First-tier Tribunal Care Standards

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

NCN: [2022] UKFTT 22 (HESC)
Appeal No. [2021] 4476.EY-SUS

Hearing by the Tribunal
held via video link
on 12 January 2022

BEFORE
Scott Trueman (Tribunal Judge)
Roger Graham (Specialist Member)
Suzanna Jacoby (Specialist Member)

BETWEEN:

Mrs Libo Xue

Appellant

-v-

The Office for Standards in Education, Children's Services and Skills (OFSTED)

Respondent

DECISION

The Application

1. This appeal is brought by Mrs Libo Xue ("the Appellant") against the decision of Ofsted ("the Respondent") by notice dated 10 December 2021 to suspend her registration as a child minder on the Early Years Register and the compulsory and voluntary parts of the General Childcare Register for 6 weeks from 10 December 2021 to 20 January 2022 in accordance with section 69 Childcare Act 2006 and the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 ("the 2008 Regulations").

Attendance

2. Although the Appellant initially asked for the suspension appeal to be determined on the papers, and the Respondent subsequently agreed to this, the Appellant confirmed at a telephone case management hearing on 4 January

2022 that in fact she did wish to have an oral hearing, and the matter proceeded to a hearing before us on that basis.

3. At the hearing, Mrs Xue appeared and was supported by her husband, Mr Paul Keung, who also gave evidence on her behalf.

4. The Respondent was represented by Miss Wendy Gutteridge, solicitor with Ofsted Legal Services. The Respondent's witnesses were Mrs Sherrie Nyss, an Early Years Regulatory Inspector and Mrs Julie Swann, Senior Officer, both with the Respondent.

5. The Appellant was offered the option at an earlier telephone case management hearing (TCMH) of having an interpreter for this suspension hearing and having had the opportunity of 24 hours to consider her final decision, indicated after the TCMH that she did not need one. At the hearing, we were satisfied that the Appellant was able to understand the proceedings and participate fully, and although we indicated that if she needed anything repeating or wanted to raise questions at any point she could do so, the Appellant did not raise any concerns with us. At the end of the hearing, both parties informed us that they considered they had been able to make their case fully during the hearing.

Restricted reporting order

6. The Tribunal makes a restricted reporting Order under rule 14(1) (a) and (b) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("the Tribunal Rules") prohibiting the disclosure or publication of any document or matter in this appeal likely to lead members of the public to identify any child or their parents in this case so as to protect their private lives.

Late Evidence

7. Some late evidence in the appeal had been admitted by the Tribunal prior to the hearing under orders dated 5 and 7 January 2022. However, on 10 January 2022 the Respondent had submitted a copy of the Exhibit SN7 to Mrs Nyss's statement which had been omitted from the bundle. At the hearing, Miss Gutteridge indicated that this material had been sent to the Appellant along with all other material in accordance with the Tribunal's earlier orders. She submitted on that basis that it was not really late evidence. Mrs Xue confirmed that she had seen it. However, the Tribunal took the view that as it had not reached the Tribunal before it should be treated as such. The Tribunal admitted this material as it was relevant, the Appellant had seen it and took no objection to its admission, and its omission was an error.

Exclusion of Mr Keung from the hearing

8. Mr Keung attended the hearing to support the Appellant and as a witness and they were present for much of the hearing in the same room and on the same electronic device. In the former capacity he offered comment and support to the

Appellant during the early part of the hearing to which we took no objection. However, once the Appellant had made her affirmation and was giving evidence, Mr Keung initially continued to offer comments and prompts. The Tribunal Judge stopped the evidence and informed Mr Keung that he must not speak during the Appellant's evidence and that the evidence given by the Appellant must be hers alone. Although this was apparently accepted, when the Judge resumed asking questions of the Appellant it was evident from the delay to her responses, and from the fact that she was evidently speaking, but unable to be heard, that the Appellant had placed herself on mute between responses. The Appellant said in response to a direct question that her husband had not said anything to her during the times she was on mute. However, the Tribunal was not satisfied that it could assure itself that the evidence being given by the Appellant was completely hers other than by excluding Mr Keung from the hearing. As a result, the Tribunal exercised its powers under rule 26(5)(a) and/or (b) to exclude Mr Keung from the hearing for the duration of the Appellant's evidence. Mr Keung left the room where his wife was giving evidence and moved to another room in their home closing the door between them. He returned to the hearing after the Appellant had given evidence.

Background

9. The Appellant has been a registered childminder since January 2010 and provides childminding services from her home address in Surrey, from a cabin at the bottom end of her garden ('the garden cabin'). This address is a more recent location for her childminding practice- until 2019, she operated from her former home in Isleworth.

10. The Appellant has been inspected 6 times since registration. Prior to early 2020 the inspection results were mixed. Following an 'inadequate' outcome in 2010, she was assessed as 'good' in both 2011 and 2016. At the inspection in February 2020, shortly after she had moved to her new premises, the Appellant received an outcome of 'requirements not met- with enforcement' and received a Welfare Requirements Notice with 5 actions including improving knowledge and understanding of safeguarding, allegations management and child protection.

11. The Appellant was re-inspected on 17 June 2021 (following a gap in inspections due to the pandemic) and received an inadequate outcome from the Inspector. In line with Ofsted's practice under the Early Years Inspection Framework (EIF), the Respondent would have aimed to complete another unannounced inspection of the Appellant's premises and practice within 6 months of that inadequate judgment.

12. On 11 October 2021, the Appellant received notice of decision from the Respondent that it was intending to cancel her registration in both Registers on the basis of her safeguarding knowledge and practice, particularly child protection. It should be noted that the Appellant has also appealed that decision, which is pending before the Tribunal and is currently scheduled to be heard later this year.

13. On 9 December 2021 the Appellant was the subject of an unannounced inspection from the Respondent, conducted by Mrs Sherrie Nyss. That Inspection forms the basis for these proceedings. Mrs Nyss conducted a full inspection of the setting, between about 9am and 2.50pm that day. At the end of the inspection the Inspector indicated that the outcome was 'inadequate – with enforcement', and the Inspector issued a Welfare Requirements Notice with six actions attached to it, each having a compliance date of 31 December 2021. Following the inspection, a case review was held by the Respondent on 10 December at which Mrs Nyss and the Senior Officer, Mrs Swann, were present. Mrs Swann reviewed the inspection evidence and history. She concluded that the threshold for suspension was met, and decided that the Appellant's registration should be suspended.

14. Mrs Nyss contacted the Appellant by telephone to inform her that a decision had been made to suspend her registration for 6 weeks from 10 December 2021 until 20 January 2022. A notice of suspension was also issued on the same day confirming the suspension, under section 69 Childcare Act 2006, and giving detailed reasons for this. The notice indicated that based on concerns about the Appellant's integrity, ability to meet the legal requirements, the suitability of her premises, risk assessments and her understanding of safeguarding, the Respondent considered that it had reasonable cause to believe that children are, or may be, exposed to a risk of harm, and that the suspension was necessary to allow for the investigation of the circumstances and for steps to be taken to reduce or eliminate the risk of harm.

15. On 17 December 2021 the Appellant appealed against her suspension under regulation 12 of the 2008 Regulations. The Respondent's response to the appeal is dated 24 December 2021. In her appeal document, the Appellant asserts that the Respondent had set out to find fault following their earlier decision to cancel her registration. She asserted that the Respondent had, in effect, pre- judged the inspection, and had decided to 'fail' the Appellant almost from the very beginning when she had answered the front door without the minded child who was in her care being with her. The Respondent's case is that the inspection on 9 December 2021 revealed multiple issues about the Appellant's childminding practice. These concerned the Appellant's lack of knowledge around safeguarding and welfare under the Early Years Foundation Stage; the Appellant's failure to meet the legal requirements of registration; and her assertions that children could safely be left alone, or in the care of an unregistered household member. The Respondent asserted that these issues meant that they reasonably believed that children might be at risk of harm in the Appellant's care. The Respondent also drew attention to the fact that the Appellant had said she did not trust and would not allow the Respondent access going forwards.

Legal Framework

16. Childminders are regulated by Part 3 of the Childcare Act 2006 which provides for registration and regulation by the Respondent in one or both of two

Registers. Section 69 of that Act provides a power of suspension from the Registers in prescribed, relevant circumstances, and provides for a right of appeal to this Tribunal against any such suspension. The relevant circumstances, and other matters, are prescribed in the 2008 Regulations, referred to at the outset of this decision. Regulation 9 provides, so far as material, that the test for suspension is whether:

"…the Chief Inspector [of Ofsted] *reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm".*

17. For the purposes of regulation 9, 'harm' has the same meaning as in section 31(9) Children Act 1989, namely '*ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing ill-treatment of another*".

18. In any appeal, the Tribunal stands in the place of Ofsted's Chief Inspector in reaching its conclusion. The burden of proof lies on Ofsted, and the standard of proof of having a "reasonable cause to believe" lies somewhere between the balance of probabilities and a reasonable cause to suspect. Accordingly, the burden is not an especially high one, and it does not require us to make findings of fact about what has happened. We need to judge any 'belief' on the basis of whether a reasonable person, assumed to know the law and possessed of the relevant information would believe that a child may be at risk. We need to consider the position as at today. Even if the threshold of the regulation is met, we need to consider whether a suspension is necessary and proportionate.

19. The periods of suspension are prescribed by regulation 10 of the 2008 Regulations. Any suspension is for an initial period of 6 weeks, which can be extended for a further 6 weeks where based on the same circumstances. Thereafter, the suspension can only be extended again where it is not reasonably practicable for the Respondent, for reasons beyond its control, to either complete any investigation into the grounds for its belief under regulation 9 or for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9. Even then, the suspension may only continue until the end of the investigation, or until the steps have been taken. The courts have emphasised that suspension is intended to be only an interim measure. The Respondent has an ongoing duty to monitor whether suspension continues to be necessary and the suspension may be lifted at any time if the circumstances in regulation 9 cease to exist.

Evidence

20. As we are not making findings of fact in this appeal, we summarise the evidence briefly, referring only in detail to the matters on which we based our decision.

21. For the Respondent we had two witness statements- one from Mrs Sherrie Nyss, the Early Years Regulatory Inspector who conducted the inspection on 9 December 2021, dated 22 December 2021; and one from Mrs Julie Swann, the Senior Officer who made the decision to suspend the Appellant's registration, dated 23 December 2021. We heard oral evidence from both Mrs Nyss and Mrs

Swann.

22. In her statement, Mrs Nyss set out her dealings with the Appellant at the inspection which she conducted on 9 December 2021 as well as her telephone and email exchanges with the Appellant thereafter. She indicated that the purpose of the inspection was to establish what steps the Appellant had taken to make improvements to her understanding of safeguarding since the June 2021 inspection. She noted that the Appellant had initially not wished her to access the premises and had asked her to come back on another occasion, having queried the 'no notice' aspect of the inspection. She also noted that the Appellant had told her different things at different times in the inspection. In particular, she said that the Appellant had initially denied having a child on the premises, but subsequently admitted that she did and that she had left this child with her husband, an unregistered person. Secondly, she told Mrs Nyss that she had two children on roll but later changed this to three (and when giving parental names to the Respondent after her suspension, provided details of four). Mrs Nyss said that Mrs Xue had also told her contradictory things about her practice of how older children accessed toilet facilities without affecting supervision of toddlers. She said the Appellant had also told her that she would not allow children with illness or infection to attend the premises- but then had done so when one child arrived with conjunctivitis.

23. Mrs Nyss referred to a number of occasions when it appeared to her that the Appellant was suggesting that it was OK to leave the children in her care out of sight and/or hearing or did in fact do so. These included on her arrival at the premises; when the Appellant and Mrs Nyss were to discuss leadership and management; and when one of the children needed to use the toilet facilities.

24. Mrs Nyss's statement indicated that she had asked the Appellant a variety of questions, including some based around scenarios, to indicate the extent of her knowledge of safeguarding and whether this was current. The detailed discussion was set out in the inspection log at SN1 (bundle, H10-H70) and summarised in the witness statement. Mrs Nyss said that the Appellant's answers were of concern because they seemed to suggest that she would not immediately report any concerns to relevant authorities if allegations were made, or if there was evidence of abuse or neglect, but would seek to make judgments for herself, or to keep things under review. Mrs Nyss's statement also identified a number of concerns around maintaining good health and hygiene and the conduct of risk assessments around children's access to antibacterial spray and to other hazards around the property and a breach of the requirement to have an attendance register.

25. The exhibits to Mrs Nyss's statement included full case notes from the visit, and a summary of both earlier inspections, and case reviews that had been held before and after June 2021, and prior to the inspection in December 2021. The inspection notes indicated that the only issue preventing the Appellant from being graded as 'good' in June 2021 was the weakness in her knowledge of her role around safeguarding; and that in a subsequent case review on 18 June 2021 the Respondent had decided to allow the Appellant a further opportunity to demonstrate compliance in the next 6 months given that some areas of her

judgment were good. The notes also show, however, that subsequent dealings with the Appellant principally via email and telephone between June and September 2021 cast doubt on this approach for the Respondent: whereas the Respondent had considered in June that the Appellant had learned that some of her previous thinking about safeguarding was incorrect, comments made by her in emails and telephone calls thereafter sought to justify her original positions.

26. In her oral evidence to the Tribunal, Mrs Nyss confirmed that the December 2021 inspection had been full and not just focused on the weaknesses identified back in June. She said this was standard procedure for Ofsted. She said that although she appreciated that English was not Mrs Xue's first language, she had been careful to ensure that the Appellant understood her questions, by repeating back to her the answers she gave in response. She accepted that there had been some misunderstandings (for example, in relation to the difference between references to birth marks and bruises) but said that where these had occurred she had flagged that in her notes and ensured that the Appellant understood. She did not accept the point put to her that the inspection had only recorded information that was of assistance to the Respondent in making its case against Mrs Xue and not recorded everything that was said. She stated that the Appellant had given a number of concerning answers to various questions about safeguarding in the inspection and her practice with children who were unwell. She said she had observed issues around hygiene and risk management which had also prompted her to ask additional questions.

27. During Mrs Nyss's oral evidence the Appellant took issue with a number of the comments ascribed to her by Mrs Nyss in her inspection report and statement. In some cases she disputed that she had said what was recorded; in others she accepted that she had made the comments but her case was that the Respondent was wrong to rely on the comments as evidence relating to a risk of harm to children: she maintained that there was nothing wrong with the answers in question.

28. Mrs Nyss said that she had been concerned that Mrs Xue's hygiene practice around allowing an ill child to attend (despite it being her policy not to) and the way she dealt with the infection demonstrated that children's health was not adequately protected. She said the children were not encouraged to wash their hands at relevant times.

29. Mrs Swann's statement set out the fact that she made the decision to suspend the Appellant's registration. She briefly set out the factors that led her to conclude that the test in regulation 9 of the Regulations was met. In oral evidence she denied that the suspension had been implemented as a bolster to the Respondent's case in the cancellation appeal which had then been recently commenced. She noted that the reason for the suspension arose directly out of the inspection in December 2021. She set out the factors that she considered gave rise directly to a reasonable belief that a child may be at risk of harm in the care of Mrs Xue. These were: dishonesty about minded children; leaving children with an unregistered assistant; a willingness to leave minded children unattended out of her sight or hearing; poor hygiene practices with the

children; a lack of risk management for example in relation to the easy accessibility of the children to antibacterial spray; the lack of a register of children's presence and attendance at the premises; her lack of knowledge of safeguarding practice, and the lack of integrity demonstrated by the Appellant, particularly in her refusal to grant access to the Respondent to monitor. She said that the Respondent did consider it a risk to children for Mr Keung to keep an eye on the children, however briefly, and to allow an unsupervised 4- year old to access a bathroom independently. She said that this issue also gave rise to concerns about risk to children in relation to the suitability of the premises. She said that options other than suspension had been considered but that simple monitoring was not appropriate because of the risks involved to children and issuing actions would not have dealt with the problems. She noted that she did not consider an emergency suspension had been necessary or proportionate but considered that a suspension to allow the Appellant time to put in measures to safeguard children in her care properly was.

30. We had a witness statement from the Appellant herself, dated 30 December 2021. In this statement, Mrs Xue sets out her history as a childminder since 2010 and the fact that she has looked after more than 30 children in that time of a variety of ages. She explained the situation with her move to her current premises and stated her view that she had only received an inadequate inspection outcome in June 2021 because of her answer to one question on a scenario which she considered unfair. She indicated that whilst she had sent an email to the Respondent after her inspection, she did not take issue with the June inspection until August 2021, when the Respondent had concluded that it was not, at that stage, going to cancel her registration. She said that she felt it necessary to raise a complaint at that stage because she considered that the Respondent's attitude that she needed to get a 'good' rating at the next monitoring inspection to avoid cancellation was too harsh, and risked them being able to proceed to cancelation for any minor infringement. She said that she considered that the Respondent had made up its mind that it wanted to cancel her registration and she was not surprised when it gave her a notice to this effect in October 2021. She said she did not expect to be inspected thereafter and was therefore surprised when Mrs Nyss attended on 9 December. She said that she thought the only purpose of it was to collect evidence against her. She said that she did not consider it problematic for her husband to look after a child for a few minutes given that he was DBS -checked. She accepted that she had said that she did not want the Respondent to come to her house again. She set out her position on the suitability of the premises, and on the requirements to keep children in sight or hearing at all times.

31. In her oral evidence to us today the Appellant repeated a number of these points. She noted that she had first had an inspection at her new property when a child or children were present only in June 2021. Her previous inspection in February 2020 had been without children on roll though she had subsequently minded at least one school child after school shortly thereafter. Mrs Xue said that she had told the Inspector different things at different times- with respect to the presence of children, the arrangements for taking children to the toilet and the number of children on roll, because she did not trust Ofsted. She repeated her belief that the Respondent only visited her premises and came to

inspect so often as a means of gathering evidence against her and finding fault. This was the reason she said she did not want to admit the Inspector on 9 December 2021.

32. In response to a direct question she confirmed that this was no longer her position and that she would allow access to Ofsted inspectors 'if they come without purpose' and clarified that she was happy for them to inspect provided they weren't simply trying to find fault or gather evidence. She could not explain how she would tell whether this was the case (or why this would justify her not admitting the Respondent's inspectors).

33. Mrs Xue gave evidence concerning when she would or wouldn't report possible abuse, neglect or harm to the relevant authorities. The Appellant said that she would report potential abuse or harm to the authorities if she was concerned by it or suspected abuse, harm or neglect. She said that if she was not concerned by a situation however, she would monitor it and decide to report only if she had or developed a concern. She said that whether she would have a concern in a particular situation would depend on how well she knew the child. She said that she could form a basic judgment when told something by a child as to whether the child was telling the truth or not. She said that generally the first time a child raised something with her she would monitor it. She said if someone's actions had caused injury to a child then she would report it; conversely if a child made an allegation against her that she had injured the child, she would explain this to the parent and would record that allegation but would not report it 'because I know I wouldn't do it'. She also said that if an allegation was made against her husband she would also not report this because '*I know him and he would not do anything like that. I know instantly that this is not the truth and I wouldn't report it but will record it*'. She then said that she would report a bruise on a child only if she considered it was in an 'uncommon' area. She noted that children can often get bruised on elbows and knees and that if she saw such a bruise, she would ask the child about it, and would not report it if the child said it was an accident. She said she would report it if the bruise appeared to be uncommon and if the child said something of concern about how it happened. Mrs Xue accepted that it was not her responsibility to analyse and investigate incidents, but said her knowledge and experience would help her identify whether the injury was accidental or not. In her closing remarks, Mrs Xue said that it was a fact that children can, and do, lie.

34. Mrs Xue also gave evidence on the role played by her husband in relation to the children in her care. She noted that he did occasionally 'keep an eye on' the children for a minute or a few minutes if she was, for example, in the toilet or fetching milk from the kitchen or if 'one of the children was in a different room asleep'. She noted that she and Mr Keung had not considered registration for him as an assistant because he had been employed in the restaurant business until the pandemic and would not therefore have been around.

35. She confirmed that she had not kept an attendance register since she moved premises to Surrey in late 2019, and said it was not necessary because she had so few children on roll, but also said that she had not 'focused' on it, partly

because the Respondent had never raised it as an issue with her. She said that the purpose of an attendance register was to show when a child was present in the premises at particular times and for fire safety reasons. She accepted that she knew it was a requirement to have such a register and she said she would have one going forward if she had the opportunity.

36. In relation to the issue of hygiene, the Appellant did not accept the criticisms made of her in the Inspector's report, and had wiped the eye of the child with conjunctivitis with a different part of the tissue than the one she had first wiped it with. She said in evidence that she knew that the other child present on 9 December 2021 would not get re-infected with this condition so soon after they have previously had it based on her own knowledge of other minded children and her own children.

37. Mrs Xue said that she had undertaken an online training course in safeguarding since the June 2021 inspection and had implemented the Welfare Requirements Notices including improving her knowledge of safeguarding and the requirements of the 'Regulations'.

38. We had a statement from a parent of a child minded by the Appellant. We have not named the parent in this decision to preserve the anonymity of the child, though we were made aware of the identity of both parent and child in the papers. The statement noted that the Appellant had cared for the child 2 days per week since September 2021 and it set out how happy they had been with the childminding provided by the Appellant. The parent had brought their child to the Appellant's premises during the inspection on 9 December 2021 and was questioned by the inspector. The parent said that they had explained how content they were with the level of care provided but that they had found Mrs Nyss's questioning style to be leading and subjective, and the line of questioning unprofessional (though the statement does not explain in what way). The parent ends with the observation that they never had any concerns about the care provided by the Appellant.

39. We had a short statement from the Appellant's husband, Mr Paul Keung dated 4 January 2022 in which Mr Keung set out his involvement with the Appellant's practice and noted that he did not care for the children but might occasionally 'keep an eye on them' for example if she answered the door. He accepted that he was not registered as an assistant but might now consider it if the opportunity arose as he had retired. Mr Keung accepted in his own oral evidence that he would 'keep an eye on' the children from time to time for no more than a few minutes at a time.

The Tribunal's conclusions with reasons

40. We have considered the Appellant's grounds of appeal against the Suspension dated 17 December 2021 and we have also considered the Respondent's Response to them. We have considered the written evidence and materials before us carefully, and we have heard oral evidence both from the Appellant and her husband, and also from the Inspector who conducted the December 2021 inspection and the Senior Officer who made the decision to suspend Mrs

Xue's registration.

41. We remind ourselves that at this stage we are not making findings of fact concerning these events, and that the requirement of the test in regulation 9 concerns only the reasonableness of the Respondent's belief that the continued provision of childcare by Mrs Xue to any child *might* expose that child to a risk of harm, which is a reasonably low threshold. It is not necessary for us therefore to decide whether any of the matters raised as concerns by the Respondent would result in a risk of harm to children; only whether they might and whether the Respondent's belief that they might is reasonable. We also note that for these purposes 'harm' not only includes ill-treatment, but also any impairment of health or development (or the witnessing of this occurring to others).

42. Mrs Swann's witness statement and evidence before us set out a useful summary of the grounds on which Ofsted said it was concerned that there might be a risk of harm and we use this as the basis of our examination of the reasonableness of the concerns.

43. The inspection in December 2021 had been precipitated by the inspection in June 2021 in which the Appellant had been graded as 'inadequate' with enforcement and the principal concern at that stage, it was accepted, was around the Appellant's knowledge of safeguarding practice. A Welfare Requirements Notice under the applicable Regulations[1] had been issued in June 2021 and was to be a principal focus of the inspection (though as Mrs Nyss indicated, this was to be only one part of the inspection).

44. It is clear from the inspection notes and from Mrs Nyss' statement and oral evidence that the answers given by the Appellant to questions about safeguarding practice and whether she knew how to keep children safe continued to cause them concern. Mrs Nyss said that the answers to the questions (which we have seen) caused her concern that the Appellant did not fully understand the indicators of abuse; lacked clarity or understanding of her role in relation to reporting concerns without delay; did not appreciate how to respond to allegations made against the childminder herself or members of her household; and lacked a detailed knowledge of the wider context of safeguarding- including the Prevent Duty, online extremism or County Lines. The Appellant took issue with whether or not she had actually ever told Mrs Nyss that she did not know the answers to some of the questions put to her; but in our view we have no reason to doubt the content of the contemporaneous notes taken by Mrs Nyss, and we note that the Appellant did not give us any indication of what alternative responses she said she had given Mrs Nyss, if any.

45. In the Respondent's view, the Appellant has demonstrated a lack of knowledge in relation to safeguarding for a sustained period over the last couple of years, and despite receiving Welfare Requirements Notices to improve it, in their view, hasn't really done so. This was the conclusion of the December 2021 inspection (bundle, page H59). The details of the discussion on safeguarding, contained

[1] *The Early Years Foundation Stage (Welfare Requirements) Regulations 2012* (SI 2012 No 938), regulation 10, made under s. 40 Childcare Act 2006.

in Mrs Nyss's contemporaneous notes bear out the basis of the Respondent's concerns. We appreciate that the Appellant says that the notes are not accurate, and do not record the 'full' answers that she gave to the questions. We also allow for the risk of some language issues between the parties and the possibility of some misunderstanding. But it was also clear in the hearing that, as the Judge put to the Appellant, her real case in relation to much of this evidence was not so much that she took issue with what she was recorded to have said; but more that she denied that the answers she gave should have given rise to any concern. This was particularly the case around what should occur were there allegations made against Mrs Xue herself, or her household and on reporting issues more generally. At several points in the hearing the Appellant asked Mrs Nyss questions about the appropriate course to take in various situations, demonstrating that she didn't presently appear to know the answers.

46. The other safeguarding issue identified by the Respondent as problematic was the failure of the Appellant to keep an attendance record of when the children (or indeed anyone else) came and left the premises. Mrs Xue accepted in the hearing, as we noted, that she had not kept such an attendance record since she had moved to Surrey. Although we have her justification for this, Ofsted explained that the reason why such a log is important is not only because it allows a setting to identify who is present, or not, at any particular times, but because it also has a safeguarding function in allowing anyone inspecting it to identify times when a child may not be present at the setting when they would be expected to be or when they have erratic attendance patterns, both of which may be indicators of potential abuse. In not keeping such a log at all, the Respondent said that that this was an indicator again of poor safeguarding practices since it would not allow the Appellant to identify and consider reporting any unusual attendance of this sort.

47. If we had had any doubt about the equivocal views that the Respondent considered had been expressed by Mrs Xue in relation to safeguarding, these were dispelled by the evidence that the Appellant gave in front of us on these issues, which we set out above in the evidence section. The Appellant does not accept the extent of the reporting obligation that the Respondent considers to exist and told us in terms that she would not report allegations made about herself or her husband (because they could not be true); would decide for herself initially whether a child was lying about allegations; and would make judgements about whether injuries or bruising to a child was accidental based on its location on the body, her knowledge of the family and what the child told her when asked about it. We do not have to make any finding in relation to the Appellant's views. But in our view, this evidence is sufficient in and of itself to justify the reasonable belief that Ofsted has that the continued provision of childcare by the registered person to any child *may* expose such a child to a risk of harm. This is because in our judgment, it is reasonable for the Respondent to believe in the circumstances that i) the Appellant is not fully aware of the relevant protocols for identifying and reporting abuse or harm; and ii) even to the extent she is aware, the Appellant would not always follow the correct protocols or relevant statutory guidance to report potential harm or abuse, unless this coincided with her own judgment.

48. The Appellant's (accepted) failure to keep an attendance log is further evidence in our judgment to support the reasonableness of the Respondent's view that the Appellant's safeguarding knowledge and practices are inadequate and may put a child in the Appellant's care at risk of harm.

49. However, there are other grounds relied on by Ofsted in support of its contention that the regulation 9 test is made out. When questioned by the Tribunal, the Appellant did not deny that she had changed her answers to the inspector in response to a number of questions from the Inspector. These included the presence in the premises of a minded child on the day; the number of children on roll at the premises; and her arrangements for taking a child to the toilet without affecting the supervision of other children. Her response was only that she did not 'trust' the Respondent and felt that it was only trying to find fault. But even if that were so, we do not consider that this really explains why she had changed her answers. The Respondent says that it has issues with Mrs Xue's integrity because it can't rely on her being open and honest with them about what is happening in her setting. In the absence of explanations for the change in position, we also conclude that this belief is reasonable. And if the Respondent considers it cannot rely on what it is told, particularly in relation to the other matters on which it has concerns- such as suitability of premises, supervision of children by unregistered persons and the exact numbers of children attending the setting- then it is reasonable in our view for them to be concerned at potential risks of harm.

50. Allied to that was the previously expressed intent of the Appellant not to allow the Respondent access to her premises to inspect (borne out by her initial refusal to allow the Respondent access on 9 December 2021). Although the Appellant said in front of us that she *would* allow the Respondent access whenever they wanted it, and accepted that it had been inappropriate to say otherwise, it was clear to us that this agreement was conditional on the Respondent not coming 'with a purpose'. Given that the Appellant said that the Respondent put lots of time and effort into coming to collect evidence against her and in not listening to her explanations, it is hard to envisage circumstances in which the Appellant would not perceive any visit to be 'for a purpose'. And this therefore must give rise a reasonable belief in the Respondent that they will not be allowed access to the premises to monitor and inspect the activities conducted by the Appellant from them.

51. The Respondent has expressed concern that there is evidence that the Appellant has left minded children alone or with unregistered persons. They point to the start of the inspection, when the Appellant answered the front door and accepted some minutes into the discussion that a child was with her husband in the Garden Cabin; to the fact that the Appellant appeared to accept that at other times she left minded children with her husband for a few minutes; to her comments to the Inspector indicating that she was willing to leave the children completely alone during discussions with the Inspector and to the practical difficulty of an older child accessing toilet facilities without that child, or the other children, being left unattended for some period.

52. The Appellant's position on this was somewhat unclear: she accepted that her husband did occasionally 'keep an eye on' the children for a few minutes at a time when she needed to undertake particular tasks (and her husband also accepted this) but she denied that she ever left the children in his care. She also did not clarify whether she did ever leave the children out of sight and/or hearing during the time they were with her. She did say that she considered it impossible to meet a standard which required her to be with minded children at all times and queried the necessity and practicality of it. In evidence to us she accepted that she would always answer the door to parents, but that if the back door to the garden was closed, she would not be able to see or hear any other child already present in the setting. She seemed in the hearing to also accept that the 4 year old child that attended her setting was allowed to go to the toilet on her own in the house whilst Mrs Xue minded the younger children or that she left the toddlers 'securely' in the Garden Cabin whilst she took her (because she asked the Senior Officer whether she considered either to be a risk).

53. There does not seem to be any substantive dispute that the Appellant leaves the children alone or with her husband from time to time for a few minutes, and it is accepted he is unregistered. We also note the various comments made by the Inspector (not denied) that the Appellant had suggested moving away from the sleeping children into the main house for their discussion. We noted too the comment from Mr Keung that he would sometimes keep an eye on a child if a child was asleep 'in another room'.

54. The Appellant does not see that this is potentially problematic and does not accept the validity of the Respondent's concern. In our view however, it is clear that the Respondent's practices require childminders to have in place processes to ensure that children can be seen or heard at all times and are not left unattended or with unregistered persons. The risks to them in these circumstances are, in our view, self-evident. But we set out that children can be exposed to hazards from choking, falling, interacting with items or liquids left unattended, and there can be a multiplicity of risks from being left in the care of someone who is untrained and unsupervised. We make clear that there is no suggestion of any wrong-doing by Mr Keung in these circumstances or that there is any suggestion of any child actually coming to harm in his care. But that is not the point. These are risks that are inherent in any setting. And in our view, they are made more potent in this particular case by the Appellant's own attitude, expressed in her oral evidence, that there is nothing wrong in any of this.

55. Again, we do not need to make any findings beyond what has been accepted by the Appellant herself. We conclude that the Respondent's concerns in this context are reasonable that there is a risk of harm to any child left in the childminder's care from the child being left alone or with an unregistered person.

56. Lastly, we deal with concerns about health, hygiene and risk management. The Respondent raised concerns about how the Appellant had dealt with the illness of one of the children who attended the setting on the day of the inspection and in particular was concerned that the Appellant had: i) allowed the child to attend

the setting on that day despite being ill and despite this being contrary to the Appellant's own policy; ii) had used poor hygiene techniques to help manage the child's condition, including wiping the child's nose and eye with the same tissue; iii) had taken the view that the other child present in the setting would not be re-infected because they had only just recovered from a similar infection themselves the week prior; and iv) did not encourage the children to use hygienic practices around hand-washing.

57. The Appellant took exception to Mrs Nyss's wording that the Appellant was 'happy' to take the child despite the illness, and we are content to assume in the Appellant's favour that the position was, as she said, that she felt she had no choice at the time. However, it was an accepted fact that the child had spent the day in the setting despite being infectious and that this was contrary to the Appellant's own stated policy. It was not really disputed that the child's face had been wiped in two places with a single wet- wipe, only whether different parts of the tissue had been used. We did not hear oral evidence in any detail about hand- washing but we have the evidence recorded in Mrs Nyss's inspection notes about the extent to which she considered the Appellant did not proactively encourage the children to wash their hands.

58. At the hearing, the Tribunal asked the Appellant how she knew that a child who had had conjunctivitis the previous week could not be re-infected by another child this week, and her response to this was that this was something she knew from her experience of child minding and of bringing up her own children. She did not indicate any medical basis for the opinion expressed.

59. In terms of risk management, Mrs Nyss recorded that an antibacterial spray had been left at the premises on a cupboard which was at a height accessible to the toddlers; and that little thought appeared to have been given to the risks to a young child of accessing a toilet indoors on her own. The Appellant's explanation of the antibacterial spray was that the children knew not to touch it, but as the Respondent points out, the children in question were 18 and 19 months' old. The basic fact of the spray being at an accessible height did not appear to be contested. In terms of the use of toilet facilities, we have already considered this in the context of the Respondent being concerned that children were left alone. But the Respondent also raised this as a risk management issue, indicating that they were concerned that the Appellant had not considered the hazards inherent in this for a young child who might interact with things on the way, or wander off into other parts of the house. It is unclear to us whether the Appellant accepted that there was a risk or that she had failed to consider it: she asked the Senior Officer in the hearing whether a child going to the toilet on her own presented a risk to which the answer given was 'yes'.

60. Again, we do not make any findings in relation to what may have happened on 9 December 2021 or as to what the position in the premises may be. We are concerned only with the reasonableness of the Respondent's beliefs. Taken together, however, we consider that the matters referred to above demonstrate that there was evidence, much of it uncontested in substance, to support the Respondent's belief that the Appellant had unsatisfactory hygiene practices in relation to the children, and relied on her own judgment when this was

inappropriate. We also consider that there is evidence to support concerns about risk management in the premises.

61. We accept that there was evidence from a parent which supported the Appellant and her setting. We have taken that into account. But in our view, the parent is unlikely to have seen or been aware of many of the issues raised by the inspector. The parent would, quite rightly, have been focused on whether there were any evident risks to her child from the setting. But the Inspector and the Regulations focus on potential risks too which may not be visible to a parent present in the setting only for a few minutes at the start and end of the day. A parent may well be unaware of the practices that a childminder is required to operate, and will rely on regulation and registration by the Respondent for this.

62. Taking all of these matters together, we conclude that the Respondent did have reasonable cause to believe that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm, and that this stemmed from their belief about the Appellant's knowledge of welfare and safeguarding; her stated or observed practices around reporting or attendance records; her dishonesty with the Inspector; her earlier refusal to allow the Respondent access and her equivocal acceptance before us of their right to this; about children being left alone or with unregistered persons; poor hygiene practices with the children and the lack of risk management in the setting.

63. In our judgment the threshold in regulation 9 of the 2008 Regulations is met. Looking at the matters offered by the Respondent in support of the suspension, we are satisfied that the period of suspension is necessary and proportionate.

64. Suspensions are an interim remedy. We remind ourselves that the Respondent has an ongoing duty under regulation 9 to continue to monitor whether suspension is necessary. The Respondent must consider whether suspension is still necessary to allow it to complete any investigation into the circumstances and/or to reduce or remove the risk of harm.

65. It is important to note that we have not made any findings of fact against the Appellant, and this decision is completely separate from any decision with respect to the Appellant's substantive registration. It may be that these issues will be contested fully as part of any further proceedings and it will be for that Tribunal to make decisions about the facts. We are focusing only on the Respondent's belief. This decision provides no indication of any decision that the Tribunal might make with respect to the substantive appeal against cancellation of the Appellant's registration; the two matters are separate and are considered against different tests and circumstances.

Decision:

The Appeal is dismissed.

The Tribunal confirms the Chief Inspector's suspension of the Appellant's registration dated 10 December 2021.

Judge S Trueman

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 17 January 2022