

First-tier Tribunal Care Standards

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

[2023] 4816.EY-SUS
Neutral Citation number: [2023] UKFTT 105 (HESC)

Hearing by video-link on 25 January and 27 January 2023
and with panel deliberations on 30 January 2023

BEFORE
Tribunal Judge Siobhan Goodrich
Specialist Member Mrs Denise Rabbetts
Specialist Member Mrs Sallie Prewett

BETWEEN:

Kids Around the Clock Ltd

Appellant

-v-

Ofsted

Respondent

REASONS FOR THE DECISION ON APPEAL AGAINST SUSPENSION

Preamble

The panel delivered a short form decision on 30 January 2023 in which we dismissed the appeal. We now provide the panel's reasoning.

Representation

Appellant: Ms Carine Patry KC, instructed by DAC Beachcroft

Respondent: Mr Praveen Saigal, Solicitor Advocate, PS Law LLP, instructed by Ofsted Legal

The Appeal

1. By notice dated 4 January 2023 the Appellant company appeals against the Respondent's decision made on 19 December 2022 to suspend its registration to provide childcare on non-domiciliary premises at Chadderton, for a period of six weeks to 30 January 2023.
2. The right of appeal lies under regulation 12 of the Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2008. The Applicant seeks a direction that the suspension shall cease to have effect. The Respondent resists the appeal and requests that the decision to suspend registration is confirmed.

Restricted Reporting Order

3. 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 matter likely to lead members of the public to identify any child or parents involved in order to protect their privacy. In this decision we anonymise the name of the child involved accordingly. We have decided that it is also appropriate to anonymise the full name of another individual (Ms J) because some protected personal/confidential information regarding health is disclosed in this decision.

The Background and Chronology

4. Some matters are not in issue:
 - a) The Appellant company (hereafter "the Appellant") was first registered with Ofsted in 2016. There are currently two nursery settings some 20 miles apart: Chadderton and Benchill.
 - b) The sole director of the Appellant company is Mrs Rashada Bashir. She is also the Nominated Individual. Her daughter, Sabar Bashir is the manager of both settings.
 - c) As at 30 July 2022 the information held by Ofsted recorded the following as managers at Chadderton: Sabir Bashir, Victoria Barber-Olufowobi and Sarah Diogo (deputy manager.)
 - d) This is the third consecutive suspension decision in respect of Chadderton. The first suspension decision was made on 27 September 2022 to run for 6 weeks and the second was made on 8 November 2022 to run until 19 December 2022. There was an appeal lodged against the second suspension decision which was withdrawn. We say straightway that the fact of that withdrawal has no bearing on the merits of the Appellant's appeal before us.
 - e) The matters that led to a first and subsequent suspension decisions were that it appeared that serious injury was deliberately inflicted on a 7-month

year old baby (Baby A) by a member of the Appellant's staff, Ms J, on 21 September 2022, whilst Baby A was in the care of the setting.

Events on 21 September 2022

5. All references to time are approximate, and not least because of an apparent discrepancy regarding the timing recorded on CCTV. On the information currently available to us it appears that:
 - i. Baby A arrived at the setting with her mother at about 8.40am on 21 September 2023. There was discussion regarding whether Baby A could be given nasal drops and Calpol provided by her mother during the day because she had a cold. This was not permitted because these are non-prescription medicines. There was no issue about Baby A being well enough to attend the nursery. She was looked after along with others in what is known as the "Early Risers" room, to which a sleep/sensory room is attached.
 - ii. On 21 September 2022 at about 3.30 pm an ambulance was called to attend Baby A by Mrs Barber-Olofowobi, the manager in charge of the setting that day. At the time the ambulance arrived Baby A was being resuscitated by Mrs Barber-Olofowobi on the advice of the call handler. Baby A was in respiratory arrest and was taken to hospital. The ambulance service notified the police. At hospital Baby A was diagnosed to be suffering from a severe bleed on the brain and retinal haemorrhage. Urgent surgery was performed. Baby A was thereafter treated in the paediatric intensive care.
 - iii. Initial police inquiries were focussed on Baby A's parents but this changed when the police obtained and viewed the CCTV footage that covered the events on 21 September in the Early Risers room at the setting.
 - iv. Medical opinion is that the CCTV footage shows that Baby A was neurologically well on her arrival at the nursery. It was only after this symptoms of neurological abnormalities began to arise. These are apparently demonstrated by Baby A's inability to hold her head upright, drowsiness and possible seizures. It is reported that the injuries, notably the retinal and brain haemorrhaging, were so severe that Baby A would have become symptomatic "almost immediately" following this injury occurring. It is considered that an inflicted mechanism of shaking is the most likely cause for Baby A's presentation.
 - v. The opinion of the treating paediatrician is that the traumatic event occurred between about 08.40 hours, (when Baby A last appeared to be neurologically normal on CCTV and before she was taken to the

sleep room) and 09.05 hours when she is brought from the sleep room - apparently pale, floppy and unconscious.

- vi. On 26 September 2022 at the request of the police the CCTV footage of the Early Risers room was viewed by Ms Law, Early Years Senior Officer, and other Ofsted inspectors at the police station. At the point when Baby A is first seen, she is upright, holding her body and head up and looking around inquisitively. She is passed to a member of staff and then to another member of staff. After around four minutes a member of staff carries baby A through a doorway off the nursery room and out of view of the CCTV. Baby A is still upright and looking around. The footage shows the same member of staff carrying the baby back into view around 20 minutes later. Baby A then appeared to be pale, floppy and unresponsive.
- vii. Ofsted inspectors viewed further extracts from the CCTV which showed the subsequent care of Baby A throughout the day. Amongst other matters, they saw her unable to independently hold her head up and staff trying to feed her and trying to sit her up in a baby walker. Her head clearly flopped onto the baby walker tray when the member of staff let it go.
- viii. As a result of these observations Ms Law held an urgent case review on 27 September 2022. She made the decision to suspend the Appellant's registration at Chadderton due to concerns that staff and leaders and managers at that setting had not ensured the safety and well-being of Baby A. This included significant delay in seeking medical attention and serious shortcomings in basic standards of care. The CCTV showed the child's declining condition throughout the day. A number of staff cared for her in this period but it was only after a parent expressed his concern that senior management assistance was sought.
- ix. Baby A was later discharged from intensive care. It appears that she has not returned to meeting milestones in her development and there are concerns that there will be lifelong consequences for her development as a direct result of what happened to her.

The Appeal and Response

6. In essence, in the Notice of application the Appellant's position is that the threshold tests in regulation 9 and 10 are not satisfied so the suspension should be lifted. Alternatively, suspension is not necessary or justified and is disproportionate. There is no evidence that if Ofsted were to commence regulatory enquiries this may adversely affect the police investigation. It is difficult to see why interviews conducted by Ofsted could be relevant to, or prejudice, a criminal prosecution. The police have formally interviewed the

only three members of staff who remain working at the settings. There is no risk to children because all the staff involved on 21 September 2022 are no longer employed. Ofsted do not appear to have considered any lesser steps such as the imposition of conditions to the effect that any relevant staff not provide any direct childcare or only provide supervised childcare. The Tribunal cannot impose such conditions, but Ofsted have the power to impose them, and the Tribunal could approve an order which provides for relevant undertakings to that effect from Ofsted.

7. In response to the appeal the Respondent's position is that during the regulatory visit on 11 October 2022, inspectors identified serious and widespread breaches at Chadderton of the safeguarding and welfare requirements of the Early Years Foundation Stage ("EYFS"). These include:
 - a) substantial shortcomings in relation to the safer recruitment practices at Chadderton, specifically the recruitment of Ms J, including failure to: obtain satisfactory references for SJ, to assess her suitability to work with children; to carry out effective supervisions and to take appropriate action following a whistleblowing report in relation to SJ.
 - b) Substantial failure by management and staff at Chadderton on 21 September 2022 to identify a child in very obvious declining health; very poor-quality care from staff; and a lack of immediate and appropriate action being taken when a child became extremely ill in the care of the Appellant.
 - c) Constant changes in management at Chadderton which may have contributed to the failings that resulted in a baby in the care of the Appellant suffering catastrophic injuries.
8. The Respondent's position is that Ofsted must await its turn and is unable to conduct its own investigations and follow-up on its lines of enquiry by interviewing staff and the leadership and management team at the setting, until the police consider that this will not risk prejudice to their investigation. The Appellant relies on steps taken to improve safeguarding including removal or departure of certain members of staff but the Respondent does not consider such steps to be sufficient to mitigate or address risk given the serious and widespread breaches of the EYFS identified, which need to be put to the Appellant and which would then allow a proper assessment of the further steps that may be needed to reduce or eliminate a risk of harm. There is a reasonable prospect of the Respondent's investigation showing that further steps to reduce or eliminate a risk might be necessary.
9. The Respondent submits that it is not realistic for conditions to be considered by Ofsted until the investigations by the police and by Ofsted, when permitted by the police, have been completed. Suspension is proportionate and necessary.

The Legal Framework

10. The statutory framework for the registration of nursery provision is provided under the Childcare Act 2006. Section 69(1) of the Act provides for regulations to be made dealing with appeal against the suspension of a person's registration: see regulations 8-13 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (hereafter "the 2008 Regulations").

11. When deciding whether to suspend registration the applicable test is that set out in regulation 9 of the 2008 Regulations. It is that:

*"...the Chief Inspector **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**."*

(our **bold**)

12. "Harm" is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989:

"ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another".

13. The immediate duration of suspension under regulation 9 is for a period of six weeks. It may, however, be extended to 12 weeks under regulation 10. This provides that:

"Suspension of registration: further provisions

10.—(1) Subject to paragraph (2), the period for which the registration of a registered person may be suspended is six weeks beginning with the date specified in the notice of suspension given in accordance with paragraph (4).

(2) Subject to paragraph (3), in a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the Chief Inspector's power to suspend registration may only be exercised so as to give rise to a continuous period of suspension of 12 weeks.

(3) Where, however, it is not reasonably practicable (for reasons beyond the control of the Chief Inspector)—

(a) to complete any investigation into the grounds for the Chief Inspector's belief referred to in regulation 9, or

(b) for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9, within a period of 12 weeks,

the period of suspension may continue until the end of the investigation referred to in sub-paragraph (a), or until the steps referred to in sub-paragraph (b) have been taken.”

14. Under regulation 11 suspension “*must*” be lifted by Ofsted at any time if the circumstances described in regulation 9 cease to exist. This effectively imposes an ongoing obligation upon the Respondent to keep the need for suspension under review.
15. The first issue to be addressed by the panel is whether, as at today’s date, it 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 (the threshold test). In this appeal the suspension to date has exceeded 12 weeks so the Respondent also has to meet one of other of the subsidiary tests set out in regulation 10.
16. The burden of satisfying us that the threshold test under regulation 9 is met lies on the Respondent. The standard of proof ‘reasonable cause to believe’ falls somewhere between the balance of probability test and ‘reasonable cause to suspect’. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child may be exposed to a risk of harm.
17. We are guided by **GM [2009] UKUT 89 (AAC)** at [21]
“Although the word “significant” does not appear in regulation 9, both the general legislative context and the principle of proportionality suggest that the contemplated risk must be one of significant harm.”
18. Even if the primary threshold test is satisfied by the Respondent, that is not an end of the matter. In a case where suspension exceeds 12 weeks the Respondent bears the burden of meeting the requirements of Regulation 10 (3) (a) or (b).
19. Further the Respondent bears the overall burden of persuading the panel that the decision under appeal is justified in terms of a legitimate public interest objective, and is proportionate in all the circumstances.

Additional Evidence and other preliminary matters

20. There was no objection to the panel receiving some recent additional documentation provided by the Appellant at or shortly before the hearing began which consisted of:
 - An audit of character references (regarding recruitment)
 - A Re-opening Strategy
21. The Appellant relies on the statement of Ms Beverley Russell-Kemp (exhibiting the Hopscotch report) and that of Mrs Victoria Barber-Olofuwobi

which were included within the e-bundle. The Respondent's position was that the attendance of both witnesses had been requested to give evidence and that, given their non-attendance, the statements should not be considered at all. Alternatively, no weight should be attached to either statement because neither witness was in attendance for cross examination.

22. We decided that it was in the interests of justice to receive the audit of references and the re-opening strategy. As to the witness statements, these were before us and the weight to be attached to either, in the context of the proper issues in a suspension appeal, would be a matter for our assessment.

The Hearing

23. We had read the indexed e-bundle in advance, the contents of which are set out in the index. We need not relate its contents in detail. We have also been assisted by skeleton arguments from both parties.

24. There were no significant difficulties with the video connection.

25. At the start of the hearing the judge explained that the focus of the hearing would be on the panel's assessment of risk in the context of the nature and substance of the allegations made and, if the tests in regulation 9 and 10 were met, the issue of proportionality bearing in mind the impact of the suspension upon the Appellant and all concerned. As the panel is not engaged with fact finding, the focus of oral evidence adduced should be directed to matters relevant to risk assessment, and the issues of necessity, justification and proportionality. She explained that the panel expected to hear evidence about the progress of the police investigation, the scope of the further investigation intended, and the likely time scales involved.

The Oral Evidence

26. We heard oral evidence from:

- Detective Inspector Clare Harrison, Greater Manchester Police
- Ms Tranby, Early Years Regulatory Inspector
- Ms Law, the Early Years Senior Officer who made the decision.
- Ms Sabar Bashir
- Mrs Rashadar Bashir

The Tribunal's consideration

27. We will not refer to every aspect of the material before us, the oral evidence or the skeleton or oral submissions. We have taken all the information before us into account. We will refer to key aspects when giving our reasons. If we do not refer to any particular piece of evidence or any particular submission it should not be assumed that these have not been considered.

28. It needs to be emphasised that we are not today involved in making any findings of fact. Our task is essentially that of a risk assessment as at today's date in the light of the nature and substance of the allegations before us and in circumstances where the evidence is inevitably incomplete. The police investigation is on-going and because of this the Respondent has not yet been able to interview key members of staff and members of the Appellant's leadership and management team.
29. We add that whilst reference is drawn from case law to our "placing ourselves in the shoes of the Chief Inspector", we are an independent panel making a risk assessment as at today's date against the threshold set out in paragraph 9 and applying regulation 10, and on the basis of the information available today.
30. The Appellant's case in final submissions included that the panel should conclude that the Respondent has not shown that the Regulation 9 threshold test is satisfied because Ms Sabar Bashir and Mrs Rashada Bashir gave evidence on oath that the Appellant will not open its doors to children until the conclusion of the police investigation/until Ofsted agree that it can do so. This was not a matter that had been suggested in the NoA, the witness statements of Mrs and Ms Bashir, or in the Appellant's skeleton - even though, when taken to its logical conclusion, the submission is that the promise on oath by Mrs Bashir and Ms Bashir means that there "is no risk" is dispositive of the appeal. We will return to this aspect of the Appellant's case at a later stage.
31. Although the word "harm" in Regulation 9 is not qualified by the word "significant", we consider that the significance of any (potential) harm is relevant to the issues of necessity, justification and proportionality.
32. Applying **GM**, we remind ourselves that Regulation 9 sets a low threshold. However, the mere fact that the Regulation 9 threshold or the requirements of regulation 10 are met does not necessarily mean that the exercise of the power of suspension is necessary, justified or proportionate.
33. Unsurprisingly, given the fact that serious criminal offences are being investigated, the police are the lead agency. The police have made it very clear that they do not want Ofsted to interview witnesses until they, with advice from the CPS, consider that it is appropriate to do so. In our view it is clear that Ofsted have not been at liberty to interview the key management personnel or other members of staff at the setting because they are suspects in the police investigation of potential charges of neglect, and the police investigation must take priority. Ofsted has been very clear throughout that it considers that its obligation to abide by the police request is consistent with the statutory guidance ("Working Together to Safeguard Children").
34. On the information before us Ofsted has not been complacent but has kept in communication with the police to ascertain progress and to seek permission

as to what it can be permitted to do without the risk of prejudice to the police investigation. The inter-agency cooperation enabled Ofsted to visit the setting on 11 October 2022 to gather copies of documents and to enable it to develop its key lines of enquiry (KLOE) for the regulatory interviews when these are permitted by the police. We noted that the police, who in fact executed a search warrant that same day, seized documents to which Ofsted do not yet have access. That said, it appears that Ofsted were able to gather most, if not all, of the documents relevant to their role and have formulated their initial KLOE.

35. The point of Ofsted being able to conduct its own investigation is to ensure that any substantive decision on enforcement action that may be taken is made in accordance with the law, its own enforcement policy, and is necessary and proportionate. Consideration of the imposition of conditions or cancellation involves that a Notice of Intention (NoI) is served, setting out any alleged breaches of the EYFS and explaining why it is considered breaches have occurred, the reasons for the intended action, and why it is proposed to take the intended action rather than any other lesser measure. The service of an NOI provides the registered person with the statutory right to make representations before any decision is made (after 14 days). There is a right of appeal to the Tribunal in the event of an adverse decision.
36. The Tribunal's power on appeal against an interim decision is to suspend registration is to confirm the decision or to direct that the suspension shall cease to have effect. There is no provision under Regulation 12 to enable this panel to impose conditions instead of suspension. By way of contrast, there is, however, the power to impose conditions in the event of an appeal against a substantive decision regarding cancellation - see section 74 (5) of the childcare Act 2006.
37. The suspension under appeal is due to expire on 30 January 2023. It is right to say that, come what may, Ofsted have to make a new decision on 30 January 2023. Such a decision gives rise to a new right of appeal. The practical reality is that if we uphold the appeal it is unlikely that the suspension will be imposed. The opposite applies if we dismiss the appeal.
38. We agree that the regulatory scheme regarding the power of suspension is designed to ensure that investigations are carried out without undue delay – for the obvious reason that any suspension inevitably has a very serious impact on the viability of the setting, and upon the livelihood and reputation of the individuals involved, and will inevitably affect the interests of the families and children who want to use the service provided.
39. In essence the Appellant's case includes that it is not understood why Ofsted cannot carry out its investigations in tandem with the police, and/or why any regulatory interviews are necessary over and above the police interviews.

40. Much emphasis was placed in cross examination on the rationale given by DI Harrison in her statement regarding the need to consider the rights of suspects and to avoid possible arguments regarding admissibility/fairness under PACE. According to the Respondent's evidence the police gave them reasons that are simpler to understand, namely, the risk of contamination of the evidence or prejudice to the police investigation if in tandem inquiries were made by Ofsted. This is not a difficult concept to grasp. The police are conducting an investigation that may or may not lead to serious criminal charges. Its scope of inquiry is different to that of the regulator for many reasons, but there is a clear overlap between the charge of neglect being considered by the police and issues regarding safeguarding and compliance with of the requirements of the EYFS. We accept that the police do not want Ofsted to interview those people who are currently suspects in the criminal investigation until they are satisfied have completed their own interviews.
41. The Appellant also contends that Ofsted should be able to proceed to make a regulatory decision on the basis of the transcripts of police interviews (when these are available and/or have been released) and/or without the need for interviews conducted by Ofsted. We disagree. Any decision that may be taken by the police/CPS is, of course, in the context of the criminal charges and standard of proof. The scope/nature of a police investigation regarding suspected crime is different to a regulatory inquiry. An interview is a key part of the regulatory process of gathering and clarifying information, and understanding and assessing the evidence regarding the Appellant's understanding of, and ability to comply with, the requirements of the EYFS. We accept that in order to make an informed decision in exercise of its substantive enforcement powers, it is necessary, amongst other matters, for Ofsted to conduct its own interviews of key personnel (i.e. those in overall senior leadership and management roles). It may also need to obtain statements from, or interview, the members of staff in the "Early Risers" room on 21 September 2023, and any staff member (at whatever management level), who was asked for, or who gave, advice about Baby A that day.
42. The Appellant contends that there is no risk at the setting because the likely perpetrator of the injury to Baby A (Ms J) no longer works there. It is also argued that the risk posed by other staff members (who, it is alleged, did not seemingly recognise over a long period of time that Baby A was floppy, unresponsive, unable to support the weight of her head by herself, and might be seriously unwell) is no longer present because they too have left their employment. In her evidence Ms Bashir did not agree that there are any risks to children and that they want Ofsted to work with them, not about risk prevention, but about going forward.
43. In our view the suggestion that there is no risk of harm because all staff have left is, to say the least, simplistic. Having considered the documentation we are satisfied there are serious issues to be considered regarding the

recruitment, supervision and training of Ms J. There is also a serious issue regarding how it came to be that other members of staff immediately involved in caring for Baby A failed to recognise that she was “not right” until this was pointed out in the afternoon by a parent. The apparent inaction of these members of staff raises serious issues. On the face of it is striking that members of care staff in the Early Risers room between about 9am and 3pm did not recognise that there was something wrong/not right with how Baby A was presenting or, if they did notice this, they did not seek advice from senior management much sooner. This raises serious concerns as to systemic issues. It also appears that senior staff, when involved, did not call an ambulance straightaway.

44. In her oral evidence Ms Sabar Bashir said that when she had been able to bring herself to look at the footage she was devastated. In this she seemed to agree with Ms Law who described what the footage showed as shocking. Ms Law described how Baby A had the appearance of a rag doll.
45. Amongst other matters Ms Bashir told us that she saw that the behaviour of members of staff altered when a member of senior management entered the Early Risers room, and then changed back when she left. In our view this is disturbing. It suggests that there is a different standard of behaviour by staff when management are present. This raises concern regarding the culture of the setting.
46. In our view the documentation regarding the recruitment of Ms J raises serious issues about the Appellant’s ability to recruit staff in accordance with safe recruitment principles, and/or in compliance with its own policy. Ms J relied on a reference from a tutor who had last seen her some 11 or so years before, and a reference from a friend. Ms J did not want a reference to be obtained from her employer. It appears that Ms Jenness, who deals with the administration of the recruitment process, ticked the box about references but it is not clear what the “tick” is supposed to convey. The contents of the application form alone contained a number of potential warning signs including Ms J’s reasons for leaving all of her past employments, and the fact that she was taking Citalopram and Propanolol. In layman’s terms, the former is often prescribed for depression and anxiety. The latter, a beta blocker, is often prescribed for panic attacks. It is not clear whether any consideration was given to requiring Ms J to provide evidence from her GP regarding her suitability to work with children.
47. There were concerns after Ms J became an employee. Another member of staff, Ms Nicholson had, on or about 1st September 2022, raised her concerns regarding Ms J’s handling of children. There is a dispute about what Ms Nicholson said. Ofsted hold concerns as to how seriously the concern raised by Ms Nicholls was treated and this needs investigation. It appears that Ms Nicholson’s concern was not reported by the Appellant to the Local Authority

Designated Officer for Safeguarding (the LADO). It is alleged that this was a failure to follow basic safeguarding practice and procedure. Amongst other matters, it is said that, had the LADO been informed, she would have been able to access historical information held regarding Ms J. If sought, this would have revealed that allegations of the deliberate infliction of harm to children by Ms J had been made at a previous employment. In our view, how Ms Nicholson's concern was viewed/treated by management raises serious issues regarding the understanding of management as to how to safeguard children and the need to involve the LADO who, by design, plays an independent role in safeguarding.

48. In our view there are also serious issues about the suitability of the staff members who were involved with Baby A on 21 September 2023 who, it would appear, did not recognise that Baby A was unwell, and did not seek management assistance over a period of hours. Some of these members of staff recently been recruited. There are also serious issues regarding as to the management response before an ambulance was called.
49. Reliance is placed on the compliance audit report carried out in November 2022 by Beverley Kemp Russell, a former Ofsted inspector. It is said that Ms Kemp-Russell has given the setting a "clean bill of health". The Appellant's case includes that work has been undertaken to tighten and strengthen written policies and procedures. Having considered the Hopscotch report, it appears to us that Ms Kemp-Russell's opinion that robust policies were/are in place appears to be based on a table-top review following instruction and discussion with Ms Bashir. Ms Kemp-Russell was unable to attend the hearing so her evidence has not been tested. Mr Saigal objected to her evidence being received at all on the basis that he had written requesting more information as to why, despite the family illness, the witness could not attend by video for a short period, but that no explanation had been provided. We do not consider it necessary to dwell on this aspect.
50. Ms Law and Ofsted take strong issue with the Hopscotch report. We consider that the hearing of an appeal against a suspension decision is not the place to make a decision as to whose view is or is not correct, nor to speculate as to whose opinion evidence may ultimately be preferred in the event that a substantive hearing becomes necessary.
51. Looking at the value of Ms Kemp's Russell's evidence as at today and the issue we have to decide, it could be said that her report could be taken as evidence that there is no substance to the Respondent's concerns. Our view is that the value of her report is, to say the least, limited given that her opinion appears to be based on an audit review of the written policies and procedures only. In so far as her opinion extends beyond audit it could be said that the report lacks the attributes of critical analysis. Although having policies and procedures in place is important the matters that Ofsted have raised relate

more to whether the written policies then is existence were adhered to/embedded in practice - which is a matter of importance when assessing risk.

52. In our view it is obvious that a regulatory investigation of a setting that decided to recruit someone in the context of Ms J 's application and her references is very obviously required, as is investigation as to recruitment of other members of staff. The Appellant understands that recruitment is in issue this because Ms Bashir has provided an audit of references. Whether these references fulfilled the Appellant's own policy criteria and/or the requirement of the EYFS that effective systems are in place regarding recruitment is a matter that requires investigation by Ofsted.
53. We accept that a complex police investigation is ongoing as to whether criminal charges should be brought against Ms J under section 18 of the Offences against the Person Act 1863 and/or whether criminal charges of neglect should be brought against members of the Appellant's management team: Mrs Rashada Bashir, Ms Sabir Bashir and Mrs Barber-Olowufobi. Irrespective of the charging decisions that may be made by the police the simple fact is that Ofsted will have to carry out and complete its own investigation into the setting and its compliance with the requirements of the EYFS, which includes the need to have effective systems regarding the need to ensure that staff are "suitable". We accept that, for reasons beyond its control, it is not possible for Ofsted to conduct or conclude its own investigation until they are able to conduct their own interviews. Following a lengthy conference with the CPS on 24 January 2023 the police have been advised that Ofsted can now interview the three members of staff involved on the day, but that they cannot yet interview the three members of management (Sabar Bashir, Rashada Sabir and Victoria Barber-Olofuwobi)) until the police have decided whether or not to conduct further interviews with any of them. DI Harrison explained that the police will prioritise the interviews of senior management whilst other steps in their investigation are underway.
54. We are satisfied that the criminal investigation has been, and is being given, appropriate priority by the police – amongst no doubt many other pressing cases. In our view there is a clear point and purpose to the police investigation. It appears likely that the end is in sight, in that the current timeline as explained by DI Harrison is that the police expect to conclude its investigation in about five or six weeks, and that the police will allow Ofsted to carry out further interviews of senior management as soon as their own interviews have been completed. Ms Law anticipates that Ofsted will be in a position to interview members of senior management and to consider the need for substantive enforcement action within days after the conclusion of the police investigation.

55. We have considered the suggestion that the Respondent's case for suspension is undermined by the fact that Ofsted did not suspend Benchill which, it is said, is managed by the same senior personnel and the same policies. In our view there is no substance to this. Experience in this jurisdiction informs us that it is not usual for Ofsted to suspend or take enforcement action on one setting simply because another owned and operated by the same appellant is suspended. For obvious reasons the issues of risk at each setting must be considered separately. That is what Ms Law sought to achieve when she asked Ms Tranby to visit Benchill. When Ms Tranby visited she found some breaches of EYFS that were put right then and there. It was necessary to issue a WRN regarding some matters that could not be immediately remedied. The imposition of the WRNs was the subject of a complaint by the Appellant to Ofsted. The WRNs were, however, judged to be met at the next monitoring visit. As Ms Law explained she decided that it was not necessary to suspend Benchill. There were no concerns regarding safeguarding because Ms Tranby was satisfied that the staff at Benchill know what to do if a child is ill. Ms Law said her decision that suspension at Benchill was unnecessary was also informed by the Ofsted's knowledge that the manager at Benchill is capable and experienced, and had held that role there for many years.
56. In our view Ofsted's response to the matters found to be of concern at Benchill shows that Ms Law is well aware of the need to only take enforcement action when it is necessary and proportionate to do so.
57. Based on the records before them Ofsted are concerned that there may have been a number of changes in management at the Chadderton setting which may have a bearing on the events in September. This is a matter of dispute. As we have said our role is not to determine disputed facts. The possible lack of continuity and leadership are matters which will be explored in interview with senior management - which Ofsted are unable to do until permitted by the police.
58. We noted that Ms Bashir, when asked the direct question by Ms Patry as to whether she thought that management was responsible for anything that had happened, said no.
59. Ms Law repeatedly explained that she is unable to complete the investigation into the grounds for Ofsted's belief, or to consider necessary steps to eliminate or reduce risk until she is able to interview members of the leadership team. She explained many times that she was unable to form a view regarding the matters that she considers are key lines of enquiry for investigation at the Chatterton setting precisely because Ofsted are unable to interview senior management until the police have completed their interviews.
60. In our view it is not safe or reasonable for us to conclude that because Ms J and the care staff involved in the Early Risers room on 21 September have

now left there is no risk to any child at the setting. The notion that risk can be discounted on this basis is, in our view, unsound. It presupposes that the recruitment of Ms J (which, on any basis, raises serious issues about safe and effective recruitment practices) was a “one-off”. It begs other questions regarding safe recruitment, training and supervision because it appears that, despite the Appellant’s policies and systems, members of staff in the Early Risers room (including the room leader) did not recognise that something was not normal/not right with Baby A.

61. In our view what is shown by the CCTV and in other evidence raises real and obvious concerns that members of staff at practitioner and management level may have lacked the core skills required for those responsible for the basic needs of babies and young children. Ms Berber-Olofuwobi was employed as a manager at Chadderton until recently. She says that she was asked to give a second opinion on Baby A at about 3 pm and decided to take Baby A to the office. This appears to have been after a parent (a pharmacist) had advised that Baby A “was not right” and needed to be checked out. We note that Ms Auld, Operations Manager, was briefly involved in holding Baby A at about 3.30pm. She telephoned Sabar Bashir for advice. When she came off the phone Mrs Berber-Olofuwobi asked her to call an ambulance. The telephone advice given by the ambulance service was to administer CPR.
62. The substance of the matter before us is that it appears that, whilst in the care of the setting Baby A suffered significant life changing injury, believed to have been caused by means of deliberate shaking, and there was delay in seeking medical attention. The Respondent has satisfied us that what appears to have happened to Baby A involves very serious issues and apparent substance regarding serious allegations which include:
- lack of safe recruitment practice regarding references and/or attention/ consideration being given to the matters of concern in Ms J ’s application regarding her suitability
 - the management response to a concern about Ms J raised by Ms Nicholson on or about 1 September 2022
 - failure to inform/consult the LADO regarding the above concern
 - lack of understanding regarding the requirements of EYFS and with regard to safe recruitment and safeguarding
 - the apparent inability of staff at various levels to observe that the condition of Baby A was not normal and that urgent medical assistance was required.
63. The Appellant submits that this panel can allow the appeal on the basis that there is no risk to children because Ms Bashir and Mrs Bashir gave evidence on oath that they would not allow children to attend the Chadderton

setting until the police/Ofsted investigation is complete. It is not clear to us how this would assist in preventing the closure of the business: there would still be no income from nursery fees. There is, of course, nothing to prevent the Appellant and staff attending the Chadderton setting whilst it proceeds with its plan to re-open. At one stage it was suggested that a direction to set aside the suspension, albeit on the basis that no children would attend the nursery until the police/Ofsted investigation has been completed, might somehow give the bank confidence to provide further financial support. This was not developed in submissions and, in our view, is speculative.

64. We questioned whether this proposal effectively amounts “through the back door” to a condition that “no child shall attend” the setting. Ms Patry submitted that this was not the case: because the evidence had been given on oath it is “enforceable”.
65. In our view as a matter of principle it is not appropriate to decide the appeal on the basis of evidence on oath that no child will attend until the police investigation (or that of Ofsted) is complete. We say this because this has the same effect as a condition, and one that, in reality, amounts to a suspension in all but name. If parliament had intended that that the Tribunal could impose conditions in a suspension case it would have granted this power under the Regulations. We also consider that proposal also amounts to the imposition by the Tribunal of a voluntary undertaking on the regulator. In our view that is a matter that is for the regulator to consider.
66. We do not consider that evidence of oath that no child will attend pending completion of investigation enables us to avoid our proper role in deciding this appeal. The aim of the right of appeal under the regulations is to provide a merits-based decision regarding risk on the basis that the Appellant is registered to provide childcare at the setting. Absent acceptance of a voluntary undertaking by Ofsted (with any necessary legal protections considered and formalised), the assessment of the issue of risk should be undertaken by the Tribunal on the basis that the purpose of registration is, indeed, to provide childcare. Finally, we would add that whilst case law has described that we “stand in the shoes of” the Regulator we are not the regulator. Our power in this appeal is to say whether the decision under appeal is confirmed or whether to direct that it shall cease to take effect.
67. We are satisfied that unless and until the issues regarding the operation of this setting have been further investigated by way of interviews conducted by Ofsted the continued provision of childcare (i.e. as permitted by registration) poses a risk of significant harm to any child attending. The concerns held regarding safe recruitment and other practices go to the heart of safeguarding, and compliance with the EYFS. The allegations are serious and they have substance. We consider that the potential harm that may arise may be significant: a baby or young child may be at risk of rapid deterioration, if

signs and symptoms are not noticed, and appropriate advice sought in a timely way.

68. For all the reasons we have given the Respondent has satisfied us that the threshold test in regulation 9 is met. We accept that the suspension under appeal arises from the same circumstances as the earlier suspension(s). The Respondent has satisfied us the subsidiary test involved in a further period of suspension in Regulation 10 (3) (a) is met: it is not reasonably practicable for reasons beyond Ofsted's control to complete any investigation into the grounds for belief referred to in regulation 9. We would also add that the Respondent has also met the alternative requirement under Regulation 10 (3) (b) i.e. that for reasons beyond Ofsted's control it has not been possible for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9. There is a reasonable prospect of the Respondent's investigation showing that further steps to reduce or eliminate a risk might be necessary.
69. We are satisfied that the Respondent's decision is in accordance with the law and is necessary to protect the public interest in the protection of the health, safety and welfare of children pending further investigation.
70. We are also satisfied that the interference involved in the decision is justified in pursuit of that legitimate public interest aim.
71. The real issue is proportionality.

Proportionality

72. We have carefully considered all the matters raised on the Appellant's behalf. Suspension is always a very serious matter because of the adverse impact on business viability, livelihood, professional reputation and standing. A decision whether or not to suspend is never a decision to be taken lightly.
73. This is a family business that supports the livelihoods of all members of the Bashir family, including Mr Bashir and two sons who are part of the business. Mrs Bashir has been involved in childcare and childminding for many years and this was the backdrop to the founding of the company. She, as director and nominated individual, Ms Bashir as manager, and others face the loss of successful and thriving enterprise, and loss of their careers, livelihood, prosperity. Any suspension involves ongoing reputational damage. The impacts of continued suspension are very serious indeed.
74. If the suspension remains in place is likely that the setting at Chadderton will close prior to the conclusion of the police investigation because it is no longer viable due to financial impact of suspension. The setting at Benchill is also at risk, because of the current financial interdependence between the two settings due to the closure of Chadderton since September 2022. Like Chadderton, the Benchill setting was judged to be "Outstanding" on inspection

in 2017. Until September 2022 there had been no issues of concern regarding either setting brought to Ofsted's attention.

75. Each setting provides a much-needed resource for families in the area they each serve, and in which there is social deprivation. Most of the children at each setting have particular educational and/or social needs.
76. We recognise that the length of time that registration has been suspended has already had an extremely serious impact upon the business. The impact increases daily. The losses as at 12 January 2023 stood at £168, 000 and they continue. We are informed that an insurance claim for business disruption will not be considered whilst the investigation is ongoing. We recognise that suspension will have very profound consequences for all those still employed by the Appellant.
77. We balanced the harm to the interests of the Appellant and others against the risk of significant harm to children looked after at the setting whilst these allegations are investigated.
78. We have carefully considered all the matters raised on the Appellant's behalf. The events that occurred on 21 September are, in themselves, very serious. Baby A's life was placed at serious risk whilst in the Appellant's care. She required urgent surgery. There may be life-long consequences for her. It appears that the injuries Baby A sustained were due to the deliberate infliction or harm by Ms J. We recognise that such events can arise without there being any question of fault on the part of an employer, but there are serious issues regarding Ms J's recruitment, her employment and her suitability from a safeguarding perspective that are yet to be investigated by Ofsted. There are also serious issues regarding the response of members of staff including those in leadership roles to the child's condition thereafter on 21 September. All of these matters have substance and they go to the heart of the safe provision of care for babies and young children.
79. It is right to say that the choice before us is, indeed, a very stark one. We have considered the profound impact of suspension on the Appellant company, and upon all those it still employs/hopes to employ in order to re-open, as well as the loss of a valuable and well-regarded service to the community and the families that it serves. We have balanced the interests of the Appellant and all those affected against the public interest. Having considered all the material before us we consider that the need to protect babies and young children against the risk of significant harm pending further investigation outweighs the adverse impacts of suspension on the Appellant and others affected.
80. When considering proportionality, we considered again the submission (made to support the primary argument that there is no risk and therefore the regulation 9 threshold test is not met) that Mrs and Ms Bashir said on oath

that they will not allow any child to attend the setting pending conclusion of the police or Ofsted investigation. This submission also bears on proportionality – see [63] in particular. We do not repeat here our reasoning regarding our powers in this appeal. It is, of course, always open to the Appellant to provide further evidence and representations to the Respondent during the period of any suspension. It is also open to the Appellant to request Ofsted to accept a voluntary undertaking.

81. We consider that it is fair, reasonable and proportionate to the public interest in the protection of the health, safety and well-being of children that the Appellant's registration is suspended pending further investigation. We confirm the decision to suspend registration made on 19 December 2022.

Decision

The decision to suspend registration is confirmed.

The appeal is dismissed.

Tribunal Judge Siobhan Goodrich

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

Date Issued: 06 February 2023