Neutral Citation Number: [2017] EWHC 2084 (Fam)

Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Sitting at the ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 August 2017

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the matter of X (A Child) (No 4)

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- -

Mr Michael Jones (instructed by the local authority) for the applicant Cumbria County Council
Ms Rebecca Gregg (instructed by Gaynham King & Mellor) for X
Mr Simon Rowbotham (instructed by Denby & Co) for X's guardian
Ms Rachael Watkinson (of Hill Dickinson LLP) for the relevant NHS Clinical Commissioning Group
Ms Elizabeth Wheeler (of DAC Beachcroft LLP) for NHS England

Hearing date (by conference telephone call): 7 August 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir James Munby, President of the Family Division :

1. Following a hearing at Kendal on 15 June 2017, I handed down a judgment on 28 June 2017: *Re X (A Child) (No 2)* [2017] EWHC 1585 (Fam). In that judgment, I set out how X, as I shall continue to refer to her, was detained, pursuant to a Detention and Training Order imposed by the Youth Court, in a secure unit which I shall continue to refer to as ZX, expecting to be released in mid-August 2017; how, while at ZX, she had made determined attempts to commit suicide; and how, in the view of the staff at ZX:

> "***The care plan to send her back to any community setting, especially [her home town] 'is a suicide mission to a catastrophic level'. Staff do not think it will take more than 24 to 48 hours before they receive a phone call stating that X has made a successful attempt on her life*** (emphasis added).
>
> *… X will not manage in the community, … she requires long-term adolescent mental health unit input* (emphasis added)."

2. I concluded my judgment as follows (paras 34-35):

> "34 … There is … a substantial body of professional opinion that what X needs – and, it might be thought, desperately needs – is therapy in some appropriate clinical setting. That body of opinion needs to be taken very, very seriously, as I am sure it will be.
>
> 35 … If there is no effective, realistic and above all *safe* plan in place for X when she is released from ZX, the consequences, given her suicidal ideation, do not bear thinking about. If the fears of ZX are well-founded – and this, for the time being, is the basis upon which we *must* proceed – we should be left with little but the hope that the police would have had occasion to take X into custody before she was able to cause herself irreparable harm. Is that really the best the care system and the family justice system can achieve?"

3. I handed down a further judgment on 3 August 2017, following a hearing at Manchester on 31 July and 1 August 2017: *Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam). Referring to my previous judgment, I said this (para 10):

> "I could hardly have been clearer, both in describing X's needs and in stressing the imperative to find an appropriate placement for her *before* her release from ZX. For all that has actually been achieved in the last few weeks, however, despite unrelenting efforts both by the local authority and by other agencies, I might as well have been talking to myself in the middle of the Sahara."

4. I went on (para 24):

> "As matters stand – this is as at 10.30 am, on Thursday 3 August 2017, as I hand down judgment – the dreadful position in which X finds herself can be summarised very simply and very starkly:
>
> (i) The regime at ZX is not meeting X's needs. The staff there, despite all their efforts, are managing little more than to contain her.
>
> (ii) What X needs – as a matter of desperate urgency – is therapy in an appropriate *clinical* setting.
>
> (iii) Placement in a PICU [psychiatric intensive care unit] will *not* meet X's complex needs.
>
> (iv) What X needs as a matter of desperate urgency – this is clearly the best option for her – is placement in a Tier 4 (adolescent) low secure unit for some 18-24 months.
>
> (v) No such placement was available anywhere in this country when the hearing before me started on Monday 31 July 2017 or when the hearing concluded on Tuesday 1 August 2017, and no such placement is available as I hand down judgment on Thursday 3 August 2017. The only identified placement … has a 6-month waiting list for beds.
>
> (vi) Indeed, as of today, Thursday 3 August 2017, no placement of any kind is available for X when she leaves ZX, as she has to no later than 3pm on Monday 14 August 2017."

5. At the end of the hearing on 1 August 2017, I adjourned the case and fixed a further hearing for the following Monday, 7 August 2017, to enable further inquiries to be made as to what placements might be available for X. I said this (para 39):

> "If, when in eleven days' time she is released from ZX, we, the system, society, the State, are unable to provide X with the supportive and *safe* placement she so desperately needs, and if, in consequence, she is enabled to make another attempt on her life, then I can only say, with bleak emphasis: we will have blood on our hands."

6. I directed that copies of my judgment were to be sent immediately to the Chief Executive Officer of NHS England, to the Secretary of State for the Home Department, to the Secretary of State for Health, to the Secretary of State for Education and to the Secretary of State for Justice.

7. The order I had made at the end of the hearing on Tuesday 1 August 2017, which was circulated on the morning of Wednesday 2 August 2017, recorded that the current contingency options, pending any low secure placement becoming available, were (a) placement in a medium secure unit; (b) placement in a child and adolescent PICU, and (c) placement in an adult PICU. It noted that there was a difference of opinion

between the various agencies and parties as to the ranking of each of these options in terms of placement.

8. The order contained various directions, the most important addressed to ZX and to NHS England. Both required a response by 4pm on Friday 4 August 2017:

   i) ZX was directed to file and serve a letter confirming (a) whether they would be prepared to maintain the current placement for a limited (and defined) period of time following the expiry of the current detention and training order, (b) what further support they would require in that event from others in terms of additional staffing, and (c) in the event that they would not be willing to consider this, the reasoning as to why (including details of any relevant legal or regulatory issues).

   ii) NHS England was directed to (a) provide written confirmation and analysis of whether or not X's needs are better met in an adult or CAMHS PICU, a medium secure unit, or via continued placement at ZX, and (b) to file and serve a letter explaining the decision making process employed in relation to placement searches and its proposals in relation to future attempts to identify an appropriate placement.

9. ZX responded to the order by sending a letter, dated Thursday 3 August 2017, for whose detail and candour I am grateful. ZX has made it clear that it cannot care for X after Monday 14 August 2017; and explained, by reference to the relevant legislation and regulations, which there is no need for me to explore, why, as a matter of law, although it can accommodate X so long as she remains subject to the detention and training order, it cannot thereafter do so. It adds some detail which I need to quote:

> "… the home has made all and every effort to meet [X]'s needs by providing additional staffing at a cost (to date of this hearing) of £125,200.35p. This cost has been wholly met by [ZX]. The Youth Justice Board (England) have failed to provide additional resources to cope with the 3-1 care regime that is needed to maintain the safety of [X] despite requests being made to them on 06 June, 12 July and 17 July 2017. NHS (England) have provided a Health Care Assistant to perform observations but not direct care since 17 July 2017.
>
> [ZX] normally have 24 young people in residence. Since [X's arrival], 13 young people resident at [ZX] have expressed (verbally or in writing via their independent advocate, social worker, youth offending worker or other representatives) that they feel that the quality of the care they are receiving is in breach of their statutory rights. This is a result of staff having to be deployed in an emergency to assist in maintaining the safety of [X] when she is being restrained as a result of attempts to self-harm. This has resulted in a reduction in these young people's right to engage in agreed structured interventions, enrichment and contact with their key workers. In my analysis

> the inappropriate placement of [X] is infringing the rights of the other young people resident in [ZX].
>
> In addition three social care staff are absent from their contracted hours of work due to sickness (stress and anxiety). These absences all result from the unusual experiences these staff have observed with [X] and amount in total to a loss of 111 hours per week of professional staff time serving the needs of all the young people resident in [ZX].
>
> As a result of the above and further content contained within his report, I respectfully advise that [ZX] would oppose any request to extend [X]'s stay at [ZX] after the completion of her sentence on 14 August. It is in neither [X]'s interests nor the interest of the other young people residing at [ZX] that she should remain here."

Comment would be superfluous.

10. Publication of my judgment on the morning of Thursday 3 August 2017 prompted substantial coverage the same day in the on-line and broadcast media and, on the following day, Friday 4 August 2017, equally extensive coverage in the print media. It was, for example, the main front page story in both the *Guardian* ("Senior judge warns of 'blood on our hands'") and the *I* ("'Blood on our hands'"). This seems to have had some effect.

11. Media reports quoted Dr Mike Prentice, NHS England's medical director for its north of England region, as having said on the Thursday evening:

> "The judge is quite right that the relevant agencies need to ensure a safe, new care placement for this young woman which is suitable given the great complexities of her situation. That is what is now happening, and a number of options have now been identified, with detailed clinical and social assessments taking place tomorrow to ensure the right package of care can be put in place before her release date."

12. On the afternoon of Friday 4 August 2017, the court received two documents from NHS England. The first was a report from Deputy Mental Health, Programme of Care and High Secure Lead (Interim), in NHS England's North of England Specialised Commissioning Team (North West HUB), explaining why, in NHS England's view, an interim placement for X in an adolescent (CAMHS) PICU would be the least worst option:

> "[X] has been assessed by clinicians as requiring an LSU [low security unit] bed. At present (2 pm 4 August 2017), there are no LSU beds across the country that are able to meet her significant needs. It would be 3-6 months before an existing LSU bed could be made available for [her]. She is due to be released from her Detention and Training Order (DTO) on 14 August 2017. Therefore, a bed needs to be found for [X] to

> cover the period between the end of the DTO and an LSU bed being found.
>
> As a result of the shortage of LSU beds, [X] has been referred to a MSU [medium secure unit] service. However, they have confirmed that she does not meet their criteria and that she would indeed have her needs better met in a LSU environment …
>
> Given this assessment and the lack of LSU beds across the NHS England estate, Commissioners for NHS England have been looking at less than ideal settings that could manage [X]'s presentation in the short term, until a LSU bed becomes available.
>
> In terms of such an interim placement, the potentially available options are: [(1) CAMHS PICU (2) Adult PICU (3) Medium Secure Unit]
>
> The above order is NHS England's position on the "best" to the "worst" option (all being less desirable than an LSU placement)."

13. Explaining why placement in a medium secure unit would be the least desirable option for X, the letter continued:

> "Placing [X] on a MSU when she has been assessed as not meeting the criteria for such a placement would require a detention in a much more restrictive environment than her assessed needs would indicate …
>
> On a clinical level, clinicians representing the Medium Secure Provider Network across England and relayed to NHS England by their Chair … are concerned at the effect on [X]'s prospects for the future. There is concern that [she] would very likely learn or be exposed to escalating behaviours around both her self-harm and the potential to harm others in such an environment, leading to a poor prognosis to her eventual recovery. Patients spending time on a Medium Secure Unit do not thrive in adult life.
>
> For this reason, NHS England would consider an MSU as the least desirable option that should be explored – notwithstanding the accepted concerns about placing [X] in an age-inappropriate Adult PICU."

The letter concluded:

> "Every assessment and report has agreed that [ZX] is wholly inappropriate to meet her needs. NHS England would only advocate the continued placement there if every other available

> option had failed. It would also advocate that, if this were to be the case, [X] should have additional appropriately experienced and skilled healthcare support."

14. The other document was a letter, also dated 4 August 2017, from NHS England's North of England Specialised Commissioning Team setting out its involvement in the case since early June 2017. In the light of the most recent developments, there is no need for me to go through the earlier history. I can pick the story up on Wednesday 2 August 2017:

> "On 2 August, NHS England continued to follow matters up. Options were explored with [ZY] and [ZZ] (also a CAMHS PICU) with an invitation to both to say what measures would need to be put in place for them to admit X …
>
> On 3 August, there were extensive external discussions within NHS England and with external providers. In particular, there was consideration of a plan to convert PICU beds at [ZZ] into LSU beds – at the time of this letter, this option is still being actively explored. Such a conversion would take 3-4 weeks, but would have the benefit of not only providing a place for X, but also providing more LSU beds nationally (which would relieve the strain on PICUs as they are currently providing care to children and young people awaiting LSU beds).
>
> On the same day, [ZZ] confirmed that they would undertake an assessment of X on Friday 4 August at 10:30. [ZY] confirmed they would also do an assessment on the same day, at 14:30.
>
> … At 15:30 [on 3 August 2017] there was a multi-agency conference. This considered the MSU vs Adult PICU option and what steps would need to be taken in an adult PICU to accommodate her. In the course of the conference, it was noted that if X was an adult, she would potentially meet the threshold for an adult MSU – but that the child criteria was different. The legal arrangements that would need to be made under the Mental Health Act were also discussed – with consensus that any admission prior to her release from [ZX] would be under s47 MHA. A further telephone conference was scheduled for 16:30 on 4 August."

15. The letter set out the outcome of the assessment by ZZ:

> "Following their assessment on 4 August, [ZZ] have now confirmed that they will be able to convert a PICU unit into an LSU unit (providing 8 beds in total) and will be able to provide a bespoke package of care to X pending this. They have confirmed that they would aim to transfer X on Thursday 10 August so as to avoid transferring on a Friday (before the weekend). If this is not possible, they would aim to transfer on the morning of Monday 14 August. At the time of drafting this

> letter, [ZZ] were in the process of drafting the relevant care plans and transfer plans."

16. Later on the Friday, 4 August 2017, the media quoted Dr Mike Prentice as having said:

> "Following extensive assessments, the NHS has identified a bed for this young woman in a safe and appropriate care setting which will best meet her needs. The bed will be available ahead of the release date."

17. The response to this of Professor Wendy Burn, the President of the Royal College of Psychiatrists, as quoted in the media, was:

> "It is a great relief to hear that a suitable bed has been found for patient X. We must learn from this situation and keep up the momentum on this issue. Securing the right support for others like X should not be, and cannot be, dependent on one of the highest judges in the land showcasing his outrage and frustration. We urgently need to devise a national strategy so that people with personality disorders are supported from their adolescence into adulthood."

Quite so.

18. Conscious of the dangers of falling into the fallacious trap of *post hoc ergo propter hoc*, I cannot escape the powerful feeling that, but for my judgment, the steps subsequently taken would have been neither as effective nor as speedily effective as appears to have been the case. This, however, is not a matter for congratulation; on the contrary, it is, of itself, yet further cause for concern. The provision of the care that someone like X needs should not be dependent upon judicial involvement, nor should someone like X be privileged just because her case comes before a very senior judge. I emphasise this because a mass of informed, if anecdotal, opinion indicates that X's is not an isolated case and that there are far too many young women in similar predicaments. How are they to be protected?

19. On the morning of Monday 7 August 2017, I received from Ms Elizabeth Wheeler a most helpful position statement setting out the position of NHS England as at 9.30am. It summarised the plan for X as follows:

> "The current plan for [X] is as follows:
>
> a. On Thursday 10 August 2017 she will be transferred from [ZX] to [ZZ] under s47 of the Mental Health Act. If there is a problem with this, the alternative will be that [she] is detained under s2 of the Mental Health Act.
>
> b. Initially, whilst at [ZZ], she will receive a bespoke package of care. The level of this care will be that which she would receive on an LSU, in all but name.

> c. It is anticipated that this bespoke package would last for 3-4 weeks. This would be while a PICU was reconfigured into an 8 bedded LSU.
>
> d. Once the transfer from a PICU to an LSU had taken place, [X] would be cared for on the LSU.
>
> e. It is planned that the staff who provide care for [X] under the bespoke package will be the same staff who provide her care once the unit has been reconfigured to be an LSU. This will provide continuity of care for [her].
>
> f. The unit at [ZZ] was originally built to LSU specification. Therefore, it will be in a position to provide care and treatment to [X] per her assessed clinical need. From the perspective of care for [X], therefore, the re-configuration of the unit should have little to no practical difference for her."

She added that ZZ is currently registered to provide PICU care, that pending the change in CQC registration, the proposal is therefore to care for X in the interim by way of this bespoke package, and that the CQC are already aware of this proposal and the history of X's particular case.

20. By way of elaboration, Ms Wheeler added this:

> "If, as is hoped and anticipated, the transfer on Thursday is effective, [X] will be being transferred whilst still "serving a sentence of imprisonment". The transfer will therefore take place under s47 of the Mental Health Act 1983.
>
> In terms of the legal requirements for a s47 transfer, the relevant assessment took place on Friday. The [two] medical recommendations will be completed today … The relevant background paperwork … has been obtained …
>
> [ZX] have informed NHS England that the relevant s47 paperwork can take up to 72 hours to process and that an escalation route for this case, in case of any delays, has already been identified."

I responded by email (1055) that I was "dismayed" by the reference to 72 hours and asking what or who was the cause of this potential delay.

21. As directed by my order of 1 August 2017, the matter came back before me for a hearing (conducted by conference telephone call) later the same day, Monday 7 August 2017, at 1pm. Ms Wheeler was able to produce a letter, dated 7 August 2017, from ZZ:

> "Please accept this letter as confirmation that [X] has been accepted for placement on the CAMHS service, at [ZZ] (CAMHS PICU Service).

> An agreement has been made with NHS England to fund an extra package of care in order for her needs to be met. The package includes treatment that will be recommended following a comprehensive assessment.
>
> This will also include dedicated staff to support her throughout her admission, therapy and treatment including Psychological and Pharmaceutical input."

22. Ms Wheeler helpfully elaborated that, although full care and treatment plans would only be worked up following the assessment period following X's admission, the initial management plan was being worked up in readiness for her arrival – it is hoped on Thursday 10 August 2017 –, following the assessment carried out last week. She added that ZZ is currently working on preparing the environment to accept her and selecting the staff for the team to work with her, and that the plans for X's transport from ZX to ZZ would be agreed between ZX and ZZ. She explained the reference to the formal process possibly taking as long as 72 hours as reflecting the reality that NHS England is in the hands of third parties, specifically the two clinicians and the relevant Secretary of State, whose various inputs are, as a matter of law, a pre-requisite to X's transfer under section 47.

23. All that said, the hope and expectation was, I was told, that X would be transferred from ZX to ZZ this Thursday.

24. It is quite clear to me, and no-one suggested otherwise, that X's interests will best be served by her proposed transfer from ZX to ZZ on Thursday 10 August 2017.

25. At the end of the hearing I made an order, the most important provision of which for immediate purposes was a requirement that NHS England was to file and serve no later than 4pm on Wednesday 9 August 2017 all available documentation relating to X's care and treatment plan at ZZ (addressing in particular the proposals for her physical transfer to the placement) or, to the extent that the documentation is incomplete, an explanation of why this is so. My purpose in making an order in these terms is obvious. If need be, and I very much hope that the need will not arise, there will be a further hearing later this week.

26. I am handing this judgment down on Monday 7 August 2017 at 4.30pm.