Care Standards

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

[2018] 3463.EY

Heard on 14-17, 20-22 and 24 May 2019 at the Royal Courts of Justice.
Panel deliberations on 10 June 2019

BEFORE
Ms Siobhan Goodrich (Judge)
Dr David Cochran (Specialist Member)
Ms Caroline Joffe (Specialist Member)

BETWEEN:

Seahorses Bek Limited

Appellant

and

Ofsted

Respondent

DECISION AND REASONS

Representation
The Appellant: Mr David Welch, Counsel, instructed by Toltops Solicitors
The Respondent: Ms Zoe McGrath, Solicitor, Sternberg Reed, instructed by Ofsted

The Appeal

1. This is an appeal by Seahorses Bek Ltd against the decision made under Section 68 of the Childcare Act 2006 to cancel the company's registration to provide childcare on non-domestic premises on the Early Years Register, and on both the compulsory and voluntary parts of the Childcare Register. The right of appeal against the decision made by Ofsted on 20 August 2018 lies under section 74 of the Childcare Act 2006.

The Parties

2. The Appellant is a private limited company incorporated on 12 May 2015. There is one Director of the company, Mrs Adeola Oluwatosin Amuludun. She is the sole director and shareholder. For all practical reasons references to the Appellant can be taken to refer to Mrs Amuludun.

3. The Appellant company is registered with Ofsted as a provider of childcare. At the time of the decision the provider was providing childcare services at three separate settings for each of which Mrs Amuludun was, and remains, the Nominated Individual (NI):

- Becton (Evelyn Dennington Road) since 18 March 2009, on the Early Years Register (but for which the correct spelling is Bec**k**ton);
- Kilburn (Winterlys House) since 26 June 2013, on the Early Years Register, the compulsory and voluntary parts of the Childcare Register;
- Enfield (Christian Centre) since 23 July 2013, on the Early Years Register, the compulsory and voluntary parts of the Childcare Register,

Originally the settings were individually registered. The settings became part of a single registration in line with the Small Business Enterprise and Employment Act 2015.

4. The Respondent is the Office for Standards in Education, Children's Services and Skills (Ofsted) and is the regulatory authority for childcare providers. Amongst other matters 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 may be made so as to protect their interests.

The Background

6. We will return to further detail in due course. By way of overview:
    a) Each of the settings has been inspected on a number of occasions since 2009. In September 2009 (when available judgements were satisfactory, good or outstanding), Beckton was judged satisfactory. In 2014 each of the settings was rated as "good". Enfield was also rated as "good" at inspection in June 2016.
    b) In relation to all subsequent inspections the judgement reached at the three settings have either been inadequate or requires improvement.
    c) Enforcement action in the form of Welfare Requirement (WRN) and Notices to Improve (NTI) have been issued in all three settings which were directed to the breaches then identified. Various visits to monitor compliance have been undertaken.
    d) The early years advice teams in the local authorities for each setting have been extensively involved in providing support.
    e) There have been two periods of suspension by Ofsted under section 31 of the Act on the basis of safeguarding concerns:
        i. The first period of suspension related to Beckton in May 2017. The Appellant appealed against the suspension but the appeal was dismissed. The suspension was however lifted in 4 August 2018 because necessary improvements had been made and risk significantly reduced.
        ii. The further period of suspension was imposed in July 2018 following safeguarding concerns raised in a telephone call made by SY to Ofsted. The suspension was ultimately lifted by Ofsted on 21 September 2018. It is important to recognise that the threshold for suspension involves a low threshold test and is, in any event, an interim measure.

f) It is also important to note that the July 2018 suspension occurred *after* Ofsted had already issued notice of their intention to cancel the registration of the Appellant on 1 June 2018.

g) The current position is that the settings at Enfield and Kilburn are not operational but Beckton is.

The Immediate Chronology prior to the Decision under appeal

7. The key dates are as follows:

i. As set out above on 1 June 2018 Ofsted issued notice of intention to cancel the single registration which, as a matter of fact, involved all three settings. The Respondent also relies on concerns regarding all three settings.

ii. The Appellant, by her solicitors, lodged objections to the Notice of Intention to cancel registration on 23 July 2018. In summary:

a) The Appellant took issue with most of the findings/judgements made in the more recent inspections in all three settings. The objections also relied on para 6 the Inspection Handbook which states that:
"If the provider has had two consecutive inspections that have judged it as inadequate and is judged inadequate at a subsequent third inspection Ofsted will consider taking steps to cancel their registration."

b) The Appellant's position was that, given that none of the settings had been judged inadequate on three consecutive occasions, Ofsted's leaning towards wholesale cancellation *"was suggestive of mala fides on the part of the particular individuals charged with monitoring the settings".* It was said that the Appellant had complained about Ms Nazarkardeh's impartiality on a number of occasions. The Appellant asserted that no child at any of the settings is at risk. The issues experienced at each setting are not different from what one would expect at a properly administered Early Years setting.

iii. On 17 August 2018 the objections were considered by Sarah Haylett, an Early Years Senior Officer, in a different region. The objections were not upheld. In summary:

a) Ms Haylett confirmed the intention to cancel registration because she was not satisfied that the Appellant had the capacity to sustain compliance with the requirements of registration.

b) She referred to the single registration to which additional premises can be added. The Handbook does not state that Ofsted can "only" consider cancellation after the consecutive inspection judgements. The Childcare Act 2006 details the circumstances in which Ofsted may take steps to cancel registration. These include that the provider has failed to comply with a requirement imposed by regulations.

c) Ms Haylett also reviewed the comments made regarding each setting.

d) There was no record of any such complaint by the Appellant about Ms Nazarkardeh's impartiality.

e) The comment that no child has ever been at risk, given that registration had been suspended, raises concerns that the Appellant does not recognise that the ongoing failure to sustain compliance with the requirements of registration, particularly those relating to risk assessments, safeguarding and premises, puts children at risk of harm.

iv. The Notice of Decision (NOD) to cancel registration, the subject of appeal before us, was issued on 20 August 2018 – see below. This decision essentially repeated the original Notice of Intention to cancel.

The Decision under Appeal

8. In summary the Notice of Decision to cancel was that:

> "*We have decided to cancel the registration under section 68 of the Childcare Act 2006 on the grounds that you no longer meet the prescribed requirements for registration. Ofsted believes that you are no longer suitable to remain registered as a day care provider due to your repeated failure to comply with the various requirements imposed by the regulations that apply to your registration."*
>
> Having set out the history of inspections and monitoring visits in all three settings, Ofsted set out its overall conclusions:
>
> "*We remain very concerned that your consistent failure to meet requirements, recently evidenced by two consecutive inadequate inspection judgements at Seahorses Day Nursery (Winterleys House) and Seahorses Day Nursery (Enfield Christian Centre). This means that children's welfare and safety are at risk and children are not being supported to make good progress in their learning and development. Your history in all three settings demonstrates that you have not been able to maintain most improvements found at inspections or monitoring visits. Where you have made improvements, these have not been sustained and you have often relied on Ofsted to point out non-compliance before rectifying issues. Ofsted need to have trust and confidence that providers are able to identify and address matters and to operate in a self-sufficient manner. We do not believe that you have the capability to meet the requirements and therefore we do not believe that you are suitable to remain a registered provider of childcare."*

The Appeal

9. In summary, the Grounds of Appeal lodged by the Appellant include:
    a) The discretion under section 68 (2) of the Act has been wrongly exercised; the decision fails to comply with Ofsted's own guidance as to when cancellation is appropriate; the Appellant had been registered as a day care provider since 2009; until 2017 every inspection outcome was "good"; the decision to cancel registration is wholly disproportionate; the Appellant has worked with Ofsted over the last year to make improvements and to ensure that every requirement is met; it is important to note that the Appellant appointed a manager in respect of each separate setting and each setting is accordingly managed quite separately from the others.
    b) Having regard to the inspection history at the Beckton setting, the Appellant had a legitimate expectation that cancellation steps would only be even considered *"if this setting had obtained three inadequate inspection outcomes."*
    c) Further Ofsted had no up to date information about the (Beckton) setting and there is no evidence that the improvements required in November 2017 had not been made.
    d) It is unfair and irrational to cancel the registration for all three settings *"in circumstances where registered providers operate their businesses according to the Handbook"*. Providers are entitled to rely upon the (Inspection) Handbook as an authoritative guide as to the circumstances in which cancellation will be considered.
    e) No reasons have been given as to why cancellation of all three settings was considered to be appropriate.

f) There is no reason why the provider could not retain registration on respect of a setting whilst being directed to remove another setting from the registration.
g) The Appellant made specific points regarding the Kilburn and Enfield settings.
h) As to the overall picture; the Appellant's case includes that:
- *"there were no concerns at all about the Appellant until 2017, some 8 years after two of the…nurseries were registered, and four years after the final setting was registered. Until then the Appellant had a blemish free record."*
- In two settings inadequate inspection outcomes were recorded in late 2017. Compliance was monitored in one setting within a matter of weeks and the Appellant had complied with all notices. *"This is evidence that the Appellant, when presented with concerns/breaches of the requirements, takes every step to ensure that those concerns or breaches are remedied."*
- With reference to the Inspection Handbook:
  "no explanation had been given as to why this Appellant has not been given an opportunity, over three inspections, to demonstrate that she meets the requirements in the Regulations."

Case Management Directions

10. This appeal has been carefully case managed by way of telephone case management hearings (TCMHs) so to seek to ensure that the facts and issues in dispute were clear and that the parties disclosed the evidence on which they sought to rely in good time. Neither the Appellant nor her solicitors attended the TCMH on 29 October 2018. A time allocation of a 10 day hearing within a hearing window between March and May 2019 was then made and detailed directions tailored to this end. A consent order was lodged on 13 December 2018 which sought to extend the time for mutual exchange of evidence and maintained the 10 day estimate. Judge Khan, however, gave further detailed directions on 18 December 2018 which required (primary) exchange of witness statements by 10 January 2019 and supplementary statements by 8 February 2018. On 3 May 2018 the parties' position was that it was unlikely that the matter would require a time estimate of 10 days as currently listed but they requested additional time in order to agree a witness list to include a running order and time estimate for each witness. Judge Khan directed that 13th May was allocated for panel reading. The hearing dates were otherwise unaltered. Judge Khan also directed that the Respondent's application for disclosure of the relationship between the Appellant's solicitor and one of the social workers appointed by the Appellant to conduct an independent investigator be decided as a preliminary issue.

The Scott Schedule

11. The Scott Schedule (SS) sets out the respective contentions regarding alleged breaches from 2015 by reference to each setting. Essentially, with some limited exceptions (which largely relate to 2015), all matters on which the respondent relies in the SS are denied.

The Hearing

12. We had received and read a large indexed and paginated bundle which included a large number of witness statements, and supporting evidence, which we had read in advance.

13. At the hearing on 14 May 2019 we received opening skeleton arguments from both sides as well as a hard copy of the second statement of Mrs Amuludun dated 7 February 2019. A third witness statement of Mrs Amuludun dated 13 May 2019 was also provided.

14. Errors had been made regarding exhibits to Ms Crowley's statements and, with the agreement of both sides, we were provided with JC:19, 23, 25, 30 and 36.

15. During the course of the hearing the judge requested that the panel be provided with the Inspection Handbook and the Compliance Handbook published by Ofsted at the material time. Both handbooks had been referred to within the evidence, and appeal documents, but had not been included in the bundle. The point made by the judge was that the panel stand in the shoes of the decision maker and should have regard to relevant available guidance then and now. The Handbooks were duly received electronically. We were not informed of any material differences in either document between any earlier dates and now.

16. In the course of the evidence we also received further documents as follows:
    - A further copy of D50 (the notification of safeguarding concerns from Ofsted dated 4 July to Yvonne Prince to the Local Authority Designated Officer (LADO) for the London Borough of Brent).
    - Evidence regarding Mrs Amuludun's qualifications.

Preliminary Issues

17. In addition to the Respondent's request that the relationship between the independent investigator and the Appellant's solicitor should be disclosed, there was another preliminary issue concerning new evidence. We deal with both below.

18. As to new evidence, in summary, the Appellant had objected to the reception of the statements of:
    - Ms Greene dated 10 May 2019 concerning her monitoring visit that day,
    - Ms Crowley's third statement dated 10 May 2019.

    The latter addressed the apparent status of the Appellant's incorporation under the Companies Act which had recently come to light because Mrs Amuludun had sent an email to Ofsted at 7.41 pm on 7 May 2019 advising that Seahorses Bek Ltd *"has applied to Companies House to be dissolved due to financial loss of trading."* She also stated that *"Seahorses Beckton and Kilburn remains trading as Seahorses Day Nursery under sole trader"* (sic). However, search of the Companies House appeared to show that on 30 April 2018 a first gazette appeared for "notice of compulsory strike off."

19. Ms McGrath made clear that these matters raised issues regarding suitability and also Mrs Amuludun's actual intentions for the settings. However, her overarching point was that it appeared that the Appellant company was likely to be struck off the Companies House register which, in itself, speaks to suitability, but also raised an issue regarding the future of the appeal. The single registration with Ofsted is for Seahorses Bek Ltd. A new application to Ofsted would have to be made, if Mrs Amuludun now intended operate as a sole trader.

20. We permitted considerable time for the parties to take instructions. When the hearing resumed at 12.40pm it was agreed that the statements of Ms Greene and Ms Crowley should be received in evidence. We were also informed that during the adjournment that morning, Mrs Amuludun's accountant had submitted an application to Companies House for re-instatement to the Companies House register. The Appellant's position was that the cessation of incorporation was, therefore, not likely.

21. The other outstanding preliminary issue was the Respondent had sought a direction that the Appellant should state the relationship between Ms Aramide Laleye and the Appellant's solicitor. Ms Laleye was one of the social workers instructed by her to conduct an independent

investigation into a safeguarding notification made to the LADO by Ofsted on 4 July 2019. The provision of this information had been firmly resisted by the Appellant and had led to the necessity for directions on 3 May 2019 that each party file and serve written submissions, and for the issue to be determined as a preliminary issue. In the event it was unnecessary for the panel to make a ruling because the parties now agreed that the panel should properly be informed that the Appellant's solicitor, Mr Tolulope Laleye and Ms Aramide Laleye, are husband and wife.

22. In preliminary discussions, the panel had emphasised that the nature of an appeal in this jurisdiction is by way of redetermination. Essentially, the panel must place itself in the shoes of the decision maker and make a decision as at today's date as to whether to confirm the decision or to state that it shall have no effect.

23. The parties had reached agreement that we should hear oral evidence from the following.

For the Respondent:
Julia Crowley: Early Years Regulatory Inspector (EYRI)
Helen Steven: EYRI
Anne Maher: School and Early Years Improvement Services, Enfield
Gillian Critchlow: School and Early Years Improvement Services, Enfield.
Jen Haskew: School Effectiveness Lead Professional, Brent Council
Pauline Nazarkardeh: EYRI and Senior Officer
Yvonne Prince: LADO, London Borough of Brent
Alison McNeil: tutor to SY (the instigator of the July 2018 safeguarding concern).

For the Appellant:
Adeola Oluwatosin Amuludun, the director of the Appellant company
Anne Marie Gilbert: manager of the Kilburn setting
Alison Goldstone: manager of the Beckton setting.

24. There were also witness statements from the following, whose attendance had not been required:

Siobhan O'Callaghan: EYRI
Jenny Devine: EYRI
Jennifer Gee: EYRI
Malini Mandalia: EYRI
Shawlene Campbell: EYRI
Laxmi Patel: EYRI
Nick Pratt: LADO, London Borough of Newham
Tracey Schofield: Early Years Advisory Teacher, London Borough of Newham

Other case management matters

25. We were informed by Mr Welch that he had accepted instructions to appear on behalf of the Appellant on or about Friday 10 May. No application was made that any of the witnesses not previously required to give oral evidence should now be asked to attend.

26. Mr Welch informed us that he had difficulties in attending the hearing on the afternoon of Tuesday 21 May and all day on Thursday 23 May because he was due to appear in other cases, although there was the potential that this might resolve.

27. The panel was concerned that the fact that it had been assumed that, without any application to, or order made by, the Tribunal, the hearing would now only last for three/four days and that Mr Welch had been instructed on that basis. Judge Khan's order had not altered the listing

save to provide a reading day on 13 May. The panel decided to adopt a practical approach and to deal with any difficulties as and when they arose.

28. The panel also noted that on the basis of the SS that there seemed to be a dispute regarding whether the Appellant has been served with some statements. We noted that she had also expressly said in her third statement dated 13 May 2019 that she would seek permission to comment further on the Respondent's evidence when giving her evidence.

29. The panel indicated that whatever the precise background regarding the service of statements, (which was the subject of dispute but no actual evidence was put before us to enable resolution), it appeared that the final bundle before us had been served on the Appellant on or about 30 April. There was no suggestion by the Appellant that this was incorrect or that the Appellant had not reasonably been able, even within that time frame, to respond to the evidence in that bundle on which the Respondent relied (in so far as she had not already done so). An application to adjourn the hearing on the basis of any difficulty in responding to evidence had not been made after the bundle was received. There was no application before us to adjourn the proceedings on the basis that the Appellant had not been given a fair opportunity to respond to the Respondent's evidence.

30. The panel noted, however, that the Appellant had sought to effectively to reserve her position so as to be able to comment on evidence as the case progressed. We indicated our concern because of the risk that new evidence might be given as the hearing progressed which might potentially cause difficulties. We noted that the case has been carefully case managed but, as matters stood, the response by the Appellant in her first, second and third witness statements was very broad, and left pregnant the possibility of new factual evidence emerging which might imperil a fair hearing. On the other hand, we mooted that it was fair to all concerned, and in line with the overriding objective, that the Appellant could, even at this very late stage, be given a final opportunity to provide a further statement setting out any facts or matters on which she wanted to rely. Neither party disagreed with this approach. It was therefore directed on 14 May that the Appellant should file her further statement by 10 am on 15 May.

31. The fourth statement of the Appellant was received on 15 May. It was not suggested on 15 May that the Appellant had not been able, or had not been given a fair opportunity, to reduce into writing that which she now wanted to say in response to any of the Respondent's witness statements.

32. As matters unfolded it became apparent that there were also some witnesses, (Ms Anne McNeil (Tutor to SY) for the Respondent and Mrs Gilbert (manager at Kilburn) for the Appellant), whose attendance had been required by one or other side, but who would not now attend. The common feature was that each of these witnesses did not feel they were able to attend due to personal difficulties which appeared to have a basis in their health. There was, however, no formal evidence adduced to substantiate medical reasons as to why either witness could not attend. We mooted the possibility of other measures, such as specific questions being posed. In the event neither side suggested that the difficulties of either witness, or the importance of their evidence to the issues at stake, required an adjournment or other measures.

33. The overall practical approach adopted by the panel, bearing in mind the overriding objective, was that:

    a) We would assess the issue of what weight might be attached to the statements of both categories of witnesses (i.e. those not required by the Appellant, and those who had actually been required by either side but did not attend), in the light of the totality of the evidence and in the light of any final submissions regarding weight.

b) The significance of the incorporation status of SBL, as relevant to the issues before us, would be decided in the light of the totality of the evidence adduced before us.

The Oral Evidence

34. In the event we heard evidence from all of the witnesses listed at [23] above (save Mrs McNeil and Mrs Gilbert). Ms Goldstone's evidence was interposed during the Respondent's evidence. The statements of witnesses who gave live evidence made are a matter of record and we had directed that these stand as the main evidence in chief. The judge emphasised that if there was any challenge to the facts alleged in the statements, or the views given, it was to be taken in cross-examination. We will not set out all the oral evidence given but will refer to parts of it when giving our reasons.

Submissions

35. On 22 May the parties estimated that their submissions would be completed by 4.30pm at the latest. We heard oral submissions in amplification of written submission which, for practical reasons, were thereafter provided. We made a careful note of the submissions made orally and will return to these as necessary when setting out our reasons.

36. We should, however, say now that there were extremely late developments that caused very significant concern. Towards the end of his submissions at about 4.40pm Mr Welch submitted that careful examination of Ofsted's letter dated 4 July 2018 and Ofsted's transcript of the information provided by the Instigator (SY) was such that a finding should be made that Ofsted had acted in bad faith. In short, he suggested that the mistake made in the 4 July safeguarding notification (that had always been admitted) was not just a mistake, but a deliberate act in bad faith.

37. This provoked real concern because this appeared to be a very serious allegation which had not been put to Ms Crowley, nor, so far as we could see, expressly canvassed in cross-examination. Mr Welch submitted that there was no need for this to have been put to Ms Crowley because it was not known who had done this. However, it appeared that to us that the Ofsted witness who "spoke" to the mistake was Ms Crowley. It had not been suggested to her that this was more than a simple mistake but was the product of bad faith.

38. The panel decided that the appropriate course was to rise for 10 minutes to enable Mr Welch to consider very carefully the very serious nature of the allegation he was now making.

39. When the hearing resumed at just before 5pm Mr Welch said that his submissions would take a further 20 minutes. Given the late hour, the serious nature of the matters now raised, and the fact that Ms McGrath would now need to take instructions and reply, it was therefore inevitable that the submissions could not be concluded that day.

40. Mr Welch said that he could not attend the next day as he still had a commitment elsewhere. In the circumstances the panel had no option but to adjourn the proceedings to Friday 24 May.

41. It appeared to the panel that the nature of the allegation made at the eleventh hour raised serious issues and opened up the real possibility that witnesses might have to be recalled. At the outset of the hearing on 24 May the judge therefore asked Mr Welch to resume his submissions from the point where he had begun to deal with Ms Crowley's evidence. The judge made clear that if he was submitting that inferences should be drawn from comparison of the 4 July letter and the transcript of the telephone call to Ofsted by the Instigator, such as to support an allegation of bad faith, he should expressly draw the panel's attention to the precise passages on which he sought to rely. In the event Mr Welch resiled from the contention of bad faith, albeit that he submitted that the Appellant's case was that it was a "mistake of

commission" rather than one of omission. In answer to the judge's summary of the case he had pursued, he agreed that the theme of his cross-examination had always been that Ofsted had made a number of mistakes - and thus that the judgements overall, and the decision, were not reliable. In answer to the judge Mr Welch again confirmed that he, on behalf of the Appellant, expressly withdrew the allegation of bad faith.

The Law

42. The legal framework for the registration and regulation of childminders is to be found in Part 3 of the Childcare Act 2006 ("the Act").

43. Section 32 of the Act provides for the maintenance of two childcare registers. The first register ("the Early Years Register") includes "other early years providers" registered to provide early years 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 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").

44. 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.*

45. 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.

46. 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

47. The prescribed requirements for registration are provided for in Part 1 of Schedule 2 of the Childcare (Early Years Register) Regulations 2008. Those which are relevant in this case include:
    - The applicant is suitable to provide early years provision (paragraph 1)
    - The applicant will secure that the proposed early years provision meets the EYFS (Early Years Foundation Stage) learning and development requirements (paragraph 3)
    - The applicant will comply with the EYFS welfare requirements (paragraph 4).

The General Childcare Register

48. The prescribed requirements for Later Years registration are provided for by Part 1 of Schedule 2 of the Childcare (General Childcare Register) Regulations 2008 and includes that:
    - The applicant is suitable to provide later years provision (paragraph 1).

49. The prescribed requirements for "other childcare providers" are provided for by Part 1 of Schedule 5 of the Childcare (General Childcare Register) Regulations 2008 and include that:

    - The applicant is suitable to provide childcare (paragraph 1).

50. Section 40 of the Childcare Act 2006 concerns the duty to implement the Early Years Foundation Stage. It imposes a duty upon those registered as an early years provider, to secure that the early years provision meets the learning and development requirements and to comply with the welfare requirements of the Early Years Foundation Stage.

51. The standards for learning and development and the care for children from birth to five are set out in the Statutory Framework for the Early Years foundation stage. This sets the standards that all early years providers must meet to ensure that children learn and develop well and are kept healthy and safe. In the introduction it notes that children develop quickly in the early years and a child's experiences between birth and five have a major impact on their life.

The Burden and Standard of Proof

52. In so far as any past facts are in issue the Respondent bears the burden of proving any breaches alleged, including the core allegation that the Appellant is unsuitable. The standard of proof is the balance of probabilities.

53. However, when a party makes a specific allegation the general rule is that he/she must prove that which is alleged. In so far as the Appellant has alleged specific acts of bad faith and/or discrimination the burden is on her to prove these allegations on the balance of probabilities.

54. In the event that any breaches of the requirements are proved on the balance of probabilities and/or any breaches of the EYFS (including but not limited to the allegation that Mrs Amuludun is not suitable), the ultimate issue is that of proportionality in the light of any facts found. The issue of proportionality involves a judgement, as viewed today, which balances the public interest against the interests of the Appellant and all involved. The persuasive burden regarding justification and proportionality rests on the Respondent.

Our Consideration of the evidence

55. 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 which is relevant to the decision made. 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. It is also open to any Appellant to argue that, whatever past facts may or may not be established, there has been a change since the decision made such that the decision to cancel is no longer necessary or proportionate.

56. The redetermination in this appeal includes consideration of the evidence provided by both sides in this appeal as well as the oral evidence which has now been subjected to cross-examination over a number of days (although some of these days were short). We have considered all the ~~of~~ 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. As we have already said, we will not set out all the oral evidence but will refer to parts of it and submissions made when giving our reasons.

The Parties' Respective Positions

57. In broad summary:

    a) The true core of the Respondent's case is that there has been an overall pattern of poor quality provision by the Appellant in all three settings over many years. Despite measures taken and very intensive support provided by other agencies, events have shown that the Appellant, led by its director, Mrs Adeola Oluwatosin Amuludun, does not have the capacity to improve the setting(s) 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 standards required for the appropriate and safe delivery of EYFS including the welfare requirements. The Respondent also contends that she has not been honest, transparent and open and relies on particular examples in this regard. Overall, the Respondent contends that the Appellant has shown that she seeks to blame others. She is unable to accept responsibility. She has shown that she is unable to communicate with the regulator. In short, the Respondent's case that Mrs Amuludun is not suitable to meet the relevant requirements of the Regulations. The requirements for registration have ceased to be satisfied and the proportionate response is to cancel registration because she is not suitable to be a provider of early years services.

    b) By way of contrast the Appellant's case is that very few breaches (whether historic or not) are admitted. Alleged facts and/or inspection judgements are disputed. Serious allegations are made against some Ofsted inspectors. An allegation of discrimination is also made against Ms Maher. The Appellant's case is that some Inspectors have lied and/or been motivated by bias or prejudice/discrimination. In the course of her evidence in chief Mrs Amuludun said that the Enfield setting is now closed. She wants to keep open the Beckton setting but that the Kilburn setting (currently non-operational) will be permanently closed because the building is expected to be demolished by the Council within two years. Cancellation is not in accordance with the Respondent's own guidance as set out in the Inspection Handbook because Beckton (and even the other settings) has/have not had three inadequate judgements. Cancellation is, in any event, not justified and/or is unfair and/or disproportionate. In her evidence in chief she said that she now realises that she had stretched herself too thin. The Appellant is able to lead and manage the setting at Beckton in accordance with the EYFS framework and she will be able to effect/sustain improvement and work with Ofsted.

58. In our view the core factual issues in the appeal against the decision made are:

    a. Were there breaches of the relevant requirements of the EYFS?
    b. Have the requirements for registration ceased to be satisfied? i.e. is the Appellant suitable to continue to be registered?

Our Consideration and Findings of Fact

59. We have considered all of the evidence in the round. We find that the basic facts in terms of the general background prior to the decision made are as set out in paragraph 2-4 and 6-8 above.

60. On the second day of the hearing the following basic chronology regarding the inspections was agreed by the parties:

Date	Setting	Outcome	Inspector
September 2009	Beckton	Satisfactory	JC
December 2013	Beckton	Requires Improvement	SF Sharon Foggarty
February 2014	Enfield	Inadequate	SC Shawleene Campbell
March 2014	Kilburn	Inadequate	HS
August 2014	Enfield	Good	AA Aniata Aderianwalla
November 2014	Kilburn	Good	CM Carolina Montesmos
December 2014	Beckton	Good	JL Jenny Liverpool
September 2015	Enfield	Requires Improvement	MM
June 2016	Enfield	Good	JN Jill Nugent
January 2017	Beckton	Inadequate	LP

May 2017	Beckton	Suspension Period	-
October 2017	Kilburn	Inadequate	JD
October 2017	Enfield	Inadequate	JD
November 2017	Beckton	Requires Improvement	JD
March 2018	Enfield	Inadequate	JC
May 2018	Kilburn	Inadequate	JC
July 2018	All 3 settings	Suspension Period	-
November 2018	Beckton	Requires Improvement	JD

61. Whilst the basic chronology is admitted, the Appellant disputes that any adverse judgements reached by Ofsted were evidence-based and/or justified.

62. We find that the full regulatory history of the Appellant in various settings is very fully set out in the evidence of the following witnesses who have not been required to give evidence. We have put these in broad chronological order regarding the inspections and/or monitoring visits to the various settings by the following EYRIs:

    Shawlene Campbell: (statement dated 18.12.2018) regarding her inspection at Enfield in 2014.

    Siobhan O'Callaghan: (statement dated 10.01.19) regarding her involvement at Kilburn in 2014.

Malini Mandalia: (statement dated 03.12.2018) regarding her inspection at Enfield on 16. 09. 2015. (We noted that the statement in the bundle was unsigned but were informed by Ms McGrath that she had a signed copy. The inspection report and Toolkit is, in any event, a matter of record and there was no challenge to their contents)

Laxmi Patel: (statement dated 30.11.2018) regarding her inspection at on 25.01.2017 at Beckton.

Jenny Devine: (statement dated 2.11.2018) regarding her involvement at Enfield in October 2017, at Kilburn in October 2017, and at Beckton in November 2017 and November 2018.

Jennifer Gee: (statement dated 6.12.2018) regarding involvement as decision maker in the two periods of suspension in 2017 and 2018, and also exhibiting the WRN issued by Jenny Devine for Kilburn on 1.11.17.

63. The Appellant said in her evidence that she has worked full time as an administrative officer working in the Snaresbrook Crown Court and also the county court until 2010. She has: a law degree (2000); a postgraduate qualification in legal practice (2004); a level 4 NVQ in Children's Care, Learning and Development (September 2010); Early Years Professional Status from the Department of Education (July 2012). There is no issue regarding her qualifications. Her evidence was that her experience within the court system had inspired her to work with young children in deprived areas and she is passionate about the welfare of children.

64. Mrs Amuludun is the sole director or the company and was/is the NI in each setting. She was also the Designated Safeguarding Lead (DSL or DSO) for all three settings (when operational). The picture in relation to the Appellant's actual management role, and the role of others she has employed in management roles, was not entirely clear in the written and oral evidence. We will return to this in due course.

65. The fact that Enfield closed in January 2019, and that Kilburn is not open and may/may not ever be reopened, are obviously matters that are plainly relevant when considering the future of the Appellant's activities under the umbrella of its registration, but this needs to be assessed in the light of the totality of the evidence.

66. It is important to emphasise that in the general scheme of regulation the fact that, at any given point in time, a provision was in breach of the requirements of the EYFS which resulted in regulatory action such as a WRN or a NTI, is but one factor. Breaches and related enforcement taken can often be a reflection of "a moment in time" and may well be effectively remedied and addressed to the satisfaction of the regulator. That is, indeed, the aim of regulation. A history of any recurring breaches is, however, a legitimate concern when considering the future because it may illuminate the extent to which the provider has been, or will be, able to effect and sustain improvement.

67. The concept of suitability also embraces an evaluation of matters such as openness, transparency, honesty, integrity, reliability, insight, as well as attitude to the regulator and other bodies. It also embraces the issue of communication, and trust and confidence.

68. At a basic level the Respondent's case is that in view of the overall history of non-compliance across all three settings, and profound concerns regarding her understanding, Mrs Amuludun is not suitable to lead or manage any early years' nursery setting. The Appellant contends that she has always understood the need to safeguard the well-being and safety of children. Ultimately, her oral evidence was that she has, in the course of this hearing, acquired insight that the running of three settings had overstretched her capacity. The panel can have confidence that if her registration were to continue she will only deliver services at Beckton and this will be in compliance with the requirements. In his submissions Mr Welch suggested that the proportionate and practical response was that

the Appellant could now speak to the Respondent. The Enfield and Kilburn settings could be removed. The panel could accept some form of undertaking. No proposed undertaking was placed before us, but the general tenor in the Appellant's submissions was that Beckton would be the only setting that she would now seek to operate.

69. At this stage we deal with the criticisms made by Mr Welch of Ms McGrath's cross-examination of Mrs Amuludun. He said this was a mild criticism. We deal with it fully because it, amongst other matters, shows the difficulties that are encountered when, despite the provision for witness statements, new alleged facts emerge. Mr Welch submitted that questions had been lengthy, had contained several propositions, and had gone over matters already answered. So that he had a chance to address this, the judge said that the panel's overall impression was that Ms McGrath's cross-examination had consisted of short, focussed and clear questions. The judge therefore asked Mr Welch to give examples to support the particular criticisms he made so that these could be considered. He submitted that Ms McGrath has spent an hour and a half cross-examining about the issue of whether the door was open or closed. (We will return to our findings of fact on this issue in due course.) In our view the length of time that Ms McGrath spent on this issue was appropriate because this was a serious issue that went to an important safeguarding issue and also went to the heart of the Appellant's case regarding Ms Crowley. In short, she had said in terms that Ms Crowley had lied. In our view the length of time eliciting answers to very clear questions on this issue and other issues, very largely arose because the Appellant tended not to answer the question asked of her. She repeatedly tended to answer a different question to that actually asked, and her evidence tended to go off at tangents. The judge had to repeat that she should try and focus on the question asked. We ensured that suitable breaks were taken throughout to try and enable the Appellant to better focus on the questions posed.

70. In our view Ms McGrath's cross-examination was a model of courtesy, patience and tenacity conducted in difficult circumstances and not least because new alleged facts (some of which had never featured in the Appellant's four witness statements or explored with the Respondent's witnesses) emerged. The time spent in cross-examination was almost entirely because the Appellant seemed reluctant to answer the short and focussed questions invariably posed. The "open door" issue is an illustration. This was an important factual dispute. The Appellant's responses were muddled up with her evidence (not referred to in any witness statement or in chief) that on another occasion Ms Crowley had in fact deliberately deleted a key passage of her contemporaneous record, the clear implication being that Ms Crowley had done so because it did not suit her purposes. It was hardly surprising that all this took very considerable time to "unpack". In our view, it would have been unfair and unbalanced to have prevented Ms McGrath from exploring the Appellant's evidence, and not least when, despite the full opportunity to provide a final statement, her account as to the facts had not been fully set out in her witness statements.

71. Mr Welch had, in the general course of Ms McGrath's cross-examination objected on about three occasions, saying that Ms McGrath's questions were going over old ground. The judge said at the time that the questions asked appeared to be properly designed to explore the Appellant's understanding of the EYFS framework which was a key issue in the appeal. She expressly referred to the Compliance Handbook (CH) which guides that the decision maker (i.e. the panel standing in the shoes of the decision maker) should, amongst other matters, consider whether the provider has understood the issue and has sufficient knowledge about their responsibilities: (see para 15 of the CH).

72. There were a number of conflicts that have been raised. It is a theme in this appeal that Mrs Amuludun has impugned the motivation and/or integrity of Ofsted personnel such as Ms Crowley and Ms Nazakardeh. Her specific case is that Ms Crowley has a personal vendetta against her and has lied in her evidence. She also said in her first witness statement that Ofsted "*has a preference for a different type of proprietor*." It has also been

suggested in closing that we should conclude that Ms Maher of the LA, acted in a racially discriminatory way towards Mrs Amuludun because this is what she perceived. We will return to the specific allegations in due course.

The Evidence of Local Authority Witnesses

73. It is a significant feature in this appeal that the provider has received very extensive support from the services provided in the respective London Boroughs involved in each setting. We received live evidence from various individuals who had been involved: Mrs Maher; Mrs Critchlow (Enfield); Mrs Haskew (Brent). The overwhelming impact of the evidence of these witnesses is that the Appellant had received intensive support in order to assist it to effect necessary improvement to meet the needs of children within the meaning of the statutory framework for EYFS, but despite the extensive support provided, real concerns remained.

74. Mrs Maher's oral evidence was that she worked with the Enfield setting between July 2013 and December 2014 and would visit between 1 and 3 times a month. Initially, she and Mrs Amuludun got on well. She was concerned that the Enfield setting was a lot of work for someone whose background was not in Early years and she thought that Mrs Amuludun would be *"thinly stretched"* running three nurseries. She told her that the setting would require huge investment and time. Mrs Maher said she began to have concerns in October 2013. Mrs Amuludun was not always present because of the other nurseries. Mrs Maher was surprised when Enfield was judged good at inspection in August 2014 because she did not think that that the judgement was deserved. (She had said in her evidence that the inspection was conducted in the summer holidays when only 4 or 5 children were present, and when an "Ofsted ready" room had been prepared, into which the children were not allowed to go until the day of the inspection). Her own observations were that the setting was not good. She explained to Mrs Amuludun that she may have been rated as good but she (Mrs Maher) was concerned about ongoing issues regarding staff competency. She felt that Mrs Amuludun's attitude was she was talking nonsense. Mrs Maher said that she felt that Mrs Amuludun would not now listen to her advice because her view was that everything she (Mrs Maher) had been saying was not the truth. She therefore handed over to another advisor, Stephanie Husseyn who took over in early 2015. Mrs Maher also accompanied Ms Husseyn on an unannounced visit on 16 July 2015 which was triggered by a parent complaint.

75. In cross-examination it was suggested to Mrs Maher that she had told Mrs Amuludun that she would not be able to provide a suitable service because of where she came from. Mrs Maher response was that this was ludicrous. She disagreed with the suggestion that the previous nursery was shut down; the previous owner decided to close following an Ofsted report. So far as the June 2014 inspection was concerned it was not her role to contact Ofsted. The role of the service is to build a picture and the evidence told her that the setting was not good. She did not accept that the parent complaint to which she had referred in her statement (July 2015) was the only complaint. Ofsted had received two others.

76. Mrs Amuludun's oral evidence was to the effect that Ms Maher had discriminated against her. She said that Ms Maher had said that the previous owner of the setting was Nigerian and she could "signpost" Mrs Amuludun to persons to whom she could sell the business. We find that in cross-examination Mrs Amuludun was, however, extremely reluctant indeed to say that she was actually alleging that Ms Maher had discriminated against her on grounds of her ethnicity/race. Mr Welch submitted in closing, however, that it was nonetheless *reasonable* for Ms Amuludun to have *perceived* that Ms Maher had behaved in a discriminatory manner.

75. The alleged offer to "signpost" to a buyer is, in and of itself, is a serious matter because it would never be appropriate for a council employee to do so - for obvious reasons. Mrs Amuludun had not mentioned the alleged signposting in any of her four statements. Mr

Welch agreed that this had not been put to Ms Maher. It was not suggested by him that this was an oversight on his part. Mrs Maher robustly denied that she made any comment at all about the Appellant's ethnicity. Her overall concern was that the Appellant who, (as we find), had a relatively limited background in childcare at that time, was taking on a setting which had problems. She said that she discussed with the Appellant the hard work and expense that would be involved in running multiple early years settings. Having seen and heard Ms Maher give evidence we consider it very unlikely indeed someone with her long experience in working with a wide range of providers in a culturally diverse area would have ever referred to the ethnicity of the previous owner at all. She came across as very straightforward, clear-headed and professional. Her efforts to support Mrs Amuludun were frequent and intensive. The level of her support runs counter to the suggestion that she was anything other than committed and wholly professional in her engagement with Mrs Amuludun. It was very clear to us that she was initially able to get on with Mrs Amuludun and vice verse. We do not accept that Mrs Amuludun ever perceived that Ms Maher ever said anything discriminatory to her. In our view the quality of the professional and supportive relationship explains Mrs Amuludun's effective refusal to "own" the discrimination to which she referred. In our view if Mrs Amuludun had ever really and truly perceived that Ms Maher had been prejudiced or had discriminated against her on the grounds of race/ethnicity or at all, she would have said so in at least one of her four witness statements. Despite being given the repeated opportunity in cross-examination Mrs Amuludun would not say that she was alleging discrimination on the basis of race (or identify on what basis she considered she had been discriminated against). An allegation (or, as in this case, a somewhat veiled imputation - albeit subsequently argued on the basis of perception of racial discrimination), is a very serious matter to make against any council officer, let alone one of Ms Maher's experience and seniority. We have considered whether Mrs Amuludun's reluctance can be explained by her communication style but we noted that she was very direct in other areas: she was not, for example, reticent when she said in terms that Ms Crowley had lied. We do not accept that the Appellant perceived at the time or, even now genuinely believes, that Ms Maher had discriminated against her by reason of her race or at all. The overall impression we formed is that this issue has been advanced (albeit only in very muted terms by the Appellant herself), in order to seek to try and discredit Ms Maher. We find that Ms Maher, both in her statement and in her oral evidence was very clear about her long-held concerns regarding the Appellant's ability to deliver the EYFS. In our view there is no substance whatsoever to the suggestion that she was biased or behaved in a discriminatory way towards Mrs Amuludun. Moreover, we do not accept that Mrs Amuludun so perceived at the time.

76. As set out above Ms Husseyn took over from Mrs Maher in January 2015. In her statement dated 20 November 2018 Ms Husseyn set out the breaches of the statutory framework for EYFS she found at the unannounced visit in 16 July 2015 which she reported to Ofsted. Her statement includes:

    a) As to Learning and Development: children's folders were inconsistent with some children having no observations from March to May 2015; children's learning journals were sparse with no meaningful observation linked with next steps: no end of year assessments for children moving onto school and no links with schools to ensure smooth transition; children not monitored correctly due to lack of induction: staff struggling to understand their own planning cycle and weekly plans were no reflection of the child; staff not fully aware of how to carry out their daily duties.

    b) "The Deputy Manager in particular is trying to keep the place afloat by running the nursery solely alone as the manager is rarely in the setting and the majority of the staff team is new as there is a high staff turnover and this seems to continue as another staff member told me she had resigned today."

c) Registers are inconsistent, the manager rarely signs in leaving the Deputy Manager, Laura, in charge of the day to day management: the children's registers are confusing with no surnames and DOBs so that the exact numbers present cannot be identified. Accident forms were not being filled out correctly

d) A parent had made a formal complaint regarding injuries. Although investigated the complaints procedure had not been followed and the parent was still awaiting a response which has been passed by the manager to the deputy, who had only been employed for four weeks.

e) Staff files were inconsistent with no full names and addresses of referees and not all references followed up.

77. Ms Husseyn's written evidence was that Mrs Amuludun was unhappy with her report and was concerned that the EY advisors had advised the deputy to resign. Her evidence was this was incorrect: they had explained that the deputy lacked experience as she had no leadership experience. The deputy had applied for a practitioner's post and, during the interview, stopped Mrs Amuludun as she was being asked management questions. Her account was that Mrs Amuludun had then said she would be more suited to a deputy role as she held a degree in early years. The deputy stated that she took on the role on the promise that Mrs Amuludun would be at the setting daily to support and train her: however, she was left on many occasions, and had not received an induction.

78. Ms Husseyn set out a summary of subsequent visits, notable amongst which was one on 19 May 2016 when the environment was chaotic, children throwing oats everywhere, very little structure, no sand and water was out and there was a lack of positive role modelling by the staff. On a support visit on 25 May 2016 she considered that the setting was now not sustaining any of the improvements previously made. Staff were not meeting children's individual needs. There was no structure to daily routine, the activities available were not stimulating. On 15 June 2016 the outcome of an Ofsted inspection was good. At her support visit on 13 October 2016 Ms Husseyn, however, still had concerns around age appropriate planning. On 7 February 2017 Ms Husseyn started to become concerned about the setting again. There was a lack of planning and staff seemed to have little knowledge of the EYFS. On a support visit on 3 March 2017 she considered that there were no improvements regarding planning. She had concerns around the lack of consistent staff and the environment was starting to suffer. On 24 April 2017 she raised her concern that previous improvement had not been maintained and the setting had reverted to having many areas of concern: the environment was poor: planning did not reflect what was going on: there were limited resources; displays were torn; children were in the garden accessing climbing apparatus without adult supervision. She also raised a concern raised by another setting that Seahorses staff had been seen in the park on their mobile phones whilst children were in their care. Mrs Amuludun was adamant this would not have happened. Ms Husseyn considered that she seemed disinterested and dismissive.

79. In May 2017 a second advisor (Mrs Critchlow) was assigned to accompany because Ms Husseyn considered that Mrs Amuludun was becoming confrontational and challenging. For example, Ms Husseyn said that she had once stated in her report that she had been "buzzed in" rather than greeted at the door. Mrs Amuludun was not there at the time, but she had stated that this was a lie and she wanted it removed from the report.

80. In her statement Mrs Critchlow set out her account of the records of the visits made jointly with Ms Husseyn. In cross-examination she said that Mrs Amuludun was aware every time they made a (planned) visit because an email was sent. It was Mrs Amuludun's choice whether or not to be there. Mr Welch asked about the visit on 19 October 2017 which concerned Mrs Amuludun's response to the Ofsted inspection judgement of inadequate at Enfield. She said that discussion was held and advice given that Mrs Amuludun needed

to recruit a stronger team in order to move the setting forward. Mrs Amuludun had not followed that advice.

81. Mrs Critchlow agreed that there was a high turnover of staff. Many staff had been "pulled" from Kilburn. They were not necessarily stronger staff. The advisors talked to staff. She agreed that an Ofsted inspection is a snapshot: the LA advice team go in more often and often spend longer. They have a broader view of what is really going on within the setting. Asked why the visit on 23 November 2017 had not been rearranged because Mrs Amuludun was not there, Ms Critchlow said that the date has been arranged at the meeting with the Head of Services on 3 November 2017 which Mrs Amuludun had attended. She sent an apology (re 23/11). It was a matter for Mrs Amuludun if she wanted to be there.

82. Mr Welch asked Mrs Critchlow about the concerns expressed on 23 November 2017 which centred on management. Gladys, had been promoted to manager, and a newly appointed member of staff had been asked to act up as deputy. Ms Critchlow's evidence was that she had cautioned against the acting deputy's suitability, and that being new to the setting may make her an unsuitable choice even as short-term measure. In response to the point taken in cross-examination that everyone had to start somewhere, she said that in the circumstances of an inadequate setting, and where the person did not have proper experience, this was not a positive step. She agreed that the report of 6 February 2018 showed an improvement: it was a pleasant surprise that some of the advice had been implemented. Asked whether the later negative report of 8 May 2018 was because of the Ofsted judgement of Inadequate (March 2018) she said that the last paragraph of her statement was a summary of the whole year. This stated:

    "It has become increasingly clear since my involvement from April 2017 that Seahorses at times makes small improvements to practice and the environment, however these improvements are mostly short lived. A combination of poor-quality resources and inexperienced management result on a poor standard of care being offered to children and their families"

83. In answer to the panel Mrs Critchlow said that she found Mrs Amuludun hard to read. The conversations they had were one-sided and she never quite knew what Mrs Amuludun actually thought. She did not appear concerned by what they (the advisors) were seeing.

84. Ms Haskew, School Effectiveness Lead Professional at the London Borough of Brent made a statement dated 14 December 2018 in which she referred to the eight visits made to the Kilburn setting by her and members of the Early Years Quality Improvement (EYQI) team between September 2017 and November 2018. The report had highlighted that the provider had been unable to implement much of the advice of the EYQI. The setting had also received support from the Early Years Inclusion Support Team (EYIST). She met with Mrs Amuludun on 10 October 2018 because Mrs Amuludun wanted her help regarding the re-instatement of government early years funding that had been withdrawn following the Ofsted inspection judgement of inadequate in May 2018. At no point had Mrs Amuludun told her of the possibility of cancellation.

85. Mrs Haskew's overall assessment was that Mrs Amuludun did not have the expertise in childcare that she should have, considering her roles and responsibilities. Her team and she had noticed how little had filtered through into her ability to identify and appoint good quality staff, including at management level. Staff were not adequately knowledgeable or capable and should not have been appointed. Her view was that Mrs Amuludun was not equipped to drive the necessary improvement because she does not have the necessary knowledge to support their development.

86. In cross-examination Mrs Haskew made clear that so far as funding was concerned this was a trustee relationship and she was surprised that Mrs Amuludun did not share the information about cancellation with her when she met with her and when they spoke on

the telephone. She denied that there has been any discussion about what was going on, although she accepted that Mrs Amuludun was upset because the business was suffering because she could not access funding. This was not the sort of meeting for which she would keep notes.

87. In answer to the panel Mrs Haskew said, amongst other matters, that she had met the manager once or twice and thought that she required a lot of support to address some of the actions highlighted. At times advice was followed. There was some progress but the whole EYFS statutory guidance was not being adhered to. The level of support provided was not usual.

88. Ms Schofield is an Early Years Advisory teacher employed by the London Borough of Newham. Her statement is brief but she exhibits the records regarding the LA involvement at Beckton. The records show regular involvement by the EYA team after the very first Ofsted judgement of requires improvement was made in December 2013. Ms Schofield's involvement began after she began to work at Newham in August 2014. In our view the records as a whole show a similar pattern of regular involvement, with some improvement but some recurring concerns in relation to basic matters regarding learning and development and the adequacy of resources. We will return to the most recent evidence regarding Beckton at a later stage.

The Evidence of the Inspectors

89. We considered the statements of all the Inspectors who have carried out inspections and monitoring visits, including those who were not required to give evidence. Suffice to say that the concerns raised at inspections/visits were similar to those which concerned the various LA teams. We paid particular attention to the matters alleged in the more recent past i.e. from 2017.

90. Ms Crowley's statements are lengthy and detailed and are a matter of record. We will refer later to key areas which were the subject of challenge. By way of background, Ms Crowley became involved in about March 2018 and has conducted inspections and monitoring visits at all three settings. As is standard practice her approach before each inspection or visit was to review the history and develop lines of inquiry. She explained in some detail the means by which an inspection is conducted with an emphasis on observing the children and triangulating evidence by speaking to staff, parents as available, and leadership and management in order to check the reality of the experience of the setting for the children. Ms Crowley's records are extremely full and set out detailed observations, of what she saw and what she was told on each inspection/visit. Her observations in each setting form the evidence base for her summative conclusions. We will focus upon some of the specific matters placed in issue by the Appellant in her statements and/or in cross-examination so as to illustrate the main challenges made.

91. Ms Crowley was aware that on inspection on 4 October 2017 at Enfield a judgement of inadequate was made because Ms Devine had found that risk assessments were not effective, and hazards were identified in the nursery. Staff lacked awareness of the need to record accidents that occur and did not inform parents in a timely manner. There were concerns regarding behaviour management as staff did not support children to learn the difference between right and wrong. The staff did not assess and track children's progress precisely. Assessments did not include all children's starting points or accurately identify any gaps in children's learning. It was also found that managers did not take immediate action to refer concerns about children's development to other professionals. There were concerns that the management team did not review staff performance effectively to help identify weaknesses in teaching practice and staff training needs. A WRN had therefore been issued by Ms Devine relating to safety; accident records; behaviour management, supporting children with special educational needs and/or disabilities, and supervision of staff. There were also actions set around assessment; planning and the quality of teaching.

92. Ms Crowley described in great detail in her written and oral evidence how and why she formed the view that the setting was inadequate on 4 March 2018 and why further enforcement action was then taken. She provided numerous detailed observations. Her overall view was that leaders and managers had failed to sustain improvements. In summary, because of what she observed she found that: the effectiveness of leadership and management; the quality of teaching and learning, learning and assessment; personal behaviour, behaviour and welfare; and outcomes for children, were all inadequate. Her statement and the inspection toolkit contain numerous detailed evidence-based examples to support her views. In her oral evidence she explained the significance of children receiving care in a nursery setting that is inadequate or requires improvement; research shows that the child will be at a significant disadvantage throughout their schooling in primary school and beyond.

93. We deal below with some of the specific challenges made to Mrs Crowley's evidence in cross-examination regarding the inspection at Enfield on 4 March 2018.

The Door Incident

94. In summary, Ms Crowley's evidence was that when she arrived at Enfield on 4 March 2018 the external door was partially open and she was able to enter and walk through another set of doors and the length of the corridor and back again before Ms Aygeman-Badu challenged her. Ms Aygeman-Badu told her that parents had left the door open and that she was always telling parents to close the door on leaving the nursery. Given that a WRN had been issued regarding thorough risk assessments and prompt action being taken to minimise risks to children, Ms Crowley was concerned that staff knew that this had happened on previous occasions, and yet had not considered or taken steps to minimise the risk. When she arrived Mrs Amuludun acknowledged that this was unacceptable but blamed the parents: she said she had repeatedly explained to staff and parents regarding the security of the premises. Later that morning when the manager Gladys Appiah-Koti arrived Mrs Amuludun informed her of the security incident and again blamed the parents and the manager agreed. It thus appeared to Ms Crowley that neither the Appellant or the manager took responsibility for the failure to secure the building.

95. Pausing there, whilst, according to Ms Crowley, the Appellant had accepted that the door had been left open, and also that this had happened before, her position in her appeal was very different. She said in her statement of 7 February 2019 that her understanding was that the door had been held open by a parent for Ms Crowley and whilst the staff member who had signed the parent out had literally just turned her attention to one of the children in the rooms, Mrs Crowley "*slipped in*". The impact of this evidence is that she showed herself to be completely unaware that, even if her account is accurate, it is still a serious security breach that a "stranger" could enter the setting.

96. Mrs Amuludun said in her fourth witness statement dated 15 May that the door could not have been open or partially open because it has automatic traction. We noted that her oral evidence was that she had checked the CCTV footage which showed that Ms Crowley entered as parents were leaving and did not walk up and down the corridor as she claims before she challenged. We noted also that it was put to Ms Crowley that Mrs Amuludun had said to her on the day that CCTV was available and that her version did not accord in that a parent had held the door open for her. Mrs Amuludun has not produced the CCTV in these proceedings and her case that she had reviewed the CCTV footage was not mentioned in any of her witness statements. We find also that according to Mrs Critchlow's record made on 15 March 2018 Mrs Amuludun had told her that the Inspector had entered the building due to the front door being open. Ms Critchlow said in her evidence that Mrs Amuludun told her that the outcome of the inspection was "*because of Gladys*". We find that no mention was made by her to Mrs Critchlow of a parent opening the door for the Inspector.

97. We provide some examples to illustrate some of the other challenges to Ms Crowley's evidence regarding the inspection on 7 March 2018 and the monitoring visit on 20 April 2018 at Enfield:

    a) One example of Ms Crowley's observation at the inspection of the quality of provision related to a planned activity threading pasta shapes. A child was shaking the pasta and Ms Crowley's observation was that the staff member's interaction in this circumstance was limited *("Not nice. Nice and slow*"). It was suggested to Mrs Crowley that her concern was "*overkill".* Ms Crowley said that explaining to a child why "we don't do that" is part of the conversation and part of engaging children with the activity by a constant flow of conversation. She noted also the response when she asked how the activity could have been extended for a child who had completed two necklaces very quickly. Gladys Appiah-Kubi suggested that she had extended the activity because she asked the child to make another. Gladys lacked understanding of how to develop the child's ability and interest by introducing discussion and different materials. We noted that within Ms Crowley's statement there are a very large number of observations she made regarding the limited engagement by staff in terms of language.

    b) Ms Crowley was asked about her concern that the staff were not aware of the Prevent strategy which concerns awareness of signs of radicalisation. It was put to her that this seemed incredible with children of this age and it was "*ludicrous*". As the result of this challenge Mrs Crowley explained that it is known that young children can be radicalised and there was a responsibility to be aware of signs and symptoms. (We noted that when Anne Marie Goldstone gave evidence (before Mrs Amuludun) she said that she knew about the Prevent strategy and the former was not Mrs Amuludun's view).

    c) Ms Crowley was challenged about her account (regarding the monitoring visit on 20 April 2018) that a newly appointed member of staff (Iona Biesiada) with non-completed checks, had unsupervised access to children. Ms Biesiada said that she has a DBS (Disclosure and Barring System) from her previous setting and was unsure of Mrs Amuludun had processed a new DBS. Ms Crowley's evidence was that Mrs Amuludun said that Ms Biesiada had a DBS from her previous setting and she was unaware that a new DBS needed to have been processed. Ms Crowley said in her statement that she found this inconceivable knowing the amount of training, input and LA involvement. It was suggested that Mrs Amuludun had told her that she had processed the new DBS. Ms Crowley was clear in her evidence that Mrs Amuludun stated that she was unaware that a new DBS was required because she had been shocked that a DSO (designated safeguarding officer) would say that. We noted that no documentary evidence has been provided to show when the setting specific DBS was applied for.

    d) It is noteworthy that Ms Biesiada had confirmed that her induction included safeguarding policy and procedure but she demonstrated that she did not know what to do in the event of an allegation, and said she would share information with the alleged perpetrator. Mrs Amuludun's response at the time was that she could not understand this as she had recently gone through the safeguarding policy and procedure with staff and Iona Biesiada was part of her induction. This led Mrs Crowley to conclude (as she had on 7 March 2018) that leadership and management at the setting was not effective in terms of identifying gaps in knowledge and the effectiveness of training.

    e) In her statement Ms Crowley had provided numerous examples which led her to conclude that most staff present were not suitably skilled practitioners: they lacked understanding of how to engage children and extend their learning. One example was a child whose father provided encouraging information about the benefits to

his child in attending the setting. Ms Crowley later observed the child who was quiet and very much on the periphery of activities. The child was present at the table but seemed disinterested. No member of staff attempted to support her. It was suggested to Ms Crowley that when she found something that was positive (the parent's comment) she did not really accept it, but she would then go off and find something negative. She did not accept this. Talking to parents was important and she had included the positive comments. What she did was to observe the child to see if the parent's comment fitted with the child's reality in the setting. When she observed the child she was on the periphery. The father had said she was an able child which was borne out by Ms Crowley's observations but her abilities were not being channelled or supported.

f) Ms Crowley was challenged about her concerns that a member of staff, Roshana, the deputy manager at Beckton, had been brought over in the afternoon for the joint observation at the inspection on 7 March 2018. Ms Crowley queried with Mrs Amuludun why this was so given that the staff ratios were met. Mrs Amuludun said she had not selected Roshana but, when challenged as to why a staff member at Enfield could not complete the activity, said that she would rather Roshana did so. Ms Crowley also noted at the time that the three children involved in the observed activity were more able children. Mr Welch suggested to Ms Crowley that there was nothing wrong with having the best performing staff present. She said the point of the joint observation was to assess the strengths and weaknesses of Mrs Amuludun's observation so to provide a picture of the Enfield setting. Her view was that Mrs Amuludun was aware that the practitioner at Enfield was not performing very well and it felt as if the observation was staged. Asked again what was wrong with that, Mrs Crowley said that it was not representative of that nursery.

98. Given the Appellant's case we focus on Beckton. This setting last had a good judgement in December 2014. It was judged inadequate in January 2017. It was judged by Ms Devine as requiring improvement in November 2017 and again on 12 November 2018.

99. Ms Crowley gave evidence regarding her visit to Beckton in March 2018. One particular aspect concerned the fact that there was a knife left by the toilet upstairs. She agreed that there was a stairgate in place. Another of her concerns was that the children were outside without shoes or coats on a cold windy day. The explanation given on the day was that the staff had unexpectedly had to put the buggies in the conservatory area. It was suggested to Ms Crowley that the children had only put their shoes on outside because the usual area inside was occupied by buggies. She was asked by Mr Welch what was wrong with that explanation? She said it was not just the shoes but coats as well. If the situation was because of the buggies then that should have been addressed. The first consideration was to plan how to *prepare* the children to go outside. She did not agree that the coats had been put on inside.

100. We noted that the evidence of Ms Schofield at her section 11 moderation visit in 5 November 2018 supports the Appellant's case that Beckton has improved in many respects. She considered that there had been a marked improvement in the performance of the team and *"work continues to build in these improvements and the setting is aware that they are still on a journey to improve their practice and provision."* Staff were confident in responding to safeguarding concerns. In our view this report also shows a number of aspects that strike a chord with previous weaknesses. For example, the dressing up clothes were unorganised and inaccessible for children in the way they were arranged. Ms Schofield considered that there need to be more opportunities created to support children's thinking skills and opportunities were missed to sustain conversations through asking how, what, why and when questions. Although positive comments were made regarding the development of Roshana's practice, Ms Schofield observed it would have been useful to have had extension activities available. We find that this relates to a repeated theme in

past inspections regarding the ability of staff to extend learning, In our view it is notable that at the time of this LA visit the setting had only 5 to 7 children present. However, the Appellant intends that the numbers will increase to about 20 - 25 i.e. at similar levels to when there were very significant past problems regarding the delivery of the statutory framework at Enfield and Kilburn.

101. Ms Devine's inspection just a week later on 12 November 2018. She noted that Mrs Amuludun had addressed the previous concern regarding the heating system and the temperature. She considered that Mrs Amuludun had not identified that the playroom had not been thoroughly cleaned, and the baby room in particular had lots of small pieces of rubbish on them which could cause a choking hazard. It was also noted that staff failed to follow good hygiene routines during mealtimes. It was found that progress regarding staff knowledge of the learning and development requirements continued to be a slow process. Her view was that although Mrs Amuludun and the manager, Ms Goldstone, conduct supervision with staff they do not identify closely enough where staff need further training to improve their teaching skill to a good level. She found that staff do not gain enough information from parents when children first start and do not have a clear awareness of each child's individual needs. An NTI with actions regarding supervision and coaching; hygiene and gaining information about children was raised. Ms Devine's overall view was that she did not think that the Appellant should remain registered because it is unable to demonstrate the ability to sustain improvement to ensure that welfare is assured and ensure that children receive good outcomes in their education. The panel noted that the total number of children on roll at this inspection was 5.

102. Miss Goldstone gave evidence before that of the Appellant. In summary Ms Goldstone said that the setting at Beckton was improving and she wanted to further develop the nursery. There are currently 16 children on the register. Her perspective regarding past inspections was that these were "snapshots" and that if anything can go wrong on an inspection/visit it usually will. In cross-examination she agreed that it was the "nature of the beast" that made her and staff feel intimidated, rather than that the inspectors had been intimidating. In early 2014 she applied for the deputy manager role and moved into the acting manager role alongside Mrs Amuludun. She later said in answer to the panel that as soon as she got the job it was as acting manager. Someone had just left as she came in, and Mrs Amuludun had taken over in that period as manager.

103. She agreed that the outcomes of the requires improvement judgements in November 2017 and November 2018 were not ideal but they are continually trying to improve. She said she accepted the findings of the inspectors. When asked further questions it transpired that she did not agree with Ms Devine's observations regarding possible choking hazards. She said that the garden had soft gravel that came in (on shoes) and they (the staff) were sweeping behind. They had now changed the system so that children take their shoes on and off in the conservatory. She could not remember when that change was made but it came out of the 2018 inspection. (The old system) had been that way before she arrived and had stayed that way until after the inspection in 2018.

104. It was suggested to her that there had been lots of areas identified for improvement in November 2018. She said that they had ongoing action plans. She said that nurseries can always improve and that there will always be issues, but she did not think the nursery setting should end just because it requires improvement. She agreed that a judgement of requires improvement meant that the setting fell below minimum standards. Asked about the improvement required regarding cleaning, she said they had had professional cleaners to clean the carpet. This had first occurred 3 months ago. She did not agree that the setting did not identify children's starting points. The incident which led to the concern of Ms Devine related to a child who had just started that day and her sleeping pattern was not known: she was just tired because it was her first day.

Leadership and Management

105. We noted that the grounds of appeal stated that it is important to note that the Appellant appointed a manager (in respect of each separate setting). It is, of course, the case that a proprietor, does not have to have any direct management role. The importance is that if a proprietor wants to delegate to managers, appropriately trained and experienced managers are appointed, and that their roles and responsibilities are clear. In our view the evidence suggests a very unclear picture. The records are full of examples of different descriptions of the same staff member being referred to as an acting and/or deputy manager and the Appellant being referred to as the manager. The evidence overall tends to suggest that Mrs Amuludun has appointed deputy/acting managers in each setting to act in her absence. (Her absence was, of course, inevitable at times when she had three settings). The overarching issue is her ability to *recruit* staff who had sufficient skill, experience and confidence to act in a management role. There is evidence that when recruiting for a practitioner Mrs Amuludun has, mid interview, decided to appoint the interviewee in a management role (whether acting or deputy) even though the experience of the interviewee was less than one would ordinarily expect for any management role – see the evidence of Ms Husseyn at [79] above. There is also the evidence of Ms Goldstone who applied for a deputy manager role but, according to her evidence, was appointed as acting manager from the date of her appointment. She also said in her statement that she is the manager.

106. In our view the impact of Ms Goldstone's evidence was that she acknowledged that fairly basic changes concerning routine matters (such as arrangements regarding where the children took off/put on their shoes and also re professional cleaning) had not been made for many years until the need for this was pointed out by Ofsted. The bottom line is that, despite the level of continuing concern Beckton still requires improvement after four years. Whatever the hierarchy, the overwhelming impression is that Mrs Amuludun appoints candidates who do not have proven experience to truly lead and manage and that changes are only made in response to repeated concerns from other agencies. Specific concerns of the local authority officers regarding her ability to appoint staff who are able to "manage" have been made clear to Mrs Amuludun over many years – see in particular, the evidence of Ms Critchlow and Mrs Haskew.

107. Mrs Amuludun said in her evidence that she has been recruiting for a "senior manager" for Beckton. This tends to suggest that she appreciates that the fact that Ms Goldstone had been in post in a management role since early 2014, and yet the setting at Beckton still requires improvement, is a matter that needs to be addressed. The recruitment of a senior manager was not a matter that she mentioned in any of her original statements or even in the fourth statement provided on the second day of the hearing. She did not produce any published advertisement for the role she says she has advertised. It was suggested to her that the only advertisement that Ofsted could find on-line for Beckton was for trainee practitioners. She maintained that she had been looking for a senior manager for some time and had had some interest via agencies and she had someone in mind. She did not produce any documentary evidence. She was unable to explain how her plans fitted with any business plan or acknowledge any potential conflict/confusion regarding Ms Goldstone's role and her own role as manager at Beckton, which she now attend daily, other than to assert that when the numbers increase the setting will be able to afford this. This appears inconsistent with her position that a debt of £367,000 for all three settings has been incurred by the company. We noted that numbers at Enfield and Haringey had in the past been at similar levels to that aspired to at Beckton. We noted also that Ms Goldstone said she had been involved in seeking to recruit staff, but there was nothing in her evidence to suggest that she anticipated a senior manager being appointed.

The Safeguarding Concern in July 2018

108. In our view it is important to recognise that the July 2018 safeguarding concern arose after the Notice of intention to cancel had been issued. We recognise that the Appellant is aggrieved about the suspension of all three settings which then arose. We can understand this (although we doubt that this is the core reason for the indebtedness of which she has spoken). We accept that a mistake was made in the Ofsted letter in that the Instigator's account did not refer to Mrs Amuludun in terms. We noted that the transcript did refer to the "provider" although it then referred to the deputy manager, Anne Marie Gilbert. As set out above, an interim suspension under section 31 involves a low threshold: it concerns the appearance of risk rather than proof. In our view the significance of the safeguarding concern raised in July 2018 is not to do with the truth or otherwise of the allegations made by the Instigator. That was also never part of the decision to cancel. The potential significance of this issue is the nature and quality of the Appellant's response to Brent LADO, Ms Prince, and the extent to which it may, or may not, indicate a poor understanding of safeguarding in general and/or a lack of openness such as to call into question the Appellant's ability to understand due process and/or her ability to be fully transparent with the statutory agencies involved the protection of the best interests of children.

109. We set out our findings and analysis as follows:

a) The Brent LADO, Ms Prince, was made aware of the allegation as relayed by Ofsted because she was sent, and received, the Ofsted letter of 4 July which set out the safeguarding concern. This stated that the instigator *"began the call by complaining about being bullied by the provider, (Adeola Amuludun)…the provider has grabbed children by the arm…."* The letter also referred to different allegations against "the manager, Anne Marie Gilbert".

b) On Ms Prince's evidence she had asked the setting for the name of the "overall manager" and was told that this was "Tosin". Her evidence was that in her very first conversation with "Tosin", she read the Ofsted letter to her but "Tosin" did not tell her that she was, in fact, Adeola Amuludun.

c) We agree that close scrutiny of the email addresses provided the clue was Adeola Amuludn was in fact "Tosin" but we accept Ms Prince's evidence that she did not make this connection.

d) The Ofsted letter was sent by Ms Prince to the Appellant by email on 5 July, but it was not delivered to her that day due to an email address error. It was resent by Ms Prince to the Appellant on 6 July.

e) We accept the evidence of Ms Prince that she read the letter to the Appellant on 6 July because the Appellant said that she had not had time to read it. Irrespective of any earlier conversation, the contents of the Ofsted letter read to Mrs Amuludun should have informed her (whether or not the allegations had any substance) that she and Anne Marie Gilbert were the subject of allegations on the face of the letter. The Appellant did not, however, inform Ms Prince that she was, in fact, the provider until about an hour later when she phoned Ms Prince back. Whilst we agree that this is odd, it is our view that how the Appellant dealt with matters thereafter is more significant.

f) There is no dispute that Mrs Amuludun was advised by Ms Prince that an independent investigation was required. She was advised by Ms Prince that she could approach the LADO at Newham (Mr Pratt). Although he sent various names of investigators to her by email she decided against his recommendations. She said in evidence that she thought that Mr Pratt had some form of a vested interest. She said that although she believed she had a good working relationship with Mr

Pratt, she thought that maybe he wanted to see the outcome of her failure. She was suspicious.

g) She agreed that the requirement was to instruct an independent investigation. In the event she decided to engage the joint services of Ms Caldarawu and Ms Laleye.

110. We listened very carefully to the Appellant's evidence. We find that she was extremely reluctant to provide details as to how she came to instruct Ms Caldararu and Ms Laleye. Eventually she said that someone on the office of her solicitors (but not her solicitor Mr Tolulope Laleye because he was not available) provided a list of names to her and she happened to choose Ms Caldararu and Ms Laleye from that list. This, however, is in stark contrast to the clear picture set out by Ms Caldararu and Ms Laleye, on the basis of the Appellant's instructions, in the chronology annexed to their report. This expressly refers to emails from Nick Pratt on 11 and 12 July with the names of independent investigators. It also states that at 5.16 pm on 12 July 2018 the Appellant emailed her solicitor *"…Tolu for advice on which investigator".* The record exhibited shows the simple fact that advice was received from *"Tolu"* at 6.19 pm that evening. The records then show that Ms Caldaru (and by implication Ms Laleye) engaged with the Appellant within three hours, and the next day engaged with Ofsted on her behalf.

111. There is, of course, nothing remotely wrong with the Appellant choosing her own independent investigator. That was her right. However, we do not agree with Mr Welch's suggestion that it is natural for someone to appoint investigators to support their case since they are paying for the report, and/or that the system provides an inbuilt conflict. Anyone approaching the issue with any understanding of the need for complete transparency in safeguarding would understand that an independent investigation was needed if weight was to be attached to it by the agencies involved. In our view, it is obvious that the Appellant should not have instructed the wife of her solicitor to act as one of the social workers involved to provide an "independent" report because of the possible conflict of interests.

112. The Appellant herself spoke of her reluctance to appoint anyone suggested by Nick Pratt (a LADO) because of her fear and suspicion of *his* vested interests. This was not, therefore, a situation where the Appellant did not know or understand the issues regarding a potential conflict of interests. We find in any event that the Appellant has not been open about the true facts regarding the appointment of Mrs Laleye in her evidence before us.

Ms Nazarkardeh's evidence

113. The main focus of cross-examination of Ms Nazarkardeh appeared to be that there was some irregularity in the decision-making process because Ms Crowley had drafted the cancellation letter. It was also submitted that the letter was not even signed by Ms Nazarkardeh who was supposed to be the decision maker. We find that it was, in fact, signed by Mrs Nazarkardeh in her formal role as decision maker. In answer to Mr Welch she said that *"we made the decision. Ms Crowley drafting the Notice of Intention to cancel based on a discussion of the identified weaknesses."* The judge suggested to Mr Welch that he might want to ask what Ms N what she meant by "*we*". He said that he relied on the answer she gave. He said he did not need to ask the question and was satisfied with the answer she gave. The judge later asked Ms Nazarkardeh what she meant when she had said "*we made the decision…"* Ms Nazarkardeh said when she referred to "*we*" she was referring to Ofsted. None of this was (or is) remotely surprising when one reads at the actual letter. The letter itself repeatedly refers to "we" i.e. an organisational "we". In our view there is nothing remotely untoward in the fact that Ms Crowley, the case owner, drafted the letter which was approved by Ms Nazarkardeh who made the formal decision. This is entirely in line with ordinary practice in an organisation where decisions are based on a case review but where the ultimate responsibility for decision lies with a senior officer.

It was crystal clear to the panel that Ms Nazarkardeh "owned" the decision and took complete responsibility for it on behalf of Ofsted.

114. There is evidence that the Appellant had said to Ms Critchlow that Ms Nazarkardeh had said that she *"would bring her down*." In the event, this allegation was not canvassed with Ms Nazarkardeh. We do not accept that Ms Nazarkardeh's evidence was motivated by any ill will or bad faith. It is notable that it was Ms Nazarkardeh who decided that the 2017 suspension should be lifted. We consider that she was a reliable and credible witness who was able to explain the overall concerns held in a professional and consistent way.

115. In any event Mr Welch's criticisms of the process overlook that the nature of an appeal against the decision made is by way of redetermination. The "we" for current purposes is this panel: standing in the shoes of the decision maker.

Overview

116. We have considered the totality of the evidence.

117. The lengthy SS identified the main themes of the concerns that have recurred in each setting and are illustrations of an ongoing failure over several years to meet the required standards. The Appellant's responses in the SS have largely consisted of a bare denial. Her statements and those of her witnesses were in very broad terms. In general terms the evidence adduced by the Appellant and her witnesses was long on assertion, but short on fact.

118. It is significant feature in this appeal that despite the long and fully documented history of inspections, WRNs and NTIs, as well as the very extensive support provided by other agencies over many years, the Appellant's position is effectively to seek to discredit the professionalism of inspectors, and also Mrs Maher, and to assert in very broad terms that view reached and judgements made were unduly harsh.

119. We find that Ms Crowley was a reliable and truthful witness. She was consistent in her evidence and was able to explain her reasons very fully. We accept her factual account and also accept that the judgements and views she reached were fair, evidence-based and objective. We do not consider that there is any substance to the allegation that she had, or has, a vendetta against the Appellant, personal or otherwise. We accept also the evidence of the other Ofsted inspectors, and also the evidence of the local authority advisors. We found that the evidence of the LA advisors and the Inspectors was honest, clear, cogent and evidence-based. We do not accept that any of the officers or inspectors involved has been motivated by bias, prejudice or discrimination or any improper motive or were unduly harsh. Where there was any conflict of fact we prefer the evidence of the Respondent's witnesses to that of Mrs Amuludun, Ms Goldstone and Ms Gilbert.

120. Overall, we find that the breaches of the EYFS requirements alleged in the SS have all been proved on the balance of probabilities. There are some individual breaches which, in our view, were far less significant than others. There were plainly some breaches which were judged on monitoring visits to have been satisfactorily addressed after enforcement action (i.e. WRN and/or NTIs) had been taken but the Respondent has satisfied us that the evidence demonstrates a clear pattern of genuine and recurring concerns that go to the heart of delivery of the statutory framework in at least the following areas: learning and development; risk assessment: safeguarding; recruitment/training and supervision of staff. We find that Ofsted inspectors did recognise improvements when they have occurred and that they have sought to act proportionately. We accept, however, that the same core themes recurred time and time again across and within each setting, and have been very amply demonstrated in the evidence before us.

121. A clear pattern that improvements effected have not been sustained has been established by the Respondent. In our view Mrs Amuludun has sought to deflect the

genuine concerns raised by many witnesses by making, as we find, unjustified allegations to impugn the professionalism and integrity of those she perceives are most critical of the quality of care provided by the registered entity. We refer to our findings above. We find that she is not a reliable or credible witness. In our view she does not have any real understanding of, or respect for, anyone's perspective other than her own. If she had, she would have acknowledged the breadth and depth of the real concerns raised in this appeal and would developed a clear plan to turn these settings around (or a credible plan to remove the number of settings) a very long time ago.

The Future

122. The Appellant now says that she will only run the Beckton setting. We paid full regard to the positive aspects as evidenced by Ms Greene's recent monitoring report, amongst other evidence. The Appellant's evidence as to her future intentions was contradictory in material respects. It is obvious from her email to Ms Crowley dated 7 May 2019, just a week before her appeal was to start, that she informed Ofsted of her application for company dissolution and she would operate both Beckton and Kilburn as a sole trader. In our view, this shows her lack of understanding of the nature of the company registration with Ofsted. She said in answer to Ms McGrath that she would like to re-open Kilburn, but later said that she would not do so. She told us that the building is to be pulled down in about two years. It was very clear to us that the Appellant vacillated in her intentions even within her oral evidence. It was clear to us that her overall position is that she wants to keep as much in play as possible.

123. We have little or no confidence that if the company registration were to continue the Kilburn setting would not be re-opened (even if only for a period.) Further, and in any event, we find there would be nothing to prevent the Appellant from opening another setting elsewhere under the single registration if it were to remain in being. We do not consider that Mrs Amuludun's claimed insight regarding being "stretched too thinly" was real or sincere. In our view she only expressed this view because, at best, it had finally dawned on her that this fitted with the reality of the mass of evidence before the panel. If her insight was sincere and genuine (i.e. based on an real understanding of her responsibilities as an EYFS provider) she would have reached this realisation on her own a long time ago, would have said so in her statements, and would have requested Ofsted to remove the Enfield and Kilburn settings from the registration long since. In our view the very late emergence of the Appellant's claimed insight speaks volumes as to her real attitude to registration. She appears to go along with the views of others when it suits her but has always followed her own path. In our view Mrs Amuludun is unable to effectively lead and manage any early years setting. She has relied on others to do this, who, despite their efforts and intentions, have been unable to provide the necessary leadership and management skills to secure necessary improvement.

124. We find that despite Mrs Amuludun's evidence that she is motivated by the welfare of children, the history of her entire registration tends to show that her main focus has been on getting by, in line with her business interests. It was notable that she returned in her evidence repeatedly to her point that the government hourly funding allowance for children was less than *"the cost of a MacDonalds"* and was not enough to pay for the wages, food and rent of the setting. Whilst we recognise all the challenges and the tight margins involved, we accept that the vast majority of settings, who operate within the similar financial constraints and circumstances in deprived areas, have been able to achieve good outcomes on inspection. The Appellant is unable to recognise this but instead blames the LAs and Ofsted.

125. A fundamental point is that it is not Ofsted's role or responsibility to manage the provider to ensure that improvement is effected, so that the registration requirements are met. That is always the responsibility of the provider. We noted that the Appellant said in her evidence that it was Ofsted's role to support her and further, that her responsibility to

meet children's needs was a joint responsibility with the local authorities. It was very clear to us that she does not understand that the primary responsibility has always lain with her, and, further, that the support that was provided to her in support of the settings by the local authorities was extensive and unusual.

126. It is a startling feature in the evidence before us that the Appellant says that she had incurred debt of £367,000 in order to acquire and/or support the three nursery settings. We have seen no documentary evidence. The claimed level of debt calls into very serious question the future viability of the Appellant company (which is also relevant to the issues of impact on the Appellant and thus proportionality). This level of debt is not discordant with the information that the Appellant company did not file company tax returns as required - which appears to be why Companies House proposed to strike the company off. Whatever the position is regarding why the company returns were not filed, the indebtedness of which the Appellant speaks plainly suggests that this is not a viable business. In our view this calls into serious question whether any future inward investment required to drive improvement by, for example, the appointment of an experienced manager at Beckton (to which the Appellant now says she aspires) is likely to occur.

127. We agree with Mr Welch that whether the Appellant will or will not succeed in her quest to remain registered as a company is a matter that awaits a decision by Companies House. The fact is that, as at todays' date, the company remains in being and we therefore make our decision on this basis. However, the fact that this application for reinstatement was only made as the result of Ofsted raising the issue at the start of the appeal hearing speaks volumes regarding the Appellant's attitude to ordinary regulatory processes. We find that she waits for others to present and define the problem for her, to which she only then responds. It is said on her behalf that she was dependent on her accountant's advice. She is, however, the Director of the Appellant company so she has, and always had, her own responsibilities regarding the company, and those affected by its operations. The evidence shows that she does not understand this.

128. Despite that fact that the Beckton setting last met a good standard in late 2014, the Appellant has not herself produced any plan (let alone a rapid action plan) before us. In her evidence there was no real recognition by her of any weaknesses, or how she plans to address these. There is no documentary evidence of the goals *she* has set to be achieved, or how *she* is driving improvement. In our view this is because, despite the extensive evidence and the support she has received over many years, the Appellant does not personally have any real understanding of what "good" provision in EYFS terms actually looks like. She does not accept the judgments that have been reached in the past either at Beckton or elsewhere. We noted that the grounds of appeal had asserted that the Appellant had a "*blemish free"* record until 2017 but this is plainly wrong and underlines that her understanding and insight is very poor.

129. Our overall view, based on all the evidence before us is that the Appellant has no real insight regarding her failure to lead and manage the settings. Her case is that only one setting is, or will now be, involved. Even adopting that narrow framework we find that she does not accept or understand that the fact that the setting at Beckton was last judged good in 2014 shows that the management for the setting for which she is responsible has always needed rapid change which she has not been able to achieve over some four years. In our view her overall approach is, and always has been, one of denial and combat.

130. Mrs Amuludun has no insight into the fact that the life chances of children at the Beckton setting have been affected because the setting has required improvement since 2014. At the risk of stating the obvious the delivery of good provision in an EYFS setting, although undoubtedly not without its challenges, is not unduly onerous and yet there is no real evidence of how the Appellant aims to achieve this within any time frame. Instead she prefers to assert that others are at fault and to rely on what she claims are her legitimate expectations. We find that the evidence that she will not be able to sustain any

real improvement in any setting is very clear. In our view the Appellant is not suitable to be registered as the provider of services on either Register.

The Guidance and Legitimate Expectation

131. We considered all of Mr Welch's submissions regarding the guidance contained in the Inspection Handbook and the authorities he cited. Para 6 of the IH states:

> *"All provision judged as inadequate will be re-inspected within six months. Only provision judged as inadequate with enforcement will be monitored. During the monitoring process, Ofsted may take further enforcement action if there is no improvement. If the provider has had two consecutive inspections that have judged it as inadequate and judged inadequate at a subsequent third inspection Ofsted will consider taking steps to cancel their registration."*

132. Mr Welch characterised this as a policy of "*three strikes and you're out*" but this is not strictly accurate because even paragraph 6 refers to consideration of cancellation: i.e. it is not a rule.

133. We noted that para 6 is the only reference to cancellation in the Inspection Handbook. It is an extraordinarily short exposition. In our view, the fuller picture of what is or may be relevant when considering cancellation are dealt with very fully in the Compliance Handbook. We do not accept the submission that the Compliance Handbook, or even the Inspection Handbook, convey a policy which we rephrase as follows: "three inspections with a judgement of inadequate in any one setting must have been undertaken before cancellation of registration can be considered".

134. We considered the Compliance Handbook. Part 1 describes Ofsted's compliance and enforcement work. It sets out in clear terms the duties of Ofsted. It contains this:

> *"Deciding what enforcement action to take*
>
> *14. We consider the protection of children and risks to their safety when we are deciding on enforcement action. We also ensure that the action we take is proportionate to the risk involved.*
>
> *15. We consider whether the provider:*
>
> - *has understood the issue*
> - *has sufficient knowledge about their responsibilities*
> - *demonstrates a willingness to put things right.*
>
> *16. We assess the risk to children from any non-compliance and take stronger enforcement action if children are, or are likely to be, at risk.*
>
> *17. If the incident is a first breach and/or when the impact on children is minor and/or when there was no deliberate intention to avoid compliance, the inspector does not need to move to statutory enforcement action. In these circumstances, we will:*
>
> - *issue a letter to the registered person warning them that we may take statutory action for any future breach, if identified during a regulatory visit*
> - *follow the inspection guidance on failure to meet conditions of registration if identified during an inspection.*
> - *If the evidence suggests that the offence has happened on more than one occasion, or the offence is serious enough that children may be at risk of harm, Ofsted must consider whether it is appropriate to take other enforcement action."*

Thresholds for our enforcement action

18. We can use our enforcement powers only when particular thresholds are met. We will take enforcement action alongside an inspection, if appropriate. This section sets out the thresholds for each type of enforcement we take.

135. In relation to ***"Cancellation (non-emergency)"*** the Compliance Handbook states:

"51. We may cancel the registration of a childminder or childcare provider for any one or more of the following reasons."

It then lists some 10 or so circumstances which include that:

- *the registered person has ceased, or will cease, to satisfy the prescribed requirements for that registration type*
- *the registered person has failed to comply with a requirement set out in regulations (this includes failure to comply with requirements relating to suitability checks)*
- *a childminder or childcare provider on the Early Years Register has failed to meet the legal requirements in the 'Statutory framework for the early years foundation stage'*
- *other enforcement action (recommendations/actions/warning letters/welfare requirement notices) has failed to achieve, or is unlikely to achieve, the outcome needed within a reasonable timescale*
- *there is minimal evidence to suggest that the provider is acting purposefully to resolve the matter within a reasonable timescale*
- *we consider that cancellation is the only way to assure the safety and wellbeing of children.*

Notably there is no reference to three inadequate inspections being required before consideration of cancellation.

136. Mr Welch relied on Section 69 - 71 of the Compliance Handbook which deals with the "*Escalation route for three or more concerns (other than notifications by the provider) in a two-year period."* We do not consider that this assists the "three strikes" argument because it is dealing with a different issue, and specifically, the risk assessment decision to *carry out a priority inspection* or refer for regional action.

137. We have considered the Appellant's case based on the Inspection Handbook. The first issue is whether paragraph 6 conveys an unequivocal promise. We do not consider that it does. It does not state that Ofsted will only cancel registration following a third inadequate inspection. In our view the absence of the word "only" tends to suggest that, at best, the sentence conveys an indication of the circumstances in which cancellation will usually be considered. In our view this makes complete sense in regulatory terms because the factual circumstances underpinning consideration of cancellation of registration in any given situation are necessarily variable.

138. We noted also that the purpose of the Inspection Handbook is described in the preceding paragraphs. In particular paragraph 3 states:

"This handbook is available to providers and other organisations to make sure that they are informed about inspection processes and procedures. It balances the need for consistent inspection with the flexibility needed to respond to each provider's individual circumstances. It should not be regarded as inflexible, but simply as an account of normal procedures…"

(Our *underlining*)

In our view this tends to support that, even looking at the Inspection Handbook alone (and we do not consider, standing in the shoes of the decision maker, that consideration of the Inspection Handbook in isolation is the correct course), the guidance in the Inspection Handbook, such as it is, relates to what can be properly characterised as usual practice, rather than any hard and fast rules.

139. In any event the proposition for which the Appellant contends fails for another reason. There is no distinction drawn in paragraph 6 between different settings. It refers only to "the provider". This Appellant provider had had seven inadequate inspections by the date that notice of intention to cancel was given. Mr Welch argued that this did not make sense because, for example, a large provider with 100 settings could face cancellation of registration if 97 settings were good, but only 3 settings were judged inadequate. In our view this tends to reinforce our view about the infinite variability of circumstances that might be involved, and which is not remotely encapsulated in the rather simplistic sentence in paragraph 6. We consider that the fuller guidance in the Compliance Handbook is more informative than the Inspection Handbook. Further, as a matter of common sense, the fact that a provider with 97 good settings has 3 which are inadequate would be highly relevant to the assessment of the capacity of the provider to effect change within a reasonable time frame, and thus proportionality. Such a scenario would tend to suggest local and/or temporary factors against the background of an overall provider history of good provision. Here the case against the Appellant is based on her lack of capacity because she is unsuitable: that judgement having been based on her response to serious and recurring breaches over many years and in all three settings.

140. Returning to legal principles, we are mindful that reliance or detriment is not a pre-requisite when considering the issue of legitimate expectation and/or whether there has been a departure from published guidance. We consider that the absence of detriment is a matter that is capable of being relevant to the issue of fairness and proportionality. The grounds of appeal had asserted that it is unfair and irrational to cancel the registration for all three settings *"in circumstances where registered providers operate their businesses according to the Handbook"*. We find that the Appellant did not, as a matter of fact, operate her business in the belief that her business would be immune from consideration of cancellation until each setting had received three consecutive judgements of inadequate. On her own evidence she was unaware of paragraph 6 of the Inspection Handbook until it was drawn to her attention by her solicitors after the decision was made. (We do not, of course, say that she should have known what the Inspection Handbook or even what the Compliance Handbook said). We find, however, that the Appellant was, as a matter of fact, aware that cancellation was a possible outcome. The Appellant did not dispute that:

- Siobhan O'Callaghan, EYRI, had on a monitoring visit in October 2014 told her that the legal options open to Ofsted included cancellation of registration which would mean the cancellation of all three settings. Ms O'Callaghan told her that Ofsted were concerned about her ability to meet the requirements of registration. The Appellant confirmed that she understood the decision making and expressed her gratitude that Ofsted were not taking steps to cancel.

- Ms Devine, EYRI, had on a monitoring visit in October 2017 told Mrs Amuludun that Ofsted could decide to take steps to cancel. Mrs Devine explained her concerns that she was not engaging with the Inspector and appeared quiet. Mrs Amuludun had explained that this was because she felt shocked at the feedback and would work with Ofsted to make improvements.

141. In our view, even if we wrong in our analysis as set out above, (i.e. even on the premise that consideration of cancellation can or should properly be regarded as a departure from an unequivocal promise), the ultimate issue is whether the claimed departure from

guidance can be clearly justified. The Respondent has satisfied us that the discretionary decision was and is very clearly justified under section 68 of the Childcare Act because *"the prescribed requirements for registration which apply in relation to the person's registration under that Chapter have ceased to be satisfied"* and that the registered entity *"has failed to comply with a requirement imposed on him by regulations under that Chapter."* In short, the Appellant is not suitable to deliver the statutory framework of the EYFS and which is a fundamental requirement for continued registration under both the General Childcare Register and the Early Years Register. In our view the facts and circumstances surrounding this registration as we have found them to be are also within the scope of many of the harms, risks and factors identified in para 51 of the CH. Put another way and very simply, there is a competing public interest expectation in play. The public, families and children are entitled to expect that children will receive care in a setting that is run by a provider who is suitable. They are entitled to expect that Oftsed will take steps to prevent the continuation of registration if the provider is not suitable. In our view the decision is clearly justified because the Appellant is not suitable.

Proportionality: our overall evaluation

142. We address the issues by reference to ordinary principles for the avoidance of any doubt. Although not argued before us in this way, we accept that the company interest and Mrs Amuludun's personal interests are such as to merit the protection of the ECHR by reference to Article 1 of Protocol 1 and Article 8.

143. 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 best interests, (which includes safety, welfare and educational needs) of children accessing general childcare and early years provision, as well as the maintenance and promotion of public confidence in the system of regulation.

144. In reaching our decision on the issue of proportionality we recognise that the impact of decision is very serious indeed. Cancellation will bring to an end the provider's registration and will bring to an immediate end Mrs Amuludun's career and ambitions, and her ability to earn her living by providing registered childcare services. The decision will also adversely affect the livelihood of her employees and the children and families who use or may want to use the service at Beckton, or any other service opened under the umbrella of the company registration. In addition, cancellation has reputational implications. The decision will have a very profound impact upon Mrs Amuludun's future in the provision of general childcare and EYFS services in the long term.

145. We place very significant weight indeed on the public interest in young children being looked after in a way that is compliant with the regulations i.e. that the provider is suitable and is able to deliver care in accordance with the requirements of the Childcare (General Childcare Register) Regulations 2008 and the statutory framework for EYFS. Children are entitled to care which meets required standards. The public are entitled to expect that care provided meets required standards and regulations and that unsuitable providers will not remain registered.

146. When assessing proportionality alternatives to the least serious response must always be considered.

147. The logic of the Appellant's case is that the registration should continue and any further issues at Beckton or elsewhere can be dealt with by further enforcement action such as WRN (s) or NTI(s) as needed. We do not consider that this would be adequate to address the real issues because Mrs Amuludun lacks insight. Her acceptance of the vast majority of the alleged breaches was not forthcoming in the preparation of the appeal or in her evidence. We have found that she is unwilling or unable to recognise her own limitations.

She says that she has acquired insight into the fact she was overstretched. We do not accept that her insight is real or sincere. We have found that there is little or no prospect of any or any meaningful or sustained change even at Beckton because, in our view, she lacks sufficient knowledge or understanding to deliver the EYFS framework to the required standards in any setting.

148. It is open to us to exercise discretion so as to impose conditions on the registration of the person concerned. We do not consider that there are any conditions that we could devise that would begin to adequately address the legitimate public interest concerns in this case. In order for any conditions to be considered adequate, any decision maker would have to be satisfied that the Appellant could be trusted to fully engage with the Respondent in a transparent way. In the light of our findings, we have no confidence at all that the Appellant is or will be able to do so. She has shown time and time again that her approach to legitimate concerns is to seek to deflect responsibility to others. She is someone who, we find, when faced with any concern is combative and defensive and seeks to protect her own interests, and in a manner that lacks transparency. She is, we find, someone who is unable to take meaningful responsibility.

149. The Appellant contends that she should be given a last chance and she could give undertakings to Ofsted. Even leaving to one side the issue of enforceability, we do not consider that undertakings would be remotely appropriate for the same reasons that conditions would be inappropriate.

150. In our view it is probable that the continuation of registration will expose children to care that will fall significantly below the standards required in terms of the Childcare Regulations 2008 and the EYFS statutory framework. This would not be in the best interests of children accessing services now, or who might access its services in future. We recognise that the Appellant's case is that it seeks to provide a needed service in deprived areas. 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 required standards. We do not consider that the Appellant has the capacity to effect or sustain any real improvement in the services she seeks to provide. She is not suitable.

151. 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.

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

Date Issued: 26 June 2019