



Neutral Citation Number: [2021] EWHC 2171 (Fam)

Case No: FD21P00312

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between :

North Yorkshire County Council

Applicant

- and -

C

First

-and-

Respondent

F

Second

-and-

Respondent

NHS Commissioning Board

Third

-and-

Respondent

M

Fourth

(By her Children's Guardian)

Respondent

-and-

Fifth

Leeds City Council

Respondent

Miss Jacqueline Thomas QC (instructed by North Yorkshire County Council) for the
Applicant

The First Respondent appeared in person

The Second Respondent did not appear and was not represented

Ms Laura Twist (instructed by NHS England) for the Third Respondent

Nageena Khalique QC and Mr Martin Todd (instructed by Jones Myers Solicitors) for the
Fourth Respondent

Mr Karl Rowley QC (instructed by Leeds City Council) for the Fifth Respondent

Hearing dates: 29 July 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 30 July 2021.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with M, born in 2005 and now aged 15. M is represented by Ms Nageena Khalique QC and Mr Martin Todd of counsel. M has attended this hearing and listened quietly to the submissions that have been made. The mother of M is the First Respondent, C. The mother appears before the court in person. The father of M is the Second Respondent, F. He did not appear.
2. The applications in respect of M with which the court is seised are an application made by North Yorkshire County Council, represented by Ms Jacqueline Thomas of Queen's Counsel, (a) for permission to invoke the inherent jurisdiction and make M a ward of court, (b) for an order under the inherent jurisdiction authorising the deprivation of M's liberty and (c) for an injunction prohibiting Leeds City Council from discharging M from her current placement.
3. Also a party to these proceedings are the NHS Commissioning Board (otherwise known as, and referred to in this judgment as, NHS England), represented by Laura Twist of counsel, which is responsible for providing the medium secure tier 4 bed M has been assessed as requiring, and Leeds City Council, represented by Karl Rowley of Queen's Counsel, which manages the secure children's home in which M is currently placed.

BACKGROUND

4. M is a young person with highly complex needs and a significant offending history. She is currently placed at XY. XY is a secure children's home. It has capacity for 24 beds. Of those, ten are 'welfare beds' predominantly for children who are subject to orders made under s. 25 of the Children Act 1989. Those beds are allocated via the Secure Children's Home Network. The balance are 'justice beds' and are contracted to the Youth Custody Service. It was through the latter route that M came to be placed at XY in September 2020 pursuant to a Detention Training Order (hereafter DTO) following her being sentenced after her conviction for further criminal offences.
5. Over three months ago, on 22 April 2021, M was also assessed as requiring a medium secure tier 4 bed in a Medium Secure Unit. This followed a period in which M's presentation at XY had become increasingly complex and dangerous, regularly presenting a risk of harm to herself and to others. M was in a highly agitated and distressed state from early February 2021, necessitating prolonged restraint by staff and high levels of supervision and segregation. Medium Secure Units accommodate young people with mental and neurodevelopmental disorders who present with the highest levels of risk of harm to others. Across England there are only three services currently able to admit young females into medium security beds.
6. Within this context, the Position Statement provided by Ms Twist on behalf of NHS England for this hearing asserted that the NHS does not currently have the capacity to provide a medium secure tier 4 bed for M and that NHS England continues to concentrate on making such provision available for her in the medium secure estate. However, as I will come to, the position is, in fact, not so clear cut.

7. M's DTO came to an end on 6 June 2021. Ordinarily, this would have resulted in the placement at XY having come to an end as M was occupying a 'justice bed'. However, prior to the conclusion of her sentence, on 3 April 2021 North Yorkshire County Council questioned the viability of M returning to the care of her mother at the conclusion of the DTO. In circumstances where it was considered that this would not be a viable option, and in circumstances where it was considered unlikely that a bed in a medium secure unit would become available by 8 June 2021, North Yorkshire County Council commenced a search for secure and non-secure residential placements. NHS England committed to providing funding for additional mental health support in the interim at XY in the context of the high level of need M displays and committed to continuing its search for a bed in a Medium Secure Unit.
8. As at 28 May 2021, the search conducted by North Yorkshire County Council had been unsuccessful and, in those circumstances, Leeds City Council agreed that M could remain at XY following the end of her sentence and until 28 June 2021 in order to permit North Yorkshire County Council to purchase a welfare bed at XY. Leeds City Council was clear that this arrangement was on the basis that XY was able to keep M safe for a *short* period of time but that such a placement would not be able to meet her identified clinical needs in the medium to long term.
9. On 7 June 2021, a day before the DTO was due to end, an order authorising M's deprivation of liberty at XY was made by Peel J. Following that order, it became clear that M required a higher level of segregation, supervision and support, both in order to meet M's needs and the needs of other young people at XY in 'justice' beds and 'welfare' beds. Within this context, on 23 June 2021 XY communicated to NHS England and North Yorkshire County Council a proposal that they contended would permit them to continue to accommodate M in the short term, namely:
 - i) That, in addition to the costs of M's placement, North Yorkshire County Council purchase two vacant welfare beds that would become available by 29 June 2021 (at a cost of £2,868.57 per night including M's current welfare bed) so that XY could freeze admissions on those two beds and re-direct resources to providing care for M.
 - ii) An increase in the level of complex care support currently funded by NHS England to twenty four hour care to account for an anticipated increase in the level of risk presented by M upon being informed that she would be the subject of an extended stay at XY.
 - iii) The continuation of weekly multi-disciplinary team meetings (MDTs) to ensure shared accountability for M and to update XY on progress with respect to identifying a medium secure tier 4 bed.
10. Whilst, North Yorkshire County Council have this week agreed to fund the additional beds at XY in the interim to allow some sort of stability for M until a Tier 4 bed can be identified or a bespoke health bed, once again it is important to note that the placement at XY is *not* capable of meeting M's needs beyond the very short term.
11. M continues to demonstrate challenging behaviours. At the present time, M's situation is as follows:

- i) As at 12 July 2021, M has required 192 restraints in 2021.
 - ii) M is self-harming at a minimum of twice a day.
 - iii) M requires segregation and seclusion away from other young people in a locked unit.
 - iv) M has three XY staff members allocated to her from 0730 hrs to 2100 hrs. Two members of staff funded by NHS England attend to her from 0800 hrs to 2100 hrs. Additional staff are required when M's dysregulation necessitates it, for example when physical intervention and/or restraint is required.
 - v) Five members of staff are required at night. Observation of M in her bedroom varies between constant, 5 minute and 15 minute intervals depending upon the perceived risks and restrictions required. When on constant observation she requires one staff member observing her at all times; two when she uses the toilet and five if she needs to be restrained.
 - vi) M does not leave the unit. When she has required emergency medical treatment staff support has been between 4:1 and 6:1 as well as police and/or ambulance staff support on occasions.
 - vii) M has damaged property, resulting in the need for separation and restraint on 21 and 22 July 2021.
 - viii) M has assaulted staff on 22 and 23 July 2021, the latter assault involving M headbutting and kicking a staff member in the head.
12. Within this context, on 26 July 2021, Dr S undertook a further assessment of M. Dr S concludes that M *continues* to warrant placement under the provisions of the Mental Health Act 1983 in a medium secure unit. Specifically, Dr S concludes that M:
- “...she ‘needs the inpatient care and experience to enable a therapeutic response from her. XY’s inability to medicate and seclude will not get the level of engagement that would enable therapeutic gains. Her assessed needs cannot be met in a psychiatric intensive care unit or low support secure psychiatric unit and are best met in an MSSPU”.
13. At the present time, the restrictions in place in respect of M at XY are as follows:
- i) The external doors and windows to the home are locked and M may not have a key.
 - ii) M may be supervised by XY staff on a 2:1 basis for 9 hours of the day, from 7.30am to 9pm, in addition to receiving support from two care staff 24 hours per day, and waking night staff at the home.
 - iii) The use is permitted of necessary and proportionate restraint as required.
 - iv) Staff are permitted to restrict the areas of the home that M is permitted to access.

- v) Staff are permitted to prevent M from accessing any room that is unsupervised unless having private phone calls, during this time M is observed through both the door and the CCTV system.
14. All parties agree that a discharge into the community would place M at risk of serious self-harm, including a risk to life.
15. Within this context, at this hearing North Yorkshire County Council confirmed that it remains unable to identify a suitable placement for M, whether within its own residential provision or within private residential provision. As I have noted however, whilst NHS England's position had previously been that there were no beds available to take M in the Medium Secure estate, the position is more complex than that and has been communicated to the parties and to the court by Ms Twist at this hearing.
16. As I have noted, across England there are only three services currently able to admit young females into medium secure beds. It now transpires that two of those units, LS and NW, do in fact have five empty beds each. Notwithstanding this, and notwithstanding M's assessed and urgent need for a medium secure tier 4 bed, each of those units has to date refused to admit M. With respect to the reasons given for this, they are said in the latest statement of evidence provided by NHS England to be a combination of staff shortages (those shortages caused by a combination of long term and acute recruitment difficulties and the impact of COVID-19) and the contended for inability of those units to make appropriate provision for seclusion with respect to M. The court is informed today that the refusal by the relevant NHS Mental Health Trusts to admit M has been maintained even in the face of NHS England making clear that it will provide whatever support is needed in order to address any difficulties arising from accommodating M in the beds that are currently empty.
17. In the circumstances, the court is now faced with a vulnerable young women with complex and acute needs who has been twice assessed over the course of the past three months as requiring a medium secure tier 4 bed, who is presently accommodated in a placement that is not equipped to meet any of her complex needs but who is being refused admission to that urgently needed provision by two NHS Mental Health Trusts who have *ten* empty tier 4 beds between them.
18. Within this context, whilst the mother today submits that M should be placed at home, each of the parties now propose the following way forward in this case:
- i) That Leeds City Council will agree to M remaining at XY for a further period *expressly* subject to (a) NHS England continuing to provide additional support for the placement, (b) that North Yorkshire County Council continues to fund the additional beds and (c) it being clear that the placement *will* come to an end following the next hearing before the court.
- ii) That the court will join as parties to these proceedings the NHS Mental Health Trusts responsible for LS and NW in order that the court can investigate properly why those NHS Trusts are refusing to admit to a tier 4 bed a vulnerable young person who has been twice assessed to require Tier 4 provision.
- iii) That the court will direct statements from the directors of each of the NHS Trusts joined requiring an explanation in detail as to what obstacles to M's admission

to one of the empty beds are said to exist and how those obstacles may be overcome.

- iv) The court will direct a statement from the Director of Mental Health for NHS England confirming the support it is willing to commission to ensure that M can be admitted to one of the free medium secure beds that exist.
 - v) The court will join as a party the Secretary of State for Health in order that discussion can take place at the highest level regarding the provision of the medium secure tier 4 bed that M has twice been assessed to require and in order that the Secretary of State can confirm whether he is willing to direct the relevant NHS Trusts to make such provision for M.
19. Having considered the submissions of leading and junior counsel, and of the mother, I am satisfied that this is indeed the correct way forward in this case. The parties have invited the court to give a short judgment for disclosure to the NHS Mental Health Trusts and to the Secretary of State for Health, which invitation I have acceded to.

LAW

20. This judgment has been compiled one day before the Supreme Court is due to deliver its decision in the case of *Re T*. Within that context, I make clear that I am in this case continuing the order authorising the deprivation of M's liberty based on the existing legal principles that I have set out in a number of recent judgments (see for example *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam)). I do not consider it necessary to articulate the law in detail. As matters stand, the court may grant an order under its inherent jurisdiction authorising the deprivation of a child's liberty if it is satisfied that the circumstances of the placement constitute a deprivation of liberty for the purposes of Art 5 of the ECHR *and* it considers such an order to be in the child's best interests.
21. I do however consider it important to reiterate the following matters of law that impact on M's current situation and that will be of relevance to those the court has today agreed to join as parties to the proceedings.
22. In the context of the arguments advanced by Mr Rowley in this case to the effect that, having regard to the decision of Cobb J in *North Yorkshire County Council & A CCG v MAG & GC* M's placement is so unsuitable as to breach Art 5, it is important to have regard to the decision of the ECtHR in *Rooman v Bulgaria* [2019] ECHR 105.
23. In that case the Grand Chamber, in the context of an adult prisoner in a "social protection facility" noted that the current case law indicates that the administration of suitable therapy has become a *requirement* in the context of the wider concept of the 'lawfulness' of the deprivation of liberty. Within this context, the ECtHR stressed that, irrespective of the facility in which a person is placed, that person is entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release. In *Blokhin v Russia* [2016] ECHR 300 at [167], the Grand Chamber affirmed that detention for educational supervision pursuant to Article 5(1)(d) must take place in an appropriate facility with the resources to meet the educational objectives and security requirements.

24. Within this context, in *North Yorkshire County Council & A CCG v MAG & GC Cobb J* identified further authorities dealing with the extent to which the absence of appropriate therapeutic provision in a placement may breach Art 5 of the ECHR. In *Aerts v Belgium* (1998) 29 EHRR 50, the unsuitability of the detention was demonstrated because, for a person detained on grounds of mental illness, there was virtually no, and certainly no effective, treatment available in the prison wing in which he was detained. In *Mayeka v Belgium* (2008) 46 EHRR 449, in which a 5 year old child separated from her family was "left to her own devices" in an immigration detention centre for two months being held with adults and her Art 5(1) rights were found to be contravened.
25. Finally, in *R (Idira) v Secretary of State for the Home Department* the Court of Appeal highlighted the case of *Bouamar v Belgium* (1987) 11 EHRR 1, noting at [20] that:
- “[20] *Bouamar v Belgium* (1987) 11 EHRR 1 was an article 5(1)(d) case (detention of a minor by lawful order for the purpose of educational supervision). The applicant was placed in a remand prison where, he claimed, he could not receive supervised education. The court noted (para 50) that "confinement of a juvenile in a remand prison does not necessarily contravene article 5(1)(d) even if it was not in itself such as to provide for the person's educational supervision." But the state was "under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the [domestic] Act in order to be able to satisfy the requirements of Article 5(1) of the Convention" (para 52). The court held that there was a breach of article 5(1)(d) on the facts of that case. The detention of the applicant "in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim". The state was therefore in breach of article 5(1).”
26. With respect to the ECHR, and within the foregoing context, it is also important in this case to have regard to the fact that M’s Art 8 right to respect for private life extends to the right to psychological and physical integrity, personal development and the development of social relationships and physical and social identity (see *Botta v Italy* (1998) 26 EHRR 241 at [32] and *Bensaid v United Kingdom* (2001) 33 EHRR 205 at [46] and [47]).

DISCUSSION

27. Within the foregoing context, a number of things are apparent to the court on the face of the evidence and from the documents prepared by leading and junior counsel for this hearing.
28. The evidence before the court demonstrates plainly that M’s assessed needs are that she requires intensive clinical care and therapeutic support and input. M has now *twice* been assessed as requiring medium secure tier 4 provision. It is equally plain that XY, as a secure children’s home, cannot meet M’s identified needs in circumstances where all that placement can offer is containment. Within this context, it cannot seriously be disputed that at her current placement M’s situation simply cannot improve and, moreover, that effluxion of time in containment will exacerbate her problems as her primary mental health needs continue to go unmet.

29. Further, and making clear I have not heard detailed submissions on these issues, on the evidence currently before the court Mr Rowley's written submissions on behalf of Leeds City Council regarding the extent to which M's current placement is unsuitable appear to have considerable force. In particular:
- i) If she remains at her current placement M would continue to be exposed to a risk of very serious harm and would not benefit from any therapeutic progress to mitigate and address her destructive behaviours.
 - ii) M's assessed mental health needs require her admission to an medium secure unit. They cannot even be met in a psychiatric intensive care unit or low support secure psychiatric unit.
 - iii) Within this context, the arrangements at XY are not even close to the lower level of provision which M has been assessed to require. She cannot be medicated. She has severe and complex needs which cannot be met there and therefore her security of person cannot be safeguarded.
 - iv) XY is not designed to cater to the level of need of a child in M's circumstances. Its purpose is not to do so, there is no connection between the function of XY as a secure children's home and the regime of segregation, observation, restraint and confinement M has been assessed, repeatedly, as requiring.
 - v) Within this context, the current arrangements for M are *ad hoc* and are not and cannot be designed to meet her assessed needs.
 - vi) It is difficult to identify any positives in respect of the arrangements save for her containment; she continues to harm herself and staff notwithstanding their considerable efforts to help her.
30. Within this context, and without determining the point, there must be a cogent argument having regard to the legal principles I have referred to briefly above, that M's current placement is so unsuitable as to amount to a breach of her Art 5 right to liberty and, arguably, a breach of her Art 8 right to respect for private life.
31. On behalf of Leeds City Council Mr Rowley rightly identifies the following further consequences of M remaining at XY, which consequences Mr Rowley persuasively contends would be grave and potentially catastrophic:
- i) M's behaviour and the drain it requires on resources will have a negative impact upon the other young people accommodated at XY.
 - ii) Continued strain on staff members, who are not trained and not contracted to deal with a young person with M's difficulties, (which has already resulted in a staff member going on sick leave).
 - iii) Diminution in staffing levels will compromise the safe and effective running of the unit as a whole and will adversely impact the other young people resident. It risks rendering the functioning of the unit inviable.
32. Finally, Mr Rowley points to the fact that XY's statement of purpose and function, provided pursuant to the Children's Homes (England) Regulations 2015 r. 16(1) and

Sch. 1 does not cover the type of placement in effect for M now and cannot be amended and approved by OFSTED as XY does not have staff with the qualifications and experience required to manage such accommodation. As a result, Mr Rowley contends that XY will be in breach of its statement of purpose, with the real possibility that sanctions for breach could lead to the closure of the unit. Further, continuation of the placement would put the manager of XY at risk of breaching his own registration.

33. Within the foregoing circumstances, it is difficult to see how it can be sustainable for the two NHS Mental Health Trusts who have between them ten empty medium secure tier 4 beds to refuse to admit a vulnerable young person who has twice been assessed as requiring such provision, absent *very* cogent reasons. Particularly in circumstances where NHS England is willing to make good any current difficulties in utilising those empty beds with whatever resources are required. Within that context, I am entirely satisfied that it is appropriate to endorse the way forward pressed upon the court by leading and junior counsel in this case, including Ms Twist on behalf of NHS England, and to join the two Mental Health Trusts concerned and the Secretary of State for Health, subject to the usual permission to apply on short notice in respect of those orders as to joinder.

CONCLUSION

34. It will not be lost on those reading this judgment that the High Court is in this case, in effect, being required to adopt the role of mediator, or at least facilitator, between *NHS* England and two *NHS* Mental Health Trusts, in order to procure medium secure tier 4 provision that the NHS is responsible for providing and for a child who has twice been assessed as being in urgent need of that provision. As Ms Khalique QC observed on behalf of M, viewed in the context of the impact on M of the protracted nature of these proceedings, this is profoundly depressing in circumstances where each day M spends in a placement that is not able to meet her needs further compounds the difficulties under which she already labours.
35. I am satisfied that the way forward proposed by the parties in this case, namely the joinder of the two NHS Mental Health Trusts with empty medium secure tier 4 beds and the Secretary of State for Health, represents the best opportunity to break the impasse in this case and, finally, to secure for M the medium secure provision she has been assessed as urgently needing.
36. That is my judgment.