

Care Standards

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

Heard on 24-28 September & 27 November 2018 at Nottingham Justice Centre
Deliberation Hearing 12 December 2018

[2018] 3284.EY

BEFORE

Ms S Goodrich (Judge)
Ms M Harris (Specialist Member)
Ms H Reid (Specialist Member)

BETWEEN:

Elohims Little Angel Limited

Appellant

v

Ofsted

Respondent

DECISION AND REASONS

Representation

The Appellant: Mr David Pojur, counsel, instructed by DAC Beachcrofts

The Respondent: Ms Clare Stevenson, counsel, Ofsted Legal Services.

The Appeal

1. This is an appeal by Elohim Little Angels Ltd against the decision made by Ofsted on 16 February 2018 pursuant to Section 68 of the Childcare Act 2006. It was a decision to cancel the company's registration to provide childcare on non-domestic premises at Queens Walk Community Centre and at St Bartholomew's Road in Nottingham on the Early Years Register, and on both the compulsory and voluntary parts of the Childcare Register.

The Parties

2. The Appellant is a private limited company incorporated on 24 October 2014. There is one Director of the company, Mrs Joan Merlene Richards, who is the sole shareholder. To all intents and purposes reference to the Appellant should be taken to refer to Mrs Richards.
3. The Appellant is registered with Ofsted as a provider of childcare at two separate settings:

- i) Elohim's Little Angels, Queens Walk Community Centre, Queens Walk, Nottingham, NG2 2DF ("Queens Walk").
- ii) Elohim's Little Angels, Unit 1, 2 Bartholomews Court, St Bartholomews Road, Nottingham, NG3 3EH ("St Bartholomews").

Mrs Richards is the Nominated Individual (NI).

4. The Respondent is the Office for Standards in Education, Children's Services and Skills (Ofsted) and is the regulatory authority for childminding and childcare providers. Once a provider has been registered, Ofsted's role is to establish whether the person or entity registered continues to meet the requirements for registration, under the Regulations made pursuant to the Childcare Act 2006, and remains suitable for registration.

Restricted Reporting Order

5. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matters likely to lead members of the public to identify the children to whom reference will be made so as to protect their interests.
6. Consistent with this, the names of children and their mothers (some of whom are members of the Appellant's staff (MoS)) have been anonymised in this decision.

The General Background

7. This following appears uncontroversial:

- a. The Appellant was originally registered with Ofsted in 2010 as a provider of childcare at on non-domestic premises at St Ann's Junior School, The Wells Road, Nottingham, NG3 3AG ("St Ann's"). Ms Richards was also the sole Director of this company (now dissolved).
- b. During this registration, Mrs Richards' daughter, Samantha Senior, was appointed as the Manager. Three inspections were carried out during the registration period April 2010 to January 2015:
 - November 2010 - graded 'Satisfactory' with Notices to Improve.
 - June 2013 - graded 'Inadequate' with enforcement action.
 - November 2014 - graded 'Requires Improvement'.
- c. The St Ann's registration was resigned on 8 January 2015 due to a premises move. During the registration, Ofsted had a number of concerns about the quality of care provided. These concerns had remained whilst Ofsted considered the application for registration for Elohim's Little Angels in new settings: Queen's Walk and St Bartholomew's Court.

- d. Queen's Walk: On 16 May 2017 Ofsted carried out its first inspection at Queens Walk and graded it as 'Requires Improvement', with a Notice to Improve (NTI) set to ensure that checks on children's learning help staff to identify the precise steps to help children make progress. (The Queen's walk setting was suspended on 27 September 2017 until 21 November 2017 due to concerns at the St Bartholomew's setting - see below. It has remained closed following the suspension being lifted.)
- e. St Bartholomew's: the NI's daughter, Samantha Senior, (previously manager at the St Ann's setting) was appointed as manager at St Bartholomew's.
- f. On 26 January 2016 Ofsted carried out an inspection. The setting was graded as 'Requires Improvement' (RI) and three NTIs were set in relation to learning and development requirements.
- g. At the next inspection on 03 October 2016 the setting was rated as 'Requires Improvement' and three NTIs were set.
- h. On 5 June 2017 concerns were raised with Ofsted. On 20 July 2017, Ofsted received a further concern that a member of staff at the setting had grabbed a child by the arm leaving a mark. An Initial Warning Letter ('IWL') was issued for failing to notify Ofsted of this event.

The Immediate Chronology relevant to the Decision under appeal

8. The key dates are as follows:
 - i. On 27 September 2017 an unannounced inspection was conducted at St Batholomew's by Early Years Regulatory Inspector (EYRI) Caroline Clarke, accompanied by Joanne Smith, an EYRI inspector who was initially present for quality assurance purposes only.
 - ii. There is substantial dispute as to the facts involved in this inspection. It is sufficient to say at this stage that the inspection was abandoned and the setting was immediately suspended (as was the sister setting at Queen's Walk (see para 7 d) above). The suspension notice explained the procedure for appealing the decision to suspend. No appeal was lodged.
 - iii. On 13 October 2017 the Appellant was issued with a Welfare Requirements Notice (WRN) for various breaches that had been identified, including the requirement that there should be a Manager on site who holds the relevant qualifications for the role, and a Deputy qualified and capable to take charge in the Manager's absence.
 - iv. Mrs Richards as the NI was invited to attend an interview with Ofsted that took place on 26 October 2017. It was considered that the Appellant

had failed to meet the WRN in relation to having a suitably qualified manager in place.

- v. On 21 November 2017 the suspension was lifted. On the same day the WRN was reissued to the effect that there must be a Manager on site with a “full and relevant” Level 3 qualification and at least two years’ appropriate experience. The Appellant was informed that compliance would be monitored when the abandoned inspection, (i.e. that on 27 September 2017), was completed.
- vi. On 28 December 2017, the Appellant confirmed that Samantha Senior would be returning to work as the Manager at the St Bartholomew’s setting and that it was intended that the Queens Walk setting would remain closed until 2018. It was also indicated that the Deputy Manager, who had been on maternity leave at the time of the inspection in September 2017, was now returning to work.
- vii. On 8 January 2018 the setting at St Bartholomew’s re-opened.
- viii. On 9 January 2018, EYR Inspectors Will Good and Jude Sanders returned to complete the inspection that had been started in September 2017. (Different inspectors had been allocated because of the Appellant’s complaint against Ms Clarke.) The outcome of the inspection was that the childcare provision at St Bartholomew’s, was deemed ‘Inadequate’ in all areas with enforcement action to be taken. Ofsted’s position is that numerous breaches of requirements were found on 9 January 2018. A number of these were issues that had been raised on 27 September 2017, and had been the subject of WRNs issued on 13 October and 21 November 2017.
- ix. On 18 January 2018 following the completion of this inspection, a further WRN was issued to address the following concerns:
 - a) When Inspectors arrived there was no manager on duty, or a named deputy in a position to take charge in their absence. The manager Samantha Senior claimed to have been delayed in attending however staff had indicated to Inspectors that the Deputy Manager is in fact the Manager and that the member of staff who was in attendance is the Deputy. She was not appropriately qualified.
 - b) Staff were continuing to fail to enquire about or record children arriving at the setting with injuries.
 - c) Children’s attendance records continued to be inaccurate.
 - d) Staff were not being deployed effectively to meet the needs of children.
 - e) Systems were not in place to check whether staff are disqualified and staff were unaware of circumstances that might render them disqualified.
 - f) Not all staff were sufficiently skilled or proficient in the English language.

- g) Systems were not in place to ensure teaching was monitored or assessed to be consistently good across the nursery.
- x. At a case review held on 10 January 2018 the decision was made by Early Years Senior Officer, Kathryn Bell, that a Notice of Intention to cancel the registration would be issued.
- xi. On 18 January 2018 the Notice of Intention to cancel the registration was sent to the Appellant.
- xii. On 30 January 2018, Ofsted received the Appellant's objection to the Notice of Intention.
- xiii. On 1 February 2018, a further visit to the setting was carried out in order to monitor the WRN that had been issued on 18 January 2018. Ms Sanders and Mr Good were again the inspectors on that occasion. Amongst other matters, Ofsted's case is Ms Saunders and Mr Good observed inappropriate handling of a child with special educational needs, by the Deputy Manager of the setting. NK. This issue was raised with Mrs Richards and the Manager, Samantha Senior. Mrs Richards asked to, and did, record a conversation with the inspectors, a transcript of which is before us. Mrs Richards indicated that, in light of the allegation, they would voluntarily close the nursery. The LADO ((Local Authority Designated Officer) was notified about the incident by the Appellant later that evening.
- xiv. In the meantime, the Appellant's objections to the Notice of Intention to cancel registration were considered by another Early Years Senior Officer, Mandy Mooney. The objections were not upheld.
- xv. The Notice of Decision (NOD) to cancel registration, the subject of appeal before us, was issued on 16 February 2018.

The Decision under Appeal

9. The NOD of 16 February 2018 is lengthy and contains a detailed account of the history of registration and previous action taken, as well as detailed accounts as to the inspections on 27 September 2107 and 9 January 2018. In a section headed "Current concerns" Ms Bell set out matters on which Ofsted relied. It is sufficient for immediate purposes to identify the core reasoning underpinning the decision to cancel registration.

"Following the completed inspection on 9 January 2018 a case review was held to discuss your continued suitability for registration. In making the decision to cancel your registration we reviewed your history; your ability to comply with the 'Statutory framework for the early years foundation stage' (EYFS) and the quality of care you provide.

"In summary we are cancelling your registration for both settings because:

- *As a provider you have consistently demonstrated an inability over time to ensure that the setting is compliant with the early years foundation stage requirements.*
- *You are unable to identify that your manager is failing to deliver the early years foundation stage requirements (taken from para 94 'The Early Years and Childcare Registration Handbook').*
- *Your current, recently appointed manager is only able to dedicate 25 hours per week to the role, and it is your intention that she will manage across both nurseries when the setting at Queen's Walk Community Centre re-opens. This level of commitment is insufficient to bring about the significant improvement needed.*
- *Your current manager was in post at all your previous inspections, following which you never achieved higher than a satisfactory/requires improvement judgement.*
- *Recent evidence indicates that the quality of care you provide is in fact deteriorating. Your current quality of care is judged as inadequate.*
- *The manager you chose to put in place following your recent suspension did not hold a full and relevant level 3 qualification and did not have sufficient competency in the English language.*
- *Evidence of your failure to sustain compliance with requirements and poor quality care has been gathered over a significant period of time by different inspectors.*
- *All young children deserve to receive good quality childcare throughout their early years. This is of particular relevance to children who attend your provision who are already disadvantaged due to external factors such as having English as an additional language. Their needs are not being met and this will impact on their readiness for school and future educational success.*
- *You have demonstrated a lack of capacity to improve/sustain compliance with legal requirements. We have seen repeated breaches of EYFS requirements despite the issue of welfare requirement notices.*
- *You are unable to recognise that the care you are currently providing is inadequate. Your self-evaluation indicates you believe you currently provide a good quality of childcare. At your most recent inspection you did not believe the quality of teaching being provided was poor.*

We have considered alternative action, however, we feel we have sufficient evidence on balance of probability to confirm that you no longer meet the prescribed requirements for registration. There is a proven lack of capacity to improve/sustain compliance with legal requirements designed to keep children safe and well, and to ensure their learning and development needs are met. Therefore, we believe cancellation is a proportionate and appropriate decision based on the evidence detailed above."

The Appeal

10. The reasons for the appeal are very lengthy. In section H of the Notice of Appeal the Appellant made clear the core of its case:
- *"We have found Ofsted's advice to be contradictory, confusing and the gatepost keeps moving even when the requirements have been fulfilled.*
 - *Ofsted judgements has been governed by confirmation bias.*
 - *Ofsted Inspector have been dishonest in what they have reported."*
(sic)

The balance of section H largely amounts to a witness statement. There are parts that respond to the particular points which were raised on inspection, and generally. Essentially, the Appellant takes issue with each and every point on which reliance is placed by Ofsted so as to justify cancellation.

The Scott Schedule

11. This crystallised the issues between the parties:

- (i) The Respondent asserts that the Appellant cannot meet the requirements for registration. The Appellant has consistently failed to comply with:
 - the statutory framework for EYFS in terms of Learning and Development and Welfare:
 - with the Childcare (General Childcare Register) Regulations 2008. Where issues have been addressed improvement is not sustained and concerns remain.
- (ii) The Appellant makes no admissions and relies on the burden of proof. The current position is one of improvement and compliance: the Appellant has consistently made concerted efforts to comply with the Statutory Framework for EYFS in terms of Learning and Development and Welfare, and the requirements of the Childcare (General Childcare Register) Regulations 2008. Concerns raised by Ofsted require setting in context and understanding of what was actually going on at the time and not a narrow interpretation of the issue. The Appellant can meet the requirements for registration. Where issues have been addressed, improvement is sustained and concerns are abated. The appeal should be allowed.

12. The Scott Schedule (SS) sets out the respective contentions by each party in response to both historic and remaining concerns. It is notable that of some 51 breaches identified none are admitted. Some 21 out of that overall number were identified as “remains concerned” in the SS and were the main focus of the oral evidence before us.

The Hearing

13. We received and read a large indexed and paginated bundle which included a number of witness statements on both sides. We also received detailed opening skeleton arguments from both Counsel. In the course of the evidence we received further documents to which we will refer as necessary.

14. We heard oral evidence in the following order from:

For the Respondent:

Ruth Howard
Caroline Clarke
Jude Sanders
William Good
Kathryn Bell

For the Appellant:

Belinda Rose
Sharon Davies
Joan Richards
HF
Samantha Senior

15. We also received written statements for the Respondent from Joanne Smith, and for the Appellant from Jessica Douglas, both of whom were unable to attend to give oral evidence. This was because of personal illness (Ms Smith) and family illness (Ms Douglas). We fully recognise that the weight to be given to their statements is affected by the fact that they have not been cross-examined and their evidence is thus untested.
16. On 28 September 2018 the hearing was adjourned part heard due to lack of time. Mrs Richard's evidence in chief and in cross examination were complete, but the panel's questions had not been concluded. In any event, there were potentially two more witnesses to be heard. The hearing was therefore adjourned to 27 November 2018. Pursuant to directions we received (necessarily incomplete) written submissions from both counsel and, when the evidence was concluded on 27 November 2018, we heard further oral submissions.

Written Submissions

17. We will summarise below the main aspects of the respective positions of the parties as set out in their (partial) written closing skeletons below.
18. By way of overview, the Appellant's case is that:
 - a. It is an experienced and needed resource providing for children's care within the local community. It is staffed by local people who understand the needs of the children and often speak their first language. This can only be of benefit to the children, their families and their community. The Appellant has challenged the Respondent's witnesses effectively and provided live evidence from a number of staff members who are able to demonstrate their competence and understanding of the Regulations and the activities which they undertake. No such risk sufficiently exists to justify the closing down of the setting and removing an important resource. To do so would be disproportionate.
 - b. Historic concerns are no longer relevant. However, they are utilised to demonstrate their minor nature and the lack of context given to them by Ofsted. The Appellant has gone to great lengths to explain the instances and highlight the lack of proportionality and inconsistencies in the Respondent's case.
 - c. Belinda Rose and Samantha Senior, have significant experience and qualifications. Further, Mrs Richards gave clear evidence and addressed

all of the issues which were put to her in cross examination and by the bench.

- d. There is clear management oversight and training and supervision sessions for staff. Lessons have been learnt by highlighting areas which can and have been improved upon whilst also exposing the, at times, combative and defensive attitude and behaviour of the Respondent.

19. As to matters of detail, the Appellant makes many trenchant and serious criticisms of the Respondent and its witnesses, amongst which are that:

- a) On 27 September 2017 Ms Clarke *“deliberately failed to alert Joan Richards to a safeguarding incident of what she now says is rough handling as soon as Ms. Richards entered the premises.”* It is said that Ms Clarke was inconsistent and disingenuous. It is said that she prevented the Appellant from executing its safeguarding policy, for which the Respondent now criticises the Appellant. It is *“disingenuous”* to suggest that this was a line of enquiry.
- b) The plan of action suggested by Miss Clarke as an agreed itinerary between her and Joan Richards is not made out. Her notes fail to record that Joan Richards had anything to do with it. Miss. Clarke did not want to go on the 15-minute walk. The inspector is supposed to follow the children's routine.
- c) *“Miss. Clarke was evasive when questioned whether Ms. Richards saw the incident. She exaggerated the incident by describing it as of a minute duration, which is not documented, and says it was that length, the Appellant says, to create an impression where Ms. Richards must have seen the incident. It was only under cross-examination which revealed that she was not even watching Ms. Richards. The reality is that she made an assumption and that is dangerous because it has gathered momentum. The Appellant submits that Miss. Clarke is moulding the actual facts to suit her version of events. The intention can only be to bolster her own evidence and that of the Respondent and denigrate that of the Appellant.”*
- d) Ms Clarke's language in the Welfare Requirement Notice at [F839] is inflammatory and only sets out one side of the picture.
- e) So far as the inspection on 8 January 2018 is concerned, considerable criticism is levelled against Ms Sanders. The promise she made that six months would be allowed to get the setting to “good” was reneged on. The Respondent has acted inequitably in denying the period of improvement it promised. Ms Sanders undertook *“a massive climb-down”* in the use of the language (in the transcript). She was *“making excuses for her own inability to explain and own her position per the transcript”* and further *“at each turn when Miss. Sanders was pressed, she was unable to give satisfactory answers. That can be heard and seen on the audio and transcript of the same as her answers changed,*

just as they did in oral evidence.at each turn when Miss. Sanders was pressed, she was unable to give satisfactory answers.” The phrase *“inappropriate behaviour management”* is woolly, subjective and open to interpretation. Ms Sanders used the word “grab” in her evidence. It is submitted that that is an emotive word, introduced in an attempt to bolster her evidence. It is said that this contradicts her account and undermines her credibility.

- f) No other Ofsted inspector previously identified English language skills as an issue for the staff. Neither have any of the other many professionals who are tasked at the setting with evaluating and helping the children. Ms Sanders has sought to create a new issue where none existed before.
- g) Ms Sanders was an unimpressive witness who failed to answer questions properly; she was evasive and exhibited the same lack of candour the Appellant complains of - not telling the Appellant about the possibility of cancellation and then failing to give them 6 months to improve with the Pepper Stacey Consultancy.
- h) Ms Sanders should not have sought to interview staff and gain evidence to be used against the setting without warning them and doing it in a formal manner.
- i) Ms Sanders is not *“open minded because she was primed at a meeting before the inspection and so not acting with a clean slate. She has over emphasised the word “grab” on a child instead of “if the child is in danger”.*”
- j) As to the “hand over hand” incident she *“seeks to create a more detrimental impression to further reinforce her position.”*
- k) Mr Good’s evidence about the use of the word “grab” was speculative. He claimed that it was unclear why the comment was made but it is submitted this is disingenuous. The context was of a child pulling or trying to pull down a CD player off a shelf. Mr Good then conceded that the only issue he had was with the word “grab”. The Appellant’s case is that: *“Even if common sense dictates that evasive action is appropriate, so long as it is proportionate to the danger posed as children are about to go downstairs, that ought to be sufficient.”* This is further evidence that: *“the Respondent nit-picking and blowing out of proportion, common sense matters whilst giving an adverse gloss to the evidence. They are trying to create a false impression of grabbing being commonplace at the setting when it is no more than speculation.”*
- l) *“It seems there is a pattern of Ofsted evidence where they describe things in an attempt to paint a negative picture of the Appellant but when challenged, simply say “Well, that’s what happened”. As the case has proceeded the Respondent has created a lot of smoke in the hope the Tribunal will infer there must be fire.”*

m) The Respondent's evidence is "*disjointed and not upfront. They have not been fair with the Appellant in failing to provide information and creating risk. They have applied a double standard and tried to create false impressions.*"

20. The Respondent provided submissions which refer in detail to the documentary and oral evidence regarding the concerns. In broad terms it is submitted that:

- a. The witnesses for the Respondent have acted professionally throughout their involvement with the Appellant. They gave clear, consistent, credible and reliable evidence, in particular through contemporaneous documentation.
- b. The Appellant's case, in particular with Mrs Richard's evidence, (thus far) had been unclear, contradictory, and inconsistent. On a number of topics JR's evidence contradicted itself, was unclear and confusing.
- c. The Respondent relied on the following:
 - i. Failure to work effectively with the regulator and child protection agencies;
 - ii. Failure to identify and to take action in response to inappropriate handling of children;
 - iii. Failure to identify weaknesses in teaching and to provide appropriate support for staff to improve;
 - iv. Lack of oversight from leaders and managers;
 - v. Lack of active presence on the nursery site from leaders and managers;
 - vi. Failure to communicate loss of premises;
 - vii. Failure to acknowledge the weaknesses of the provision and to take effective action since registration;
 - viii. Lack of understanding of the requirements of the EYFS;
 - ix. Lack of recognition as to the importance of staff modelling correct English for children and the impact this has on children's communication and language development; and
 - x. Lack of communication, in particular regarding the loss of the premises at Queens Walk and Mrs Richard's health.
- d. It is submitted that there are a number of concerns regarding the Appellant. Despite considering future intended plans and provisions being put in place, the concerns raised are still disputed and/or not understood. There have been further breaches such as failure to notify Ofsted as to the provider's current state of health.
- e. It is submitted that these concerns still remain, as do the remaining concerns set out in the Scott Schedule.

Oral Submissions

21. Ms Stevenson submitted that the concerns were reaffirmed by the further oral evidence:

- a) The LADO's record shows that Mrs Richards proposed "MAPPA" training. Mrs Richards could give no clear and consistent answer regarding what she had learnt at the training she arranged. Mrs Senior, the proposed manager had not attended.
- b) So far as future management was concerned there is still no structure as to who will be doing what. Mrs Richards had said that Joanne Gordon would be the deputy manager but today Mrs Senior says that she and Joanne Gordon will both be managers. Mrs Richards had been unclear: she had said that Mrs Senior would be manager 2 out of 3 days and that she was at university part time, whereas it was Mrs Senior's evidence that she was on a full-time university course and would also be full time at the setting. Today NK was mentioned as a potential manager, but Mrs Richards had not mentioned her. Previously it had been said that NK was looking for alternative employment. Today, Mrs Senior had said that NK would be the deputy. It was still not clear that Ms Gordon has full and relevant qualifications. She has a teaching degree in English, but a "full and relevant" qualification requires a module in assessment and observation re childcare 0-3 years and the core principles of EYFS (1-5 years).
- c) There was a failure to work to Ofsted and other agencies: Mrs Senior had not sent the outcome regarding safeguarding investigations to the LADO or to Ofsted.
- d) There was a lack of insight. Mrs Senior had rated the setting as "good" but it was evident that the Pepper Stacey Consultancy considered this was not the case on 8 January 2018. Nonetheless, Mrs Richards and Mrs Senior considered it appropriate to (remain) open the next day.
- e) It is of concern that Mrs Senior will be the manager when, despite her involvement over many years, the setting has never provided good care. Mrs Senior has referred to the need in the community, her passion and her experience but she lacks insight. The panel cannot rely on the evidence given as to the plans for the future and what they intend to implement if the setting were to reopen.

22. Mr Pojur submitted that:

- a) Mrs Richards was a clear and consistent witness who has given a credible explanation regarding the training provided by Able Training and why this was appropriate for the setting. It was clear that "MAPPA" was not her wording. "MAPI" is relevant training and was the right response.
- b) The LADO was not concerned, was satisfied that the setting was responding correctly and took no further action.
- c) HF (J's mother) knew of the hand over hand technique. J had not shown any signs of distress.
- d) Mrs Senior was right to have said "*Don't be afraid to do your job*" it was very clear that "grabbing" did not happen.
- e) There was clear evidence about the monitoring of child development. All the files were presented when the Inspector was present but only one file has been looked at.

- f) Mrs Senior was an impressive witness who, because of her qualifications, has an understanding of child health and IEPs (Individual Educational Plans). Other agencies visit and if there had been concerns they would have been raised.
- g) The Respondent had reneged on the promise to give the setting 6 months. He relied on the evidence of Ms Sanders and Mr Good regarding this promise. The effect of the Pepper Stacey consultancy evidence on 8 January was that six months would do it. The Appellant had done as much as they could by way of updating before re-opening but it would take time for things to “bed in”.
- h) The management structure was not inappropriate. The different staff would complement each other.
- i) The setting was acting in the best interests of children by putting in extra things i.e. extra staff (for 1 to 1) that were not funded.
- j) What came over in Mrs Senior’s evidence was her passion, concern and understanding. The panel should not lose sight of the fact that they are trying to achieve something for their community in a deprived area. The community should not lose this care, passion and 25 years’ experience.
- k) There were “*significant grey areas and a lot were the fault of the way Ofsted brought about many of these issues.*” The Respondent says that going back eight years the setting is still not at the level of good but what are the real issues that give rise to risk? The Appellant should be given the benefit of the doubt and be given six months (to improve). The parties can come together to meet the interests of children. No child has been harmed. Ofsted had not proved its case. There was every reason to keep the setting open.

The Law

- 23. The legal framework for the registration and regulation of childminders is to be found in Part 3 of the Childcare Act 2006 (“the Act”).
- 24. Section 32 of the Act provides for the maintenance of two childcare registers. The first register (“the Early Years Register”) contains those providers registered to provide early years childminding/childcare for children from birth to the age of five years for which registration is compulsory. The second register (“the General Childcare Register”) is divided into two parts: A register which contains those providers registered to provide later years childminding/childcare for children aged between 5 and 8 years for which registration is compulsory (“the compulsory part”). A register which contains those providers registered to provide later years childminding/childcare for children aged over 8 years for which registration is voluntary (“the voluntary part”).
- 25. Section 68 of the Act provides for the cancellation of a person’s registration in certain circumstances. Section 68(2) provides that Ofsted may cancel registration of a person registered on the Early Years Register or on either part of the General Childcare Register, if it appears:

(a) that the prescribed requirements for registration which apply in relation to the person's registration under that Chapter have ceased, or will cease, to be satisfied,

(c) that he has failed to comply with a requirement imposed on him by regulations under that Chapter.

26. Section 73 of the Act provides that, if it is proposed to cancel registration, Ofsted is required to give notice of the same and set out the reasons for the decision and the rights of the registered person to object either orally or in writing. The registered person must be given the opportunity to object and, if they do so, this will be considered before the decision to cancel is made final. If the final decision is to cancel then, again, notice to the registered person must be given.

27. Section 74(1) of the Act provides a right of appeal to the Tribunal and the decision does not take effect until either the time limit for lodging an appeal expires, or if an appeal is so lodged, until the conclusion of the proceedings.

The Early Years Register

28. The prescribed requirements for Early Years registration are provided for in Part 1, Schedule 1 of the Childcare (Early Years Register) Regulations 2008. Those which are relevant in this case are as follows:

- The applicant is an individual who is suitable to provide early years childminding (paragraph 1)
- The applicant is to have the charge of the early years childminding (paragraph 2)
- The applicant will secure that the proposed early years childminding meets the EYFS learning and development requirements (paragraph 4)
- The applicant will comply with the EYFS welfare requirements (paragraph 5)
- Every person (other than the applicant) who is to care for children for whom the early years childminding is provided is suitable to care for young children (paragraph 8).

The General Childcare Register

29. The prescribed requirements for Later Years registration (which includes registration on both parts of the General Childcare Register) are provided for by Part 1 of Schedule 1 of the Childcare (General Childcare Register) Regulations 2008. Those which are relevant in this case are as follows:

- The applicant is an individual who is suitable to provide later years childminding (paragraph 1).
- The applicant is to have the charge of the later years childminding (paragraph 2).
- Every person (other than the applicant) who is to care for children for whom the later years childminding is provided is suitable to care for children (paragraph 5).

- An application for an enhanced criminal record certificate is provided to the Chief Inspector in respect of every person mentioned in paragraph 5 (paragraph 6).

30. Section 40 of the Childcare Act 2006 imposes a duty upon those registered as an early years provider, to comply with the welfare requirements of the Early Years Foundation Stage. Those relevant in this case are helpfully set out in the Respondent's skeleton. We do not reproduce them here but have taken them into account when making our decision.

The Burden and Standard of Proof

31. In so far as any facts are in issue the Respondent bears the burden of proof and the standard is the balance of probabilities.

32. The burden rests on the Respondent to show, on the balance of probabilities, that cancellation is justified and necessary in the public interest. This involves consideration the existence and significance of any risk. The issue of proportionality involves a judgement, as viewed today, which balances the public interest against the interests of the Appellant and all involved.

Our Consideration and Findings of Fact

33. It is common ground that we are required to determine the matter de novo and make our own decision on the evidence as at today's date. This can include new information or material that was not available at the date of decision. It is, for example, open to any appellant in any given case to rely on evidence to show that the facts were not as alleged and/or to dispute alleged breaches and/or to contend that opinions or views reached were wrong and/or mistaken and/or unjustified and/or that the issues have since been addressed.

34. In this appeal the Appellant's primary case is that the facts or matters which underpinned the decision under appeal are very strongly disputed. No breaches of the regulations are admitted. Further/or alternatively, the Appellant's case is that cancellation is not justified. Her case includes that there is an improvement plan that will address any matters of legitimate concern within a reasonable time frame and there is therefore no good reason to cancel registration. Cancellation would be disproportionate in all the circumstances.

35. The redetermination in this appeal includes consideration of the more detailed evidence provided by both sides in this appeal as well as the oral evidence which has now been subjected to cross examination over six days. We have considered all the evidence and submissions before us. If we do not refer to any particular aspect of the evidence/submissions it should not be assumed that we have not taken this into account. We will not set out all the oral evidence but will refer to parts of it when giving our reasons.

36. The true core of the Respondent's case is that there has been a consistent pattern of poor quality provision by the Appellant over many years. Despite measures taken, events have shown that the Appellant, led by its director, Mrs Richards, does not have the capacity to improve the setting because she lacks insight and understanding. Part of that lack of insight is that she is unable to acknowledge any

breaches and/or has limited understanding of the breadth and depth of the remaining issues of concern. Further, the Respondent's case is that Samantha Senior, on whom Mrs Richards principally relies to manage the setting, also lacks capacity, insight and understanding. In short, the Respondent's case that the requirements for registration have ceased to be satisfied and the proportionate response is to cancel registration because the provider is not able to meet the relevant requirements of the Regulations.

37. By way of contrast the Appellant's case at the start of the appeal was that no breaches (historic or remaining) were admitted. Alleged facts are disputed. Trenchant criticisms are made of the Ofsted inspectors. Mrs Richards and Mrs Senior, assisted by others who will be involved in management positions, are able to lead and manage the setting at St Bartholomew's in accordance with the relevant frameworks and will be able to effect improvement in so far as is necessary. Mrs Richards is undertaking her NVQ at level 5. The Appellant's case is that they will work with the Pepper Stacy Consultancy and that the setting will become good. (It is not currently intended to re-open Queens Walk.)

38. The broad issues in the appeal are:

- a. Were there breaches of the relevant requirements?; and/or
- b. Have the requirements for registration ceased to be satisfied?; and
- c. Is cancellation of the registration a proportionate step?

39. We have considered all of the evidence in the round. We find that the basic facts in terms of the general background prior to 2017, and the immediate background, are as set out in paragraph 7 and 8 above. We will make further findings, in so far as it is necessary to do so, below.

2016

40. So far as the 2016 inspections were concerned Mrs Richards accepted in cross examination the following breaches:

- a) The three remaining concerns regarding the January 2016 inspection, (see the SS at page D8). The included: lack of management oversight and provision of training for staff to improve quality of teaching; organisation of rooms, resources and equipment and daily routine; staff not using starting points to plan activities to challenge individual children in their learning.
- b) The one remaining concern in the October 2016 inspection (see SS at page D9). This concerned: *"inconsistent teaching across the nursery. Quality of staff practice not managed effectively."*

2017

41. Moving onto mid-2017, Ms Clarke was the lead inspector on 16 May 2017. She considered that the monitoring and assessment of children's progress at the Queen's Walk setting was variable in quality and that checks in children's progress were not in place to help children make good progress (see the SS at page 10). She judged the overall effectiveness of the provision to be 'Requires Improvement'. A notice of action to improve relating to the learning and development requirements of the EYFS was served. Although Ms Clarke gave evidence before us there was no challenge to the view she reached on 16 May 2017.

42. There are very significant disputes about the inspections on 27 September 2017, 9 January and 1 February 2018 at the St Bartholomew's setting to which we will turn in due course. In our view it is necessary to bear fully in mind that the alleged incidents about behaviour management and/or alleged inappropriate handling at the time of these inspections are just one part of a very much larger picture (and within each inspection). The incidents alleged were not, in our view, the sole cause for concern in relation to those inspections. The issues arising were much broader and encompassed issues regarding the overall quality of the provision.
43. We make some initial broad findings. Mrs Richards is the sole director of the Appellant company. She is also a Bishop. She has started her NVQ in childcare at Level 5 but this is not yet complete as she has been unwell. Her daughters, Belinda Rose and Samantha Senior, have been involved in the settings to greater or lesser degree over the years. Belinda Rose has a degree in social work. She has not been actively involved in the business for some time. Samantha Senior (Mrs Senior) who has relevant qualifications has, however, been involved for many years and to date. It emerged at the very end of the evidence that her brother Anthony has also been involved to a limited extent, to which we will return.
44. The overall impression we formed from the evidence is that this is a family business, albeit that we find the clear directing force is, and, always has been, Mrs Richards. She began the nursery many years ago. Mrs Richards is plainly very determined that that the setting must remain registered. Her perspective is that the setting provides a valuable community resource in a deprived area. It is clear that she is strongly motivated by the wish to provide employment in the community, which is, of course, commendable. It was clear to us from all of the evidence that Mrs Richards is also very determined that she must remain in control of the family business. Having seen and heard her give evidence it was apparent to us that she is a very strong and forceful personality.
45. Although the Appellant had appeared to suggest in the notice of appeal that all the inspectors involved in September 2017 and thereafter, were dishonest, she said in evidence that the only inspector she considered was dishonest was Ms Clarke. Ms Sanders and Mr Good were simply "incorrect".
46. The credibility of Ms Clarke's evidence has been the subject of very significant challenge. In the course of her inspection on 27 September 2017, Ms Clarke made contemporaneous and timed records (i.e. the Inspection Toolkit).
47. We will later address the core remaining issues identified in the SS but deal with some general points taken first.
48. It is suggested that Ms Clarke behaved unprofessionally in that she worked on her laptop in the small room in which she was observing the children (at about midday). We accept that it is important that inspectors make contemporaneous notes of their observations irrespective of the physical circumstances. In our view the fact that Ms Clarke had to sit on the floor in a small room using her laptop is neither here nor there: it is a fact of life that inspections are conducted in such circumstances on occasions but the need to make contemporaneous notes is obvious. The potential relevance is whether her position and her interaction with child D was a contributory factor to what then happened. We accept her evidence that although child D had shown some interest in her, the issue that in fact led to the incident of

inappropriate handling was not related to her presence. It was because a staff member C wanted to change his nappy and D was resisting this. In our view Mrs Richards's evidence about this was to seek to deflect from the real issue. We find that this was an incident of inappropriate handling. It appears that despite her response on the day Mrs Richards did come to that view. We are informed that Mrs Richards terminated the employment of C but she now seeks to say that Ms Clarke bears responsibility for what happened. We reject this. In our view Mrs Richards's evidence was inconsistent and manipulative. In our view she has sought to deflect the criticisms by blaming Ms Clarke.

49. Another complaint made by Mrs Richards is that Ms Clarke decided not to accompany the children on the trip out. She criticises this and says that this caused major disruption. We fail to see how the fact that Ms Clark did not accompany the children amounted to any disruption at all. In our view this too is simple deflection. Ms Clark was perfectly entitled to decide not to accompany the children on a trip outside of the setting. It was for her to decide how to balance her time between the review of documentation and direct observation. Further we find that the plan for the day was agreed at the outset with SK and Mrs Richards. This was clearly set out in the records. We do not accept that this was an unreliable record. Again, we consider that Mrs Richards' complaint was an attempt to deflect criticism.
50. We accept Ms Clarke's evidence that her observation of how staff handled children opened up a line of enquiry for her. In our view it was a wholly reasonable line of enquiry to further consider how members of staff generally met the needs of children and the extent to which there was any or any effective leadership and management in this core area. We do not criticise Ms Clarke for the fact that she did not immediately tell Mrs Richards of the incident that she observed at or just after 08.38 hours. Mrs Richards was on duty from 09.23 hours, and on the evidence before us, was mainly in her office which has CCTV. The matters observed by Ms Clarke as to how individual children were handled thereafter were not high-level incidents. We do not agree that it was inappropriate, unreasonable or unfair for Ms Clarke to see how matters developed both in general terms and in terms of any response or action taken by Mrs Richards. It was quite clear to us that this was an evolving situation that reached a significant point at 12.02 hours.
51. We find that it was the (third) incident that occurred at 12.02 hours, against the background of the earlier incidents and other concerns, that led to enhanced concerns. We find that Mrs Richards was present when the third incident occurred. In her evidence Mrs Richards denied that she saw the incident although, curiously, she gave a description of it, seemingly from her perspective. Given the small dimensions of the room and the description of the events as described by Mrs Richards we find that it is very improbable that she did not see the incident at 12.02.
52. We also find that immediately after the incident at 12.02 hours Ms Clarke gave Mrs Richards the opportunity to comment on it and explained to her that she found it very disturbing. She asked Mrs Richards if they could look at the CCTV together but Mrs Richards said the cameras did not record. We find that Mrs Richards' response was effectively to excuse what had happened by saying that the child was difficult. In her evidence Mrs Richards disputed that this exchange had happened at all but we reject this. In our view her immediate response to Ms Clarke amply demonstrates a very poor understanding of the principles of the

management of behaviour in young children. This causes us to have real concern regarding her insight and understanding and her ability to lead and manage the setting and to supervise her staff.

53. In our view it is clear on Ms Clarke's evidence that it was in large part Mrs Richards' lack of response that led her to consider that suspension may be warranted. Ms Clarke had also noticed fresh scratches to D. Mrs Richards said she would go and ask staff about it.
54. When Ms Clarke went back downstairs at 12.26 hours Mrs Richards was with SK who was filling out an incident form which said that D sustained the scratches on the way to the library. This form accounted for two scratches on the left-hand side of D's face. Mrs Clarke asked Mrs Richards about the scratch on the right-hand side of D's face. Mrs Richards said she had not seen this. C said that she thought this had happened at home.
55. At about this time Ms Clarke also observed a further incident when MoS C, without any verbal communication, grabbed a child by the top of her arms and pulled the child round to face the table.
56. Ms Clarke came to the view that Mrs Richards was not stepping in to deal with safeguarding issues. She then contacted Ms Bell who made a decision to suspend registration.
57. We find that at 13.10 hours Ms Clarke provided Mrs Richards with a lengthy explanation of the incidents and concerns that had resulted in suspension. In our view it is notable that Mrs Richards interrupted at one stage to assert that no child called A***** attended the setting but, notably, Ms Clarke had to tell her that this was the name of the MoS involved, and not the child.
58. We find that Mrs Richards' overall response at this time was that the children were "*difficult to manage*" which was in line with her earlier recorded response about child D.
59. We noted that, according to Ms Clarke's record, members of staff involved approached Ms Clarke wanting to know why there had been a referral/suspension. D expressed her regret for grabbing D by the arm. A***** was informed about the incidents which concerned her.
60. The overall impression we formed of Ms Clarke as a witness was that she had no "axe to grind." She came across as quiet, calm and unassertive. Her evidence was simple and transparent and in line with the records she made at the time. In our view she was trying to tell us what she saw and experienced without embellishment. She was, in our view, a witness who came across as completely guileless. We consider that there is no good reason to doubt that her timed and contemporaneous records were made at the time and represented her honest and unvarnished understanding of events as they happened. In our view, the notion that she made records in order to set up a case or as a result of some kind of pre-formed bias against the Appellant has no substance whatsoever. We find that Ms Clarke's contemporaneous records were an accurate and honest account of what she saw, observed and was told as the inspection unfolded.
61. There is substantial dispute regarding the interview on 26 October 2017. In short, we have two different versions before us and the Appellant relies on the evidence

of Ms Davies. We do not consider that the resolution of differences between accounts as to what was said after the events assists us in our essential task a great deal. In our view it is more appropriate to focus our attention on the facts at the time of the inspections.

62. We focus on the matters which are remaining concerns. We find that the following remaining concerns/breaches in relation to the inspection on 27 November 2017 have been proved on the balance of probability:

1. The environment was chaotic and children were unhappy. Staff were not deployed effectively to meet the children's needs.

Mrs Richards denies this. We find that Ms Clarke's record contains many examples of the general chaos and lack of organisation she saw during the inspection. We accept that her account is accurate and reliable.

2. Staff were observed rough handling children five times during the inspection. Staff were not managing children's behaviour appropriately.

We find that the incidents described by Ms Clarke occurred. We accept Ms Clarke's description of how staff were not managing behaviour appropriately as reliable and honest evidence.

3. Staff did not recognize or intervene when they observed other staff members managing children's behaviour in an inappropriate way.

We noted that Ms Clarke noted one occasion when one MoS did indicate to another MoS some concern. Save in this respect, there is no evidence that other members of staff recognized or acted upon inappropriate handling. This, in our view, suggests that physical handling of children (i.e. as opposed to other means to encouraging cooperation/participation/engagement) was normal in the setting.

4. The NI did not respond to incidents of rough handling by staff appropriately in line with the setting's safeguarding policy. This was despite inspectors halting the inspection and contacting the LADO.

We have found that Mrs Richards was present when the incident occurred at 12.02 hours. We find that this was an incident of rough handling. It was plainly inappropriate handling. There were obvious means by which a child resisting a nappy change could, and in our view, should have been handled. Instead the MoS resorted to physical handling which was wholly inappropriate at many levels. We find that Mrs Richards' response to this was wholly inadequate. Firstly, she did not respond at the time it occurred. Secondly, she did not respond appropriately when it was raised with her by Ms Clarke soon after. Her response to Ms Clarke was to effectively suggest that this was unavoidable because the child in question was difficult. In our view her response to Ms Clarke showed lack of insight or understanding of her responsibilities to the child (and even to the MoS involved.)

5. The children's attendance records were inaccurate and did not reflect the children present.

Mrs Richards accepted that eleven children left the setting together and that the eleventh child's name was missing from the attendance register. However,

she denied that the registers were inaccurate because it has been amended by her, once she found out who the eleventh child was. Mrs Richards agreed that prior to her amending the attendance register, the registers did not match but could not accept that prior to her amending the registers, the registers were inaccurate. We find that they were, and it is plain that this had only been remedied because it has been raised by Ms Clarke.

6 (not current)

7. There was no qualified level 3 manager on site at the start of the inspection.

Ms Clarke recorded at the beginning of the inspection that there was *'no manager and no deputising arrangements. JR is not present. Samantha [i.e. Mrs Senior] is not here'*. After Mrs Richards arrived (at 09.23) Ms Clarke noted:

'JR admits there is no active manager at either site that she is responsible for. There is a trainee supervisor S[K] who replaces the previous person in charge who has gone on maternity leave. This leaves the setting with no manager which is a breach of the requirements. JR tells me that Samantha is the area manager but she is attending university and is not readily available...she was unable to tell me the planning for the day as this falls to S[K]...'

Mrs Richards denied that this conversation took place but we accept that it did and that it reflected the true facts.

2018

63. The Inspection on 9 January 2018 was conducted by Ms Sanders and Mr Good. It was the completion of the aborted inspection of 27 September 2017. They also attended on the compliance visit on 1 February 2018. They each made contemporaneous records. We are satisfied that they were both doing their level best to accurately describe what they saw, heard and observed on both occasions both in their records and throughout their oral evidence.

64. We will deal with some aspects of the evidence and the matters in dispute against the framework of the relevant remaining concerns as per the SS relevant to this inspection. We do not pretend to deal with every point.

1. 'Qualification requirements of staff not met'.

Some examples include:

- *There are only three children and two childcare staff but the scene is chaotic...Neither the manager, deputy or provider are present';* and,
- *'I asked J who was currently in charge – she said that she wasn't sure- it was maybe SK as she was the level 3. I asked her who the manager of the setting was – she said that she wasn't sure. I asked if she knew when the manager would be present – she said that she didn't know'.*

Mrs Richards agreed that SK was alone and that the manager, deputy and provider were not present at the beginning of the inspection. However, she disagreed that the qualification requirements had not been met (i.e. on the

basis that SK's qualification did not meet the requirement. The panel queried this because in her evidence concerning the September inspection she had confirmed that SK's qualification was not full and relevant and there is also an email from the DoE which confirmed SK's qualification was not full and relevant. Mrs Richards said that she had informed Ofsted that she was seeking further information from Pakistan regarding SK's qualification and she was still questioning whether the DoE information was correct. We were not shown any evidence to demonstrate the enquiries made then or since, or any outcome.

2. **'Staff not deployed effectively at the time of the inspection'**,

The impact of the evidence of both Ms Sanders and Mr Good is that generally they observed a chaotic environment. One example is:

'During snack time there are 6 children present and 5 x MoS in a fairly small room cluttered with resources around the outside. Staff are not organised effectively by managers therefore snack time is somewhat chaotic – staff come in and out of the rooms, opening and closing stairgates – children do not appear settled – this may be partly due to how staff are deployed. Staff do not appear clear on their roles and it is not apparent why there are so many staff when they are not needed specifically'.

In our view the evidence that the environment was generally chaotic is very clear. It is also clear that part of this was the numbers of staff. Overall the evidence generally shows that there were far more staff at this setting than is usual. Based on Mrs Senior's evidence there was no one to one funding in place - although the setting was endeavouring to meet the needs of two children who were considered to have special educational needs and where no IEPs (Individual Educational Plans) were yet in place. It seems to us overall that the very high staff/child ratio is a feature that is connected to Mrs Richards' wish to provide employment for local people in a deprived area, and her willingness to take on students in training placement. In our view it is obvious that the more staff/students there are, the more effective management, deployment and planning needs to be. We will return to this aspect when considering other evidence.

3. **'Lack of recording of pre-existing injuries'**,

In our view the key evidence is Ms Sander's account: *'As we walked back from library I began to speak to a MoS D... I asked her if she had noticed that the child had a mark under her eye. Unclear from D about the process for recording any existing injuries as she appeared to indicate she had seen this at the weekend (child was her own daughter). D then said that she hadn't noticed it this morning'.*

Mr Good recorded : *'Discussion with DB...JS asks about DB's own child A's red mark on her face. DB said Child A scratched this at home and she had forgotten to complete and existing injury form. No one else at the nursery had asked about the injury'.*

In her evidence Mrs Richards said that this was not an injury: it was a little red spot on the child's cheekbone which comes and goes and did not need to be recorded. Her overall position was suggested that Ms Sanders was

looking for it (i.e. an injury) and that the mark on the child's face did not need to be recorded as it comes and goes. When referred to the record made by Mr Good, Mrs Richards said that this was not what she had been told by the mother. In our view the suggestion that that the mark seen by Ms Sanders was something that came and went, and did not need to be recorded, is not consistent with what the mother/MoS D said at the time and is not reliable.

4. **'Children's hours of attendance not accurately recorded'.**

The key records are:

- *'MoS SK in charge. I asked her how many children she had with her – she took a piece of paper out of her bag and consulted it – register...shows x7 children present. DISC: SK said...she was taking seven on the walk to the library. I counted the children present and said that there were only five...Another MoS advised her that two children had just left...not recorded on this register. Discussion held with SK about there being two different registers in place...two children not signed out from one register – numbers not checked by staff before leaving...':*
- *'DISC: When we arrived back from the walk ... I shared with JR that there had been an issue with recording children's attendance before children left the setting to go for the walk. JR said that they had tried to implement a new system...I advised JR that failure to record children's attendance impacted on children's safety while present at the setting. JR accepted this...JR confirmed that child L and child J were siblings and that they had not been signed out according to the setting's agreed procedures....'*

Mrs Richards said in evidence that the two children were 'just leaving' and they just needed to amend the register. When Mrs Richards was referred to the last entry above she stated that she could not remember the conversation.

We consider that the record made accurately reflected her acknowledgement at the time that two children has not been signed out and should have been. In our view the important point is that the staff were about to go out with a register that was inaccurate and the numbers were not checked until this was raised by Ms Sanders. We quite accept that having a register with more children on it than are, in fact, present may not pose as great a risk as having a register with less children on it than are, in fact, present. That is not the point. The Appellant's assertion that the setting has "never lost a child" misses the point and importance of accurate registers.

5. **'Staff suitability checks not carried out by leaders and managers. Staff unaware of disqualification legislation and how this may apply to them'.** One example is as follows:

'I spoke to 3x staff during the walk about disqualification. MoS SD commented that leaders and managers checked with her before she started at the setting about any convictions she may have had. None of the staff spoken to were clear about disqualification legislation and how this may apply to them. No staff clear about disqualification by

association – one commented that no household members would ever be let into the setting so that wouldn't be a problem...'

Mrs Richards' position is that staff are aware of disqualification issues, but we accept the evidence plainly shows that some members of staff were not aware of disqualification by association. We agree with the Respondent that it is thus unclear whether all staff at the nursery were, in fact, suitable to work with children

6. **'All staff not proficient in their command of English'**,

There are numerous recorded examples of a poor command of English by many staff (initials in brackets) a few examples of which are:

- *"he doesn't say much things"; (D)*
- *"was you wet?" (C)*
- *"Would you like some story? Would you like play in the kitchen?" (SK)*

We accept that the records made by the inspectors were honest and accurate. We will comment further on this aspect and Mrs Richards' response to it in due course.

7. **'Lack of support for staff to review their performance and improve the quality of teaching'**.

"DISC: I asked if there were any staff that JR was concerned about in terms of performance. JR said no, not at present. She said that there was a MoS who had a hearing aid but there were times when she would come in without her hearing aid- she wasn't picking up things readily that they were saying. JR said that she spoke to her and she is no longer with them...JR said that she had no staff that she was really concerned about – this is not an accurate reflection on the teaching we have seen today ...'

JR could not recall this conversation. We accept that it occurred. In our view there is ample and reliable evidence that indicates that there were real issues with staff performance regarding the quality of teaching. In our view Mrs Richards demonstrated to Ms Sanders that she had little or no awareness that the quality of teaching was poor. This is very striking given that the day before the Pepper Stacey Consultancy had carried out a mock inspection and provided the Appellant with a Rapid Action Plan (RAP) which identified, amongst other matters, the need to improve so as to:

- Improve consistency in the quality of teaching practice,
- Provide effective training in relation to teaching,
- Review the planning procedure to enable staff to precisely plan activities and challenge individual children in their learning.

We noted that the RAP said that two of these actions were required with *"immediate effect"*. We noted also that training was arranged for 20 January.

The Monitoring Visit: 1 February 2018

65. This was conducted to monitor compliance that the WRN. The points in the SS relate to *“Ineffective management of safeguarding concerns- allegation against a member of staff”* and *“inappropriate behaviour management of children by staff.”* Much focus has been placed in the oral evidence regarding what has been called the “hand over hand incident.” In short, the Appellant’s case is that this a recognised technique with a child (J) with (suspected) autism.
66. Ms Sanders in her records described at lunchtime where she saw a MoS (NK), who was sitting behind J, put her hand over the top of J’s roughly in a grabbing action and move this towards the spoon in the bowls to ensure that J served himself from the bowls. This action was repeated. NK moved J’s hand forcibly towards the serving bowl and back towards his plate. In her written and oral evidence she described that what she saw made her feel uncomfortable. She felt it was unnecessary force. She looked towards Mr Good to see if he had observed this. At this point another MoS entered and told JR that Mrs Richards wanted to speak with her. So far as Ms Sanders could recall there was nothing said by the MoS to accompany the action taken. She and Mr Good discussed the matter. Although the grabbing action had not caused harm they were significantly worried about how NK had forcibly grabbed J’s hand when this had been completely unnecessary. She later raised the matter with Mrs Richards because she wanted her as leader and manager to reflect on it. She had been concerned by Mrs Richards’ initial response. She thought it fair to allow Mrs Richards more time to reflect.
67. What happened soon after was a fraught exchange which we have before us in the form of a transcript (with audio), and upon which the Appellant places significant reliance. It started off with Mrs Richards and Mrs Senior explaining that legal advice had been taken and that a decision made to shut the unit, and for the legal team to investigate an allegation of manhandling. Curiously Mrs Senior also referred to the need to get witness statements and *“also to get the camera”*. This is odd because we were told by Mrs Richards that the CCTV camera, (undoubtedly in place), was not capable of recording so as to enable play back, and that its sole (operative) function was to enable live streaming. It is odd that Mrs Senior, as manager, thought that the camera would enable play back and that this would be forensically useful in support of the Appellant’s position.
68. The audio of the transcript was played during the hearing. We have listened to this again. We do not consider the audio is as helpful as Mrs Richards and Mrs Senior appear to believe. We make every allowance for the fact that Mrs Richards was undoubtedly upset. It is, nonetheless, very clear to us that her overall approach in that exchange was combative and argumentative. She spoke over Ms Sanders and interrupted her when she tried to speak. In our view the audio overall is consistent with the overall impression created by Mrs Richards when she gave evidence before us.
69. It is notable that the child’s mother, HF, who works at the setting was present during this exchange. What is clear is that she had not seen the incident and neither had Mrs Richards or Mrs Senior.
70. It is clear from the transcript that Ms Sanders wanted to describe it, but she was interrupted by Mrs R:

“No I don't need a description, what is it that you are saying, are you saying that because you have said this over and over you can't describe it but I want to know what is your position, are you accusing another staff member off mine that they have inappropriately handled a child?”

71. It is nonetheless clear from the transcript that Mrs Senior understood that Ms Sanders was saying it was *“hand over hand”*. HF did not at that time mention that *“hand over hand”* was a recognised technique used at home. She did, however, mention this in her statement dated July 2018. The oral evidence of Mrs Senior was to the effect she had been given advice by an (unidentified) Early Years Advisor at some stage about this technique and had relayed this to HF. Whilst we can see that, on occasions, some form of physical guidance might be appropriate to help support a child's efforts to achieve autonomy and independence, we consider that overall the description that Ms Sanders gave is accurate. We find that what she described was, at best, a poor method in supporting *“independence”* and was more in the nature of control so as to prevent food being spilt. This was also in line with HF's evidence as to why *“hand over hand”* was useful. In our view this is a rather narrow perspective of appropriate support. Ms Clarke and Mr Good were the only people who actually saw the incident and they both thought the interaction was inappropriate. We accept their evidence.
72. Let us be clear. No one has ever suggested that the incident would have caused significant injury to J. We should also stress that we do not consider that this incident, in and of itself, is of great significance in terms of the overall picture regarding the ability of staff to respond to children's needs appropriately. It is just one part of an overall picture. The main significance of it in our view is that it illustrates Ms Richard's approach to leadership and management. When asked to comment and given time to reflect by Ms Sanders, she decided to approach and lead the matter in a combative and defensive mode.
73. In our view the other detail of Ms Sanders and Mr Good's statements are important. They described many matters that caused them to have very significant concerns about the quality of teaching and learning at the setting overall. There was no significant challenge to their evidence.
74. One other aspect of the evidence concerns Mr Good's evidence that as the children were lining up to go downstairs he heard Mrs Senior say to staff *“Don't be afraid to grab the children just because Ofsted are here if they are going to be in danger”*. Ms Senior denies that she used the word *“grab”* and the effect of her evidence is that she did seek to convey to staff they should not be afraid to do their job. We prefer the evidence of Mr Good. We can quite accept that the use of the word *“grab”* when advising staff might be appropriate when a child is in imminent danger. Overall, however, the evidence is a piece with the overall picture that the boundaries between what is, or is not, appropriate physical contact with a child are somewhat blurred in this setting. In our view the evidence overall supports that there are real and justifiable concerns that there has been a normalisation of inappropriate physical contact with an emphasis on an ethos of control by adults.
75. We do not accept that Ms Sanders promised that the outcome would be that a period of six months to improve. She told us that she advised that the overall judgement was *“Inadequate”* and that a WRN would follow. We do accept that there was capacity for confusion because she told us that she also referred to a review

within six months if a WRN was issued. However, we accept that she also said that the inspection outcome would be reviewed by a senior officer. Much focus was placed on the fact that she agreed that she did not mention the possibility of cancellation. We are not surprised that she did not do so because that was not a decision within her remit. In any event, we do not consider that anything that was said (or not said) could reasonably be taken as a promise (and still less a legitimate expectation) that the setting would be allowed to continue or that six months would be given to effect improvement.

76. It is inescapable that Ms Bell's decision to cancel was based upon a review of the entire history of the settings. There was no challenge to the integrity of Ms Bell. We consider that her evidence was reliable and her opinions were evidence based.

Our Overall Evaluation

77. We considered all the submissions made. In our view the issues were far more wide ranging than the specific handling incident(s) described by Ms Clarke and/or Ms Sanders and Mr Good, and with which Mrs Richards takes particular exception.

78. What is significant in our view is that, despite past inspection judgements and enforcement measures, there have real and continuing concerns over a number of years. There has never been a judgement of "good". The various settings run by the Appellant, have received judgements of either "inadequate" or "requires improvement" for many years and whilst Mrs Senior has been the manager.

79. In our view the reality is that the Appellant was prepared to have the setting open on 9 January 2018 despite knowing that even Pepper Stacey, as independent consultants, considered that there was still a long way to go. Mrs Senior's evidence was telling. She is put forward as a key component to management moving forward. She considered that the outcome of the mock inspection on 8 January 2018 was sufficiently addressed by working late to amend the SEF overnight, putting paperwork in order and by changing the layout of the resources. In our view she and Mrs Richards had then, and have now, little or no understanding of what is required to address the real and longstanding issues that underpin the issues regarding the adequacy of the provision. The core issues are nothing to do with "quick fixes" to paperwork, or the layout of rooms or the resources (welcome though such changes are), but are to do with the ability of the Leadership and Management team to effect and sustain improvement in core themes across the service. The real issues are to do with the management having a shared and thorough understanding of what the childcare and EYFS frameworks seek to deliver in the best interests of children. In our view, it is obvious that the Appellant was a very long way off that mark on 8 January 2018 when it was decided to carry on.

80. In our view Mrs Richards demonstrated time and time again in her oral evidence that she has very real difficulty in listening to others. In her evidence she repeatedly showed a marked tendency to talk across people who are speaking. She tended to be entirely focussed on the argument she wishes to make rather than listening to, or actually answering, the specific question posed. We made every reasonable allowance for this recognising that it may have been a feature borne of anxiety or stress of litigation. However, it appeared to us that Mrs Richards is unable to contemplate that there might be a legitimate alternative perspective to her own that

might merit consideration. Her perspective as shown by the response to the appeal, the approach to the SS, and her written evidence is that Ofsted are wrong and she is right. We consider that the attitude Mrs Richards displayed in her oral evidence before us was defensive, combative and dismissive. She showed on multiple occasions that she unwilling to take any or any true responsibility as shown by her denial of many basic facts. Further (and even more importantly), in her oral evidence she showed a lack of any real understanding of her obligations as the provider of general childcare and within the Early Years Framework. Having considered all of the evidence in the round, we find that Mrs Richards had then, and has now, little or no real insight into the very clear issues involved regarding leadership and management and the overall quality of the provision at the setting.

81. We looked long and hard for evidence that Mrs Richards and Ms Senior are able to translate their skills, qualifications, experience and passion into sound leadership and management. We could see from her evidence that Ms Senior has a somewhat better understanding than her mother, but it was nonetheless clear that her understanding is superficial and she, is in any event, dictated to by her mother. It shone out from her evidence that her mother is, and always will be, in charge. For example, it is intended that Mrs Richards will remain the DSL (Designated Safeguarding Lead). In any event, Mrs Richards' attitude has set and, in our view, will always set the tone, not only for the standards of delivery under the general childcare and EYFS frameworks, but also for the tone of any response to regulation.
82. We also consider that there are also very significant issues about who will, or will not be, managing the setting. Despite Mrs Senior's involvement over the years there has been a long history of non-compliance and the setting has always required improvement. The future plans involve that Mrs Senior will be one of the managers but she is in the second year of a full-time university degree course. It was obvious from her evidence that her return as a manager with effect from early 2018 only came about because of the regulatory action taken. Despite the WRN addressing this issue (amongst others), there was still no management presence on 9 January.
83. The Appellant proposes that Ms Joanne Gordon will also act as a manager. The Appellant's case is that Ms Gordon is still ready, willing and available to take on this role. No statement has been adduced from her and she has not been called to give evidence. The evidence before us is that she has a degree in English and has taught in primary schools. We are not satisfied that she has a full and relevant qualification in childcare or EYFS terms.
84. Even if Ms Gordon has a full and relevant qualification and/or relevant experience, and even assuming that she is still available to take on the position, we have serious concerns about the proposed management structure. We found the evidence regarding the role that Mrs Senior and Ms Gordon would play was confused and inconsistent. We agree with the Respondent's submissions in this regard (see para 21 (b)). In our view the proposed management structure and how proposed roles are to be divided or shared is far from clear (even if one assumes that Ms Gordon has a full and relevant qualification.) Curiously, it was said by Mrs Senior on 27 November that NK would also be a manager, but this had not been referred to by Mrs Richards.

85. Our concerns about the proposed management structure were not allayed by the evidence regarding the process for supervision of the managers. The RAP proposed is challenging and, in our view, would be so even for a manager with proven experience in effecting change. We are not satisfied that Mrs Senior has the ability or capacity to effect such change.
86. Effective supervision is also part and parcel of what is required to ensure sound leadership and management. Mrs Senior said that supervision of her was undertaken by her mother. When it was pointed out that this was not at arms-length because of the family relationship she referred to there being “independent” supervision. When this was probed she said that supervision would also be carried out in the presence of Mr Anthony Richards, who, it emerged, is her brother. In our view it was apparent that Mrs Senior does not have any real understanding of what the process of supervision should entail, or any insight as to why professional supervision by her mother and brother was inappropriate. This reinforces our view that the proposed management structure is, to say the least, problematic.
87. In our view the evidence regarding the issue of training was also illuminating. We have already noted that Mrs Richards’ attitude in relation to the incident we found she observed (i.e. that at 12.02 hours on 27 September 2017) was to effectively say that the child was difficult to manage. She said that also in relation to other incidents. We entirely accept that there may be children who will present challenges. Whilst we are quite prepared to accept that the reference to “MAPPA” was a misunderstanding, it is clear from the record that the LADO was concerned that Mrs Richards’ focus was on methods of restraint. The course she chose was entitled “Managing Aggression and Physical Intervention”. We noted Mrs Richards’ evidence that the training that was in fact provided by Able Training was tailored to the early years’ setting. We have no real evidence about this other than her account. We noted that Mrs Senior did not attend this training. Irrespective of what was delivered, the overwhelming view we formed was that Mrs Richards’ focus when seeking/arranging training had been on restraint and how to protect staff, rather than the development of any real understanding of how to best support and manage children’s needs in the nursery setting. In our view this is a very disturbing attitude in relation to the delivery of appropriate care to very young children.
88. Mrs Richards’ attitude to regulation also deserves comment. She has, for example, repeatedly questioned why inspections were unannounced even though it has been repeatedly explained to her that inspections can be unannounced. She has also demonstrated that she is someone whose approach to any inspection has been to immediately go into a combative mode.
89. In our view Mrs Richards’ lack of insight is demonstrated by her attitude before us in relation to the clear examples provided by Ms Sanders as to the poor language skills displayed by some members of staff. Her approach is that Ms Sanders has focussed on a matter that has never before been criticized. We do not doubt Ms Sanders’ account about the use of language she witnessed was accurate and her concern was genuine. In our view a more responsible and responsive approach by the provider would have been to focus on the concern and to work out how this might be addressed moving forward. Mrs Richards’ approach was, however, to see Mr Sanders’ observations as unreasonable criticism, and to defend the poor use of language because the benefits of having support staff for whom English is a second language. We can quite see that it might be very useful for support workers

to be able to converse with children and parents using a foreign language on occasions. However, the fact that English is an additional language for some members of staff does not mean that it is acceptable that their use of English when communicating with children should be poor. Mrs Richards' lack of understanding of this concept was demonstrated by her pointing out, in a somewhat triumphant manner, that the carer involved in one of the examples relied on by Ms Sanders (C) is white and born in the UK. Mrs Richards did not seem to have any appreciation or understanding that (whatever their cultural backgrounds) children learn language (and model behaviour) based on their experience of others around them and it is necessary that members of staff (whatever their backgrounds) should be able to model a reasonable standard in their use of the English language. Children in a nursery need to be able to develop their skills in English as part of their preparation for primary school so that they are better able to access education.

90. Emphasis was placed by Mrs Senior that other services who have attended the setting had never before commented on this issue. The evidence before us did not, however, suggest that the access by any other services such as Speech and Language Therapists, or other agencies, was a frequent event. On Mrs Senior's evidence this was at best termly contact for a few children. It is obvious that any services accessing the setting are not conducting an inspection. In any event, even if we take the absence of any negative comment by other agencies as a given, it does not lead us to the conclusion that there was no legitimate concern for Ofsted to be concerned. We do not consider that Ms Sanders was making up or exaggerating her evidence or that it was inappropriately coloured by her particular interest or expertise. We noted that Ms Clarke had also picked up the inappropriate use of language by a member of staff who referred to "mouses".
91. We consider that Ms Sander's concerns were real and entirely justified. In our view it should be regarded as a given that, even if English is not their mother tongue, members of staff should be competent in the English language so as to be able to help children for whom English is an additional language. What we found very disturbing is that Mrs Richards was unable to acknowledge this at all. She referred to the use of "*culture slang*" but could not really explain what she meant by this. She said in evidence that the staff had sufficient English for children to understand because "*at two or three years old, children are just forming their language so children also speak in broken English.*" In our view this misses the whole point. We find that Mrs Richards has no understanding of the importance that members of staff model the correct use of language. We found the poverty of her expectation and her lack of understanding of the needs of young children was disturbing.
92. Overall our view is that the Appellant's approach to the issues presented by the regulator has been combative and defensive. This persisted in Mrs Richards' oral evidence. We find that she has repeatedly shown that she is unable to acknowledge real concerns and her response was to attack the honesty and integrity of the inspectors. Her attitude is that there is some kind of conspiracy against her and the setting and everyone else is at fault. In our view, she is unable to take responsibility in any meaningful sense.
93. Although Mrs Richards obtained advice from the Pepper Stacey Consultancy and relies on the RAP, her real position before us was that there has never been any or any legitimate cause for concerns regarding the service she provided, but we do

not accept her evidence. We find that she is unable to accept or meaningfully address the significant deficiencies in the childcare and EYFS provided under her leadership and management.

94. As set out above our consideration of the issues is made at today's date. We have found that there were repeated breaches of the requirements regarding standards. We find that the requirements for registration have ceased to be satisfied. We have set out our findings regarding the insight, understanding and capacity of the Appellant to address the issues of concern. In our view the Appellant is not able to meet the relevant requirements of the Regulations. The real issue is whether the Appellant will be able to do so if lesser measures than cancellation were to be taken. We have a discretion which must be exercised in accordance with the principle of proportionality.
95. We address the issues by reference to ordinary principles for the avoidance of any doubt. Although not argued before us in this way, we readily accept that the Appellant's interests are such as to merit the protection of the ECHR.
96. The Respondent has satisfied us that that the decision taken was in accordance with the law. We are also satisfied that the decision was objectively justified and necessary in order to protect the public interest in the protection of the interests of children accessing general childcare and early years provision, as well as the maintenance and promotion of public confidence in the system of regulation.
97. In reaching our decision on the issue of proportionality we took into account that the impact of the cancellation is undoubtedly serious. The business that Mrs Richards and her family have developed over many years was brought to an end because of the Respondent's decision. The business was prevented from operation, with consequential impact upon employees and the children and families who used the service. In addition, the fact of cancellation had (and continues to have) a significant impact upon the reputation of Mrs Richard's and her family, and may very well impact upon their (individual) futures in the provision of general childcare and EYFS services.
98. We recognise that when assessing proportionality alternatives to the most serious response should be considered. The Appellant contends there were other options available.
99. Our task is to confirm the decision or to state that it shall have no effect. It is, however, open to us to exercise discretion so as to (a) impose conditions on the registration of the person concerned or (b) vary or remove any condition previously imposed on registration - see section 74 (5) of the Act. We place very significant weight on the public interest in young children being looked after in the general childcare and EYFS setting in a way that is compliant with the Regulations. We have considered the issue of proportionality by reference to other measures available to the Respondent in the exercise of its regulatory powers. Given our findings we do not consider that further WRN (s) would be adequate to address the issues. The Appellant failed to meet the key aspects of the WRNs issued in October and November 2017. We have considered whether a Notice to Improve would be sufficient to address the issue of concern. NTIs have been tried in the past but have failed to secure meaningful or sustained improvement. We do not consider that new WRN (s) or an NTI issued now would be adequate to address the issues because the Appellant, who is the driving and controlling force in the business she

directs, lacks any real insight. Her acceptance of any breaches was not forthcoming in the preparation of the appeal, and limited admissions were only made in the context of cross-examination. We do not consider that the leadership and management structure that is proposed (even leaving to one side the adequacy of some managers in basic qualification terms) would be able to effectively overcome the directing force of Mrs Richards. We have found that she is unwilling or unable to recognise her own limitations and those of Mrs Senior and, further, that the dynamics surrounding the business are such there is little or no prospect of any or any meaningful or sustained change. In addition, in order for any other measures to be considered adequate to address the issues, any decision maker would have to be satisfied that the Appellant could be trusted to engage with the Respondent in a transparent way. In the light of our findings, we have no confidence that the Appellant is able to do so. We are satisfied that the imposition of any lesser measures would not be effective in seeking to address the deficiencies in the setting.

100. In our view it is probable that the re-opening of this setting, even with measures in place, will expose children to the real risk of receiving care that would fall significantly below the standards required in terms of the General Childcare and EYFS frameworks. This would not be the best interests of children who might access its services in future. We recognise that the Appellant's case is that it seeks to provide a needed service in a deprived area. However, all children (and not least those subject to deprivation) are entitled to the provision of a quality of service at a level that meets appropriate standards. We do not consider that the Appellant has the ability or capacity to effect or sustain any real improvement in the service provided. We have balanced the impact of the decision upon the Appellant's interests against the public interest. We consider that the facets of the public interest engaged undoubtedly outweigh the interests of the Appellant and all those affected. In our view the decision to cancel registration was (and remains) reasonable, necessary and proportionate.

Decision

The decision to cancel registration is confirmed and the appeal is dismissed.

**Judge Siobhan Goodrich
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 04 January 2019