at the CCTV so she could show him where the staff had got it wrong the Appellant refused. He wasn't willing to view the CCTV with her without speaking to his solicitor. Then he said he didn't have the access code. We found him a particularly unimpressive witness on this point in his

evidence. We have no hesitation in finding that he sought to deceive us with his answers and he was clearly not telling the truth.
Other problems persisted but we are not persuaded that that it could be said that the children were at risk of emotional harm at that visit. The evidence relied upon in support of this does not meet the required standard of proof and as shall have been apparent from our questioning, we were not satisfied that Ms Brewer, in particular, gave a fair and balanced account of her visit. It was put to her with some merit by Mr Butler that she went to the premises to see what she could find. We were left with the same impression and were not able to attach any significant weight to her evidence.
There has to be balance and fairness in a witnesses approach and we found the evidence of this witness failed in that regard.

38. A Case review was held on 22/11/2017 and a decision was taken to cancel registration and indeed to suspend it for a period of 6 weeks.
Notice of intention to cancel registration was sent to the Appellant on the 5/12/2017. Although the suspension was lifted on 14/12/2017 it does not appear that the facility re-opened that year.
We are satisfied on the evidence we heard from Elizabeth Coffey, which we accept, that alternatives to cancellation were considered at the meeting on 10/11/2017.

39. On the basis of the evidence derived from the inspections of October and November, when set against the backcloth of historical concerns and actions, we cannot but say that this was a proportionate conclusion to reach at that time. Improvements were not being sustained. The same problems were arising time and time again. The Appellant was either unwilling or unable to carry out what was required of him. We acknowledge that with one or two exceptions the testimonials we had received from parents speak highly of the facility but the requirements are there for good reason and they were repeatedly not being consistently met.

40. EXPERT EVIDENCE
The evidence from Mr Gould, who described himself as an independent expert, and who was instructed by and on behalf of the Appellant, fell well short of the standard we expect from experts. Neither his report of 29/5/2018 nor his oral evidence contributed in any way to the decision making process in this case. This appeal demonstrates an urgent need for the procedural rules and good practice relating to the instruction of experts to be imported into this jurisdiction. His report offended almost all of the fundamental principles we expect from an expert. His obligation to the Appellant by whom he was being paid took precedence over his duty to the Tribunal
Even before he was instructed, Mr Gould and his colleague had been approached by the Appellant to provide a consultancy service to the nursery. The plan was if the appeal succeeded they would be employed in that role. However, in addition to this, e mail correspondence between Mr Gould and the Appellant showed that a draft report was sent to the Appellant who then provided and requested the insertion of detailed amendments to the text. For example, the e mails show that the expert was asked to re-write parts of the report, the new text required being dictated to him in the e mails. He complied.

The quality of the report was poor and the author trespassed into judicial decision making territory opining on facts in issue-specifically whether the incident on 3/1/2018 had occurred. He commented on the bona fides of witnesses and advanced theories of collusion
It was troubling that Mr Gould did not appear to understand his duty to the Tribunal nor the true and unequivocal meaning of ”independence”. We attach no weight to his report or his oral evidence.

41. THE ALLEGED EVENTS OF JANUARY 2018.
Although this alleged incident did not form part of the reasoning for the decision to pursue cancellation quite properly it forms part of the evidence for our consideration. Indeed, despite the assertion by Mr Butler in his skeleton and opening remarks that he did not plan to address it, he robustly questioned his lay client in chief about the events of that day.

42. BACKGROUND.
On the 5th January 2018 Ofsted received a referral from the LADO. The LADO informed Ofsted that Bromley Children’s services had received a complaint from a member of the public who reported witnessing a child being smacked whilst at the nursery on Wednesday, 3rd January.
A strategy meeting had been arranged for 10/1/2018 to which Ofsted, the Appellant and the Police had been invited. The evidence before us indicates that the Appellant was informed of the allegation in writing by the LADO on the 8th January. His response was to deny the allegation and he refused to attend the meeting scheduled for 10/1/2018. In his statement he asserts the time was not convenient for him.

43. That meeting took place in his absence and a number of other concerns were raised such as the absence of planning permission to run a nursery and the absence of building regulation approval and fire safety in the building.

44. A police investigation into the incident ensued and a further safeguarding meeting was scheduled for 24th January which the Appellant did attend.

45. Details of that meeting are contained in the witness statements of Dr Moroz and Penny Fisher and we accept the accuracy of the accounts provided, in particular we accept that the conduct of the Appellant fell well short of what was expected of a provider in such circumstances. The Appellant has always robustly maintained both then and now that this allegation is a fabrication made up by some of the parishioners who attend the church next door to the nursery, and with whom there has been ongoing conflict about a number of matters relating to access to and maintenance of the premises. His statement provides details of the conspiracy he alleges against him and we have reread his evidence with care before reaching our decision on this issue.

46. FINDINGS.

We have no doubt having heard evidence form Pastor Anthony Emmanuel and Abiola Odukale that children were present at the nursery on 3/1/2018. The evidence of Abiola Odukele was compelling not only by the manner in which it was given but by the detail provided. She was an excellent witness. We accept her evidence that she saw a little girl being smacked and that she approached the person who had smacked the child who, when asked, confirmed she worked at the nursery. Whether this person was the child's parent we do not know but we are satisfied that this incident occurred.
Pastor Emmanuel did not want to come to court to speak to his statement but following our express request he did so. We employed special measures in that the Appellant, rather than the witness, was behind a screen so that the Pastor could give his evidence without having to look at him. We were not surprised by the request for special measures given the service of a Protection from Harassment Notice on the church drafted by the sister CO and dated 15th June, 2018. The behavior complained of was "Reporting and circulating untrue allegations and accusations to the Local Authority, Ofsted, the Police and others in the neighbourhood".
We have no doubt, despite his assertion to the contrary, that the Appellant knew about this notice and that it had been served with the intention of trying to influence and discourage the Pastor and Ms Odukele from giving evidence. The Appellants approach to the Pastor in April 2018 when he taped the meeting on 7th April was, we find, for a similar purpose.
We accept the evidence of the Pastor who clearly was uncomfortable about giving evidence which he knew would result in further difficulties for the Appellant and his family.

47. It follows that we reject the evidence of both Kolawole Ogundalu and his wife Maria Ogundalu. The Statement of the former is dated 30/7/2018 and was filed after the Pastor and Ms Odukale gave their evidence to this Tribunal. He was evidently aware of what had been said before he filed his statement. He was over confident in his approach and seemed at times to be amused by the process.
We are satisfied that neither of those witnesses attended this hearing with the intention of telling the truth. Maria Ogundale initially said that she had drafted her own statement with the help of her husband, then she said she had attended the nursery and the nursery had helped her draft the statements. She provided inconsistent accounts of how those statements were achieved. We now know, as was evident from the similarity of many of the statements, even down to the paragraph numbers, that the statements were essentially prepared by the nursery and staff and parents asked to sign them.

48. The Appellant has provided inconsistent accounts about the 3/1/2018 and despite being given repeated opportunity by the Panel he has still not been honest about events.
At the meeting on 24/1/2018 he said that the nursery was closed on 3/1/2018 and that no children were on the premises when the alleged assault took place. He denied that anyone was on the premises that day.
He later changed his account and said that he and his staff were on the premises that day undertaking training for from 10am - 8pm but no children were present.

He said there was no CCTV available for that day. Then he said the CCTV had got damaged in a flood but he hadn't discovered this until after November 2017 and he hadn't replaced it. His account in relation to the existence or absence of CCTV footage was wholly lacking any credibility and leads us to believe that there was CCTV footage of the incident which he did not want anyone to see hence the great lengths he then took to destroy it.
His response to the investigation into what may have been an assault upon a child attending his nursery by a member of his staff was unacceptable. It was in his interests for him to be open and honest and assist in the process particularly if as he alleges it was a malicious fabrication. On the contrary his response is consistent with that of someone who has something to hide.
The child was smacked and he knows which child and by whom.

49. CONCLUSIONS.

(a). The Tribunal has not sought to make any findings in relation to the matters alleged between 2012 and 2016. The enforcement notices were issued and they speak for themselves. We haven't gone behind or beyond them.

(b). We have taken into account in assessing the proportionality of the decision to cancel, the history and frequency of the enforcement procedures.

(c) Irrespective of the incident on 3/1/2018 we find that the decision to cancel was a proportionate response to the ongoing and repetitive problems demonstrated by the Appellant throughout 2017.

(d) We find as a fact that:

(i) the Appellant failed to identify risks of harm, issues of health and safety, and to implement appropriate and safe child-handling practice;

(ii) the Appellant repeatedly failed to manage children's behavior appropriately;

(iii) the Appellant repeatedly failed to meet the requirements in relation to child protection procedures and safeguarding; his approach to the investigation into CO in 2016 and the allegation in 2018 is indicative of an inability and/or an unwillingness to learn from past mistakes and to prioritise the needs of the children in his care;

(iv) the Appellant has historically and repeatedly failed to meet the learning and development requirements of the EYFS;

(v) the Appellant failed to ensure the suitability of staff, specifically his sister CO in 2016;

(vi) the Appellant failed to notify Ofsted of the police investigation into CO in 2016 and delayed suspending her;

(vii) the history demonstrates that the Appellant is unable or unwilling to sustain compliance with requirements imposed by the regulations.

(e) We find that the Appellant has been untruthful both to the Respondent, the Police, the Tribunal and all others involved in the investigation of the incident on 3/1/2018. His failure to co-operate mirrors his unwillingness to co-operate in November 2017.His lack of integrity and his failure to work openly and in collaboration with the Respondent results in the sad conclusion that he is not suitable to provide nursery provision.

50. We therefore dismiss the appeal and there shall be no order as to costs.

**Judge Gillian Irving QC**
**Care Standards**
**First-tier Tribunal (Health Education and Social Care)**

**Dated Issued: 11 October 2018**