

JERSEY / JUDGMENT

The X Children [2009]

JRC 058A (27 March 2009)

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judgment

the bailiff:

Introduction

1. This application concerns the future of three badly damaged children aged 12, 11 and 9 respectively ("the X Children"). They are badly damaged as a result of a shocking history of abuse, both physical and sexual, and neglect. They, and the family from which they come, have been known to the Department for Health and Social Services for many years. They were made the subject of interim care orders on 26th March 2008 and proceedings have been continuing in the Family Division since that time. 2. These proceedings were instituted by Advocate Timothy Hanson, the Guardian ad Litem of the X Children ("Mr Hanson"), who was appointed for this purpose by the Judicial Greffier on 12th November 2008. These are public law proceedings, (quite separate from the ongoing proceedings in the Family Division), seeking Judicial Review of a decision of the Minister on 19th December 2008 to refuse to provide the funding necessary for residential placements of the X Children at institutions in England specialising in the treatment and rehabilitation of severely damaged young people. The Minister's view, put succinctly, is that the X Children should be kept in Jersey and looked after in residential accommodation to be developed specifically for them and for other children in need of similar specialised care. The Court rejected the application of Mr Hanson on 12th March and indicated that it would give its reasons at a later date. This we now proceed to do.

Procedural History

of the Application for Judicial Review 3. The initial application by Mr Hanson was made on 25th November 2008 to the Bailiff sitting in Chambers. Notice of the application was given to the Minister. After an inter partes hearing the Bailiff adjourned the application to 23rd December 2008 on the ground that he was not satisfied that there had been a decision which was amenable to judicial review. He indicated that the Minister should make a definitive decision no later than 19th December 2008 in default of which he would be likely to assume that funding for placements

in the United Kingdom had been refused, and proceed accordingly. The Minister did make a definitive decision on 19th December refusing to approve the specialist residential placements for the children. A further application for leave to pursue judicial review of that decision was not opposed by the Solicitor General acting for the Minister. That application was supported by an affidavit sworn by Mr Tim Barrette of the NSPCC who was appointed as Guardian ad Litem of the children in the proceedings before the Family Division on 21st July 2008. We refer to him hereafter in this judgment as "the Guardian". Leave was accordingly granted by the Bailiff on 19th January 2009. 4. The grounds upon which relief was sought were expressed in the application as follows:- "Whether the First Respondent acted unlawfully and/or irrationally in refusing on 19th December 2008 (i) to continue to pursue identified and approved specialist residential placements for each of the children in England and (ii) to pay, or be liable to pay for such placements, and in both instances contrary to the First Respondent's duty under the Children (Jersey) Law 2002 Article 19 (1) to promote and safeguard the welfare of the children. Whether the First Respondent, his servants or agents acted unreasonably, irrationally and/or unfairly in the process leading up to such decision such as to vitiate the same. Whether the First Respondent acted irrationally and/or failed to explore or take into account all alternative means of securing funding for such placements whether under article 16 of the Public Finances (Jersey) Law 2002 or otherwise, and consistent with his said duties." 5. An affidavit in reply was filed by John Michael Pollard, Chief Executive of the Health and Social Services Department, and Mr Hanson was given leave to cross examine him upon it. The Hearing took place on 24th February 2009 and the Court reserved its decision. 6. The grounds set out in the application can be viewed in the conventional way; is the Minister's decision void by reason of illegality, irrationality, or procedural impropriety? Before examining the grounds against those tests, it is convenient to set out the background to this application in a little more detail. Background Synopsis 7. As indicated above, interim care orders were made by the Family Division on 26th March 2008, and those interim orders have been renewed periodically since that date. The X Children were placed in different children's homes in the Island. The Minister now seeks final orders committing the X Children to his care on the basis of Care Plans which have been placed before the Family Division. A number of reports have been commissioned in the context of those proceedings. It is fair to say that they are virtually unanimous in their conclusions. On 6th June 2008, by way of example, Dr Miriam Silver, Consultant Clinical Psychologist stated in her report:- "With regard to placement choice and availability, as a professional working in England where a wider range of placement options is available, I find it difficult to understand that young children can be placed in children's homes, rather than family foster placements or specialist therapeutic residential provision. In England it would be very unusual for children under the age of 12 to live outside of a family setting, and this would normally only be done in extenuating circumstances and for the purpose of completing intensive short-term work with them. I would therefore see the need for finding placements that fully meet the children's needs as being of a greater priority than keeping the children on the Island of Jersey, even if this reduces the frequency at which contact with other family members is possible." 8. In July 2008 Mr John Butterfield, Senior Educational Psychologist (Vulnerable Children) reported that in relation to each of the X Children there was a high level of educational need requiring a considerable amount of specialised intervention. 9. On 2nd October 2008 a

meeting took place between Ms Jemma Waugh, a social worker who had recently taken over responsibility for the family, Mr Butterfield and Dr Bryn Williams, Consultant Clinical Psychologist, to discuss placement options for the X Children. The unanimous view of the group was that each child required a highly specialised therapeutic package of residential care that was not currently available in Jersey. 10. In the meantime, enquiries had been made to identify suitable placements for the X Children. The steps taken were summarised in an affidavit sworn by the Guardian on 6th November 2008 in the following terms: "In trying to find appropriate placements for these children the social worker, Jemma Waugh has made extensive enquiries. From these she, in conjunction with Dr Bryn Williams from CAMHS and John Butterfield, an educational psychologist, identified several possible placements in England. Ms Waugh and Dr Williams travelled to England and spent some time visiting each unit to assess if any would be suitable for the children and their specific and extensive needs. They concluded that the Di Capo unit in Shropshire would be a very good placement for A and her sister B. This is a small unit catering for 6 children at a time. The staff have specialist skills, and are experienced in working with children who have been victims of sexual abuse and who require assistance to develop emotionally and to recover from traumatic early life events. They also concluded that the Windows Unit in Kent, which caters for younger children, would be a very suitable placement for C. With C it is hoped that she will be able to move on from a residential unit to specialist foster care by the time she is of secondary school age. I then visited all the potential placements, independently of the Jersey professionals, to assess for myself the best places for the children to go to. I also concluded that the Di Capo and Windows were very good facilities which would be able to meet the children's needs. There are no placements in Jersey which will meet their needs. The children are currently placed in children's homes in Jersey which do not have the specialist resources the children need. If they remain where they are, their position is likely to worsen considerably. Any delay will be damaging. It is very important that the children are moved to their new homes as soon as possible. Their mother, for whom it has been very difficult to accept that her children will need to leave the island, has now accepted, with the assistance of the Children's Service and a great deal of support and advice from her legal adviser, Sarah Brace, that the children should go. The children need to be prepared for the move. The mother needs to be able to support them, and wish them well, if the placement is going to have the best chance of success. This was being planned and arranged until Tuesday of this week when we heard that no further steps could be taken to progress this vital move for these children, because funding for their placement had not been approved. This is a very worrying turn of events. If there is a delay in moving towards placement, the places which have been reserved for the children will very likely be lost. Much work is required to facilitate the moves for the children, and while it is possible that the people in charge of each placement could conclude, after they have met and assessed the children, that they are not suitable for those units, nevertheless, these are the best chances the children have to regain their childhood. If funding is not to be made available for these placements the Children's Service care plan will need to change." 11. As indicated by the Guardian, the professionals were stopped in their tracks by a concern that funding might not be available. The anticipated cost of these placements was indeed high. According to a business plan prepared by the Department in early December 2008, the annual cost in relation to the X

Children was in excess of £700,000, making a total between 2009 and 2011 of £2,136,774. 12. Although it is clear that the brakes were applied to the planning activities of the professional team in early November 2008, it is not easy to ascertain how or by whom that deceleration was directed. It seems that on 5th November 2008 the Head of the Children's Service, Mr Anthony Le Sueur, was notified by e-mail from the Finance Director of the H&SS Department that:- "the level of funding to place these children into a UK placement as is being proposed is not available". The Finance Director warned that the Department must live within the resources allocated to it, or risk breaching the Public Finances (Jersey) Law 2005 . This information was given to a regular Departmental planning meeting on that day, and relayed to the Law Officers' Department. On 6th November the Crown Advocate informed the Family Division which was, unsurprisingly, very disturbed to learn that the plan to which everyone had been working for the benefit of the X Children appeared to have crashed. Viewed from the perspective of this court, the only surprising and disturbing element of the e-mail from the Finance Director is that no-one appears to have considered the financial implications before the beginning of November. 13. On 7th November a meeting took place at which the Minister, then Senator Shenton, was informed that the money for the placements could not be found from within existing resources, but that the Department supported the move threatened by Mr Hanson to seek a Judicial Review of the decision not to provide resources for the placements. The minute records that the Minister was concerned that the court might have power to instruct an action that would lead to a major departmental overspend. Ms Waugh was advised by a letter of 7th November 2008 from Dr Miriam Silver that she remained "of the opinion that the older three children need specialised therapeutic residential provision off the island. I would agree with local professionals selection of placements proposed and would be concerned that keeping them where they are amounts to little more than warehousing and would be a financially motivated decision that is not in the best interests of these children, who need input now to ameliorate the impact of experiences before they reach adulthood" . Efforts were subsequently made by Mr Hanson to meet the Minister in order to discuss the difficulties. On 13th November an application for Judicial Review was filed with the Bailiff's Chambers. On 17th November Senator Shenton agreed to a meeting which was scheduled for the following day. A full note was prepared for him by Mr Hanson's office. On 18th November the Minister cancelled the meeting. On 20th November the Solicitor General wrote to the Bailiff in relation to the pending application for Judicial Review stating that no final decision had yet been made by the Minister as to whether funding for placements in the UK was or was not available. 14. On 20th November Mr Anthony Le Sueur filed a statement in the proceedings before the Family Division. Mr Le Sueur explained that, if the Children's Service did not have sufficient funds available in their budget for particular placements (as was the case here) he would make a submission to the Health and Social Services Placement Panel. His submission would be accompanied by a business case. The Placement Panel, if minded to support it, would refer the submission on to the senior management team ("SMT") consisting of the Chief Executive, Deputy Chief Executive, Executive Directors and Directorate Managers. If the decision was favourable, the Minister would be informed, and he would request the Treasury and Resources Minister to lodge a proposal before the States seeking additional funding. On receipt of this document, Mr Hanson decided to pursue his application for leave for Judicial Review. As

indicated above, the application was heard by the Bailiff on 25th November and adjourned. 15. It is important to note that the professional team (i.e. those working for and within the Children's Service) remained convinced that the best and only suitable placements for the X Children lay outside the Island. A business case in support of that aim was developed and was to be considered by the Placement Panel on 15th December. 16. On 11th December 2008 an Assistant Legal Adviser in the Law Officers' Department wrote to Mr Hanson, on behalf of the Guardian, inviting written representations to be taken into consideration by the Minister when he made his decision. It was requested that any such representations be made available by 17th December at the latest. On the same day Mr Hanson's firm replied stating that written representations would take too long, given the wealth of documentation already available, and that the Guardian wished to meet the Minister personally. On 15th December the Assistant Legal Adviser renewed her invitation to submit written representations to the Minister. She also stated that any such representations could be placed before the placements panel which was meeting at 4.00pm that day. On the same day Mr Hanson's firm replied as follows: "This is the first opportunity that has been afforded to the Guardian or ourselves to be involved with this afternoon's meeting. The Guardian is present in Jersey today, and we would both of us (or just the Guardian if preferred) like to be able to attend the meeting. Please confirm that this will be possible. Given the lack of notice of the possibility of our contributing to the meeting, we are not able to provide written representations, which, in any event, are not appropriate as queries may need to be dealt with, and these will be much more expeditiously dealt with by attendance at the meeting". 17. The Assistant Legal Adviser replied immediately to state that neither the Guardian nor his legal advisers were invited to attend the meeting of the Placement Panel. The opportunity given was only to make written representations. Mr Hanson's firm protested, but to no avail. 18. The meeting of the Placement Panel duly took place. Those present were Mr Richard Jouault (Deputy Chief Executive), Mrs Marnie Baudains (Directorate Manager for Social Services), Mr Ian Dyer (Directorate Manager for Mental Health Services), Dr Richard Lane (Medical Director), Ms Rose Naylor (Director of Nursing Governance), Mr John Cox (Service Manager, Adult Services), and Ms Sarah Purgal (Deputy Finance Director). Mr Anthony Le Sueur, Manager of the Children's Service, made his presentation. The recommendation of the business plan presented by Mr Le Sueur was that the only option able to meet the needs of the X Children within a reasonable time scale was that involving placements outside the Island. According to the minute of the meeting, the following discussion took place:- "Tony Le Sueur presented the overview business case, placement plans, visiting schedules, RAP forms, and Statements of Purpose and Function for the two proposed UK placement units (Di Capo and Windows). These were for the three eldest of seven siblings from Family X, for whom the Children's Service are seeking full care orders from the Family Division of the Royal Court. Discussions centred around what provision (if money was not an issue) "best met" the needs of each and all of these three children. This took into account their individual needs and the recommendations made by the professionals involved; the risks associated with each placement option; the likely time-scales within which each option could be achieved

- taking particular note of current developments within Children's Services; the sustainability of each option; how quality assurance could be verified and ensured; what each option meant for the longer term future of each child; the impact of "delay" and how this may feature as an issue, not solely at the outset but at various points over the coming years. Members of the Panel asked for clarification on the current and proposed residential developments and on how these could be tailored to meet the specific needs of these three children. Tony Le Sueur explained that much work had already been done to identify two small care settings which could be utilised by up to three children in each and which, it was believed, could be set up and be running by the end of the first quarter of 2009. He confirmed that these arrangements could be prioritised for the needs of these three children. Discussions ensued on the manpower and financial resources and the practical arrangements, which needed to be considered to achieve either of the outlined options. Alternative 1 - Development of this specific local provision for the 3 children: This will require a re-modelling of residential services, which is currently under way, and is outlined in more detail in Recommendation 7 of the Williamson Implementation Plan. This would require essential investment of £223,000 per annum for an 'Intensive Support Team' that will address the needs of all new placements - thus ensuring placement stability for these children; additional therapeutic services to be established, outlined in more detail under Recommendation 8 of the Williamson Implementation Plan at a recurrent cost of £485,000 per annum - with £120,000 of this sum being absolutely essential to supporting these three children. Alternative 2 - Send the 3 children to specialist 'therapeutic' placements in the UK: Cost of this specialist care, for a minimum period of 3 years, is an annual cost of approximately £750,000, as identified in the overview business case. The arguments for this option were well documented and the key issues appeared to be: specialist opinion on placement suitability; immediate availability of therapeutic services in an appropriate environment; all services on one site; proven track record of meeting identified high level needs; the necessary process of acceptance for placement
- both by the 'unit' and by the individual child; likelihood of delay at any point of transitions between Jersey and UK; ensuring quality assurance at 'long distance'; feasibility of placement stability being 'guaranteed' given that these were both organisations whereby sustainable funding may be dependent upon maintaining occupancy levels; implications for the long term future of the children in terms of re-integration into the island community; practical implications of visiting and contact arrangements; issue of the real, or perceived 'delay' that may be caused by pursuing the first alternative. After deliberation, and giving due regard to the needs of each individual child, the views expressed by professionals including the Guardian, the risks imposed by both alternatives, and the costs involved IT WAS RESOLVED that the Panel would make a recommendation to SMT that local provision be established for the 3 eldest children, it being determined that this is the most sustainable long term solution. IT WAS FURTHER RESOLVED to recommend to SMT that H&SS commits to funding the residential services and new therapeutic service through funds which should become available under the Williamson Implementation Plan in April 2009, and if the

funding is not forthcoming, that the Minister for H&SS will approach the Treasury Minister for the £343,000 essential service development funding required. If this is not forthcoming, the panel recommend that the Minister for H&SS approach the Treasury Minister for the £750,000 funding required to place the 3 children in UK specialist placements." 19. On 16th December 2008 the SMT of twelve senior departmental officials convened under the chairmanship of Mr Pollard, Chief Executive. Mr Jouault, who had chaired the meeting of the Placement Panel on 15th December was amongst those present. The opening part of the minutes record:- "The background of the case was summarised and the consideration of the most appropriate placement of the 3 older children from this family along with the outcome of the Placement Panel Meeting of 15th December 2008. One option recommended by the Guardian ad Litem, is the placement of each child for therapy in UK specialist centres. This option would cost approximately £750,000 per annum, which, if paid for by HSSD, would represent a significant overspend for the Department. MP pointed that this would be an illegal action. The Royal Court has requested that HSSD agree an appropriately funded care plan for each child by Friday 19th December 2008. Failure to produce a plan which is acceptable to the court may lead to a Judicial Review." The meeting discussed the issues for thirty minutes (according to the minutes) and agreed with the conclusions of the Placement Panel. 20. Later the same day, 16th December 2008, the newly appointed Minister of Health and Social Services, Senator Perchard received a briefing from Mr Jouault on the outcome of the meeting of the Placement Panel which had been endorsed by the SMT. In the light of his impending departure from the Island on holiday, the Minister delegated his powers to make a final decision to Mr Pollard, the Chief Executive. 21. On 18th December Mr Hanson's firm submitted the representation of the Guardian for consideration by the Minister on 19th December. The representations were made without prejudice to the contention that the Guardian and his legal advisor were entitled to make oral submissions to the Minister. Mr Hanson's firm submitted that the Minister was under a duty imposed by article 19 of the Children (Jersey) Law 2002 to safeguard and promote the welfare of the children. All the evidence from the professionals involved with the X Children, they contended, was that the only way in which that welfare could be safeguarded was through UK placements. It was submitted that the Minister was under a legal obligation to fund these placements by one means or another. The report from the Guardian reiterated his strongly held view that the best option for the X Children remained placement in the UK. 22. On 19th December Mr Pollard considered the whole matter in the exercise of the powers delegated by the Minister. His initial consideration involved a reading of the Ministers brief which included the relevant provisions of the Children Law, a letter from Mr Robert Tucker, an independent social work consultant dated 31st March 2008, the report of Dr Silver dated 6th June 2008, the report of Mr Butterfield dated 22nd July 2008, and the report of Ms Carol Milnes, chartered educational psychologist dated 3rd July 2008, together with other documents placed before the Placement Panel on 15th December. Mr Pollard met with a number of officials during the morning and then retired to read or to re-read the report of the Guardian. Later that day the meeting reconvened, and Mr Pollard made his decision. The decision summary records the reasons for the decision as being:- "After due consideration of all information and

opinion outlined in the report and in particular the submission of the Guardian ad Litem, the Chief Officer supports the opinion that the development and provision of local services as recommended by the Placement Panel at its meeting of the 15th December 2008, is in the best long term interests of the family". The Statutory Context 23. It is important to set the submissions of Mr Hanson on behalf of the Guardian in their statutory context. Article 19 of the Children (Jersey) Law 2002 provides (so far as material) that:- "General duty of Minister in relation to children the Minister looks after (1) Where the Minister is looking after any child, the Minister shall - (a) safeguard and promote the child's welfare; and (b) make such use of services available for children cared for by their own parents as appears to the Minister to be reasonable in the case of that child. (2) Before making any decision with respect to a child the Minister is looking after or proposed to look after, the Minister shall, so far as is reasonably practicable, ascertain the wishes and feelings of - (a); (b) the child's parents; (c) (d) any other person whose feelings and wishes the Minister considers to be relevant regarding the matter to be decided. (3) In making any such decision the Minister shall give due consideration- (a) to such wishes and feelings as the Minister has been able to ascertain of - i. ... ii. any other person mentioned in paragraph (2); and (b) to the child's cultural... background". The Regularity of Proceedings 24. Mr Hanson submitted that the Minister, acting through Mr Pollard, had acted unfairly by excluding the Guardian and his legal adviser from the meeting on 19th December 2008 at which the decision was ultimately taken. Mr Pollard gave evidence that he did not want to be lobbied by the Guardian; he was prepared to take, and did take, the written representations of the Guardian into account but he was not willing to offer an oral hearing. He had many such difficult decisions to take, and it was not practical, in effect, to contemplate an oral quasi-judicial hearing on every such occasion. 25. Mr Hanson drew attention to a decision of the English court in *R v Cornwall County Council ex parte LH*

[2000] 1 FLR 236. In that case the defendant county council operated a policy whereby solicitors acting for the family were not permitted to attend child protection case conferences. The applicant sought judicial review of the policy. The court held the policy to be in breach of statutory guidance and unlawful. Scott Baker J stated:- "Other authorities operate a different policy and seem to manage it perfectly successfully. In my judgment the solution is simple. The chair of the conference has discretion as to who should be permitted to attend the conferences and for what purpose. Such a discretion should be exercised without the present background prohibition. Indeed it seems to me that in general solicitors ought to be allowed to attend and participate unless and until it is felt they will undermine the purpose of the conference by, for example, making it unnecessarily confrontational. I should have thought any experienced chair would be well able to assess the situation." 26. If the court were being asked to determine whether or not the Guardian should have been permitted to attend the meeting of the Placement Panel on 15th December 2008, we should have been inclined to the view that he should. The Guardian is appointed to protect the interests of the children and the Minister has a duty under Article 19 to give due consideration to the Guardian's views. The notice of a few hours given to the

Guardian to make written representations was impossibly short and wholly inadequate. There seems to be no good reason why the Guardian and his legal adviser should not have been permitted to articulate their views to the Panel as they considered the different available options. Indeed Mr Pollard told us that if the matter had been brought to his attention, he would have over-ruled objections from the Panel and permitted the Guardian to attend. We think that Mr Pollard was entirely right to make that concession.

27. What is in question here, however, is the decision-making process itself. Was the Guardian given a reasonable opportunity to express his views before the Minister (through Mr Pollard) took his decision? It is clear that he was given the opportunity and that he took advantage of it to submit a lengthy document setting out his views in full. 28. Was the Guardian entitled as a matter of law to an oral hearing before the Minister? Mr Sharp, who appeared for the Minister, referred us to another decision of the English Court in *R v North Yorkshire County Council ex parte M*

[1989] 1 FLR 203. In that case the Guardian ad Litem of a seven year old child was not permitted by the defendant county council (*inter alia*) to express her view to the council before a decision was made to place the child for adoption. In setting aside the decision of the council Ewbank J stated:- "The matter, however, does not rest there because, on behalf of the parents and on behalf of the guardian ad litem, a further criticism is made of the decision-making process of the local authority. I have already read out the rules governing the duties of a guardian ad litem. The guardian has to investigate all the circumstances and interview such persons as she thinks appropriate. This implies, in my judgement, a corresponding and reciprocal duty on the part of the local authority to disclose to the guardian ad litem any major changes in the circumstances of the child which are [1989] 1 FLR 207 proposed. In *R v Birmingham Juvenile ex parte G and others (Minors)* and *R (A Minor)*

[1988] 2 FLR 423, the President had to deal with the responsibilities of local authorities and guardians ad litem. The circumstances were very different. The local authority in that case has withdrawn an application against the wishes of a guardian ad litem. The President at p.430 D-E, said:- "The local authority has a grave responsibility in the matter of children. It should never have applied to withdraw the proceedings without full consultation with the guardian ad litem who represented the children' In my view, the remarks of the President in that case constitute an example of a more general duty. In my judgment, there is a reciprocal duty on the part of the local authority, not only to disclose proposals for change in relation to the child, but also to listen to the views of the guardian ad litem. I am not in any way suggesting that the guardian ad litem makes the decision or in any way is a party to the decisions, but the guardian ad litem is appointed, in accordance with the statute, to safeguard the interests of the child. While a case is in train, the local authority ought not to take any major decisions without informing the guardian ad litem before the decision is made of the proposal and listening to her views. That the local authority have failed to do in this case." 29. Article 19 of the Children (Jersey) Law 2002 does not impose any express duty on the Minister to inform the Guardian of its proposals in relation to children in the

care of the Minister but we think that such a duty is also to be implied from the duty to give due consideration to the guardian's views. The Guardian cannot properly perform his duty unless he is taken into the Minister's confidence and informed of all material considerations. 30. This element of the Minister's actions in relation to the decision making process did trouble us greatly. The Department was considering, in the context of how best to deal with the problems of the X Children, wider issues of child protection policy following a report dated June 2008 prepared by Mr William Andrew Williamson. A plan has been drawn up ("the Williamson Implementation Plan") to implement a number of the report's recommendations. A degree of unnecessary secrecy seems to have enveloped this plan, certainly prior to the decision of 19th December 2008. The minutes of the SMT meeting early on 19th December record:- "MP [Mr Pollard] asked whether any of the professionals who had been asked to submit comment regarding the case were aware of the detail of the Williamson Implementation Plan particularly with regard to recommendations 7 and 8. It was confirmed that only the Minister, very senior members of the H&SS and independent experts such as Professor June Thoburn and Andrew Williamson himself had seen the report to date". 31. Mr Pollard was cross examined as to why he had not taken greater note of the views of Dr Silver and the other professionals. He replied that he was "aware of a number of significant investments that were likely to be made in Children's Services... The Andrew Williamson recommendations, which were known to me but were not known to either Dr Silver or to the professionals that you mentioned at the time. Those were pieces of important information that were kept very close to myself and a number of other very senior [officials]". 32. We appreciate that the evolving plan to implement the Williamson Report constituted confidential information which it would not have been helpful to place in the public domain at that time. We see no reason, however, why the information could not have been shared in confidence with the Guardian and his legal adviser. It was important to the decision-making process in relation to which the guardian should have been permitted to contribute informed views. We considered whether we should strike down the decision of 19th December 2008 on this basis but have concluded on balance that it would not be in the interests of the X Children to do so for all the reasons that follow. 33. It appears that a redacted version of the Williamson Implementation Plan was eventually made available to the guardian and to the mother's legal adviser in early January 2009, probably after the financial elements had been approved by the Council of Ministers. The substance of the plan was however known to the guardian before he made his representations to the Minister on 18th December. His report provided at paragraph 12:- "I have already given evidence to the Court regarding the damage caused to these children by the delay that has already occurred in providing the right kind of therapeutic interventions within a safe setting. The development of appropriate services in Jersey is clearly to be welcomed, but establishing specialised units that can qualitatively match off-island placements such as the Di Capo and Windows children's homes [the institutions in question for the X Children] will take time and these children cannot wait". 34. Although the details of the Williamson Implementation Plan and the proposed financial investment in facilities in Jersey were not known to the Guardian,

he was clearly aware that what was envisaged was the development of residential accommodation and services on the lines of the premises in England that had been recommended. The Guardian took the opportunity to argue that such facilities could not be developed in time to meet the needs of the X Children. Furthermore we do not think that this application can sensibly be resolved without considering the other arguments advanced by Mr Hanson. Illegality 35. Mr Hanson first submitted that the Minister's decision should not have been influenced by financial considerations. His duty to promote the welfare of the X Children was absolute. If necessary, the Minister should have sought emergency funding pursuant to article 16 of the Public Finances (Jersey) Law 2005. 36. Counsel first referred us to Article 39 of the UN Convention on the Rights of the Child but we do not think that that provision has any relevance, not least because no evidence was furnished that the Convention has been extended to the Island. 37. Counsel then relied upon *R v East Sussex County Council ex parte Tandy*

[1998] AC 714 . In that case the local authority, as a result of reduced government funding, made a policy decision reducing from 5 hours to 3 hours the normal allocation of home tuition to children unable to attend school on account of illness. The relevant statutory provision required the authority to provide "suitable education". . The House of Lords held, reversing the Court of Appeal, that "suitable education" within the meaning of the Act connoted a standard to be determined purely by educational considerations, and that the availability of financial resources was not relevant to that question. A statutory duty had been imposed to provide "suitable education" by reference to criteria set out in the Act and the authority could not avoid that duty. 38. Mr Sharp contended that that decision was not relevant to an interpretation of Article 19 of the Children Law which imposed only a general duty drafted in broad terms. He drew attention to the terms of the Children Act 1989 of the United Kingdom on which the Children Law was plainly based, and in particular to the terms of section 22(3) which is in virtually identical terms to article 19(1). 39. In *Re T*

[2004] 1 FLR 601 *Walls J* held that section 22(3) of the 1989 Act did not create an absolute right to particular services. He stated, at paragraph 134:- "I would be the first to accept that the local authority has, in this area, a wide margin of appreciation. Many different factors are in play and have to be balanced, including finance, the provision for children in need in the county generally, and the availability / suitability of local resources". 40. The court in *Re T* had followed an earlier decision of the House of Lords in *R v Barnet London Borough Council and Others*

[2004] 2 AC 208 . Lord Hope of Craighead referred to various general duties imposed by the statute and stated, as paragraph 82:- "The discretion which is given by these provisions to the local authority is framed in various ways, but the result is the same in each case. Where a discretion is given, the child in need does not have an absolute right to the provision of any of these services". 41. In relation to funding, Lord Hope stated at paragraph 75:- "The cost of providing accommodation for children in need under Part III

must be met out of the funds which are set aside in their accounts for the provision of social services. As I have mentioned, the provision of accommodation is only one of the many services which may be provided in the performance of the general duty which is owed by the local social services authority under section 17(1). It is an inescapable fact of life that the funds and other resources available for the performance of the functions of a local social services authority are not unlimited. It is impossible therefore for the authority to fulfil every conceivable need. A judgment has to be exercised as to how needs may be best met, given the available resources. Parliament must be taken to have been aware of this fact when the legislation was enacted." 42. In the same case, at paragraph 118, Lord Scott of Foscote stated:- "It is plain, in my opinion, that in relation to each of these specific duties the local authority can take into account among other things, its overall financial resources and, in particular, the cost of taking a specific step that, if taken would benefit the child and meet some need". 43. We reject the submission of Mr Hanson that Article 19 of the Children Law imposes any absolute duty upon the Minister. It imposes a general duty to promote and safeguard the child's welfare, and confers a discretion as to how that duty should be fulfilled. Clearly the advice of child psychologists and other experts in the field should be very carefully considered. Ordinarily, perhaps, it may well be that such advice should be followed. But the Minister is plainly entitled also to have regard to the financial resources available to him and to the cost of implementing any particular recommendation. In this case the total budgeted cost of sending the children to the recommended placements in the UK amounted to £2,136,000, not very far short of the entire annual budget of the Children's Service for 2008. Mr Pollard seemed a little diffident about acknowledging that the cost of sending the X Children to placements in the UK was a material consideration but he need not have been so wary. Public funds are not a bottomless pit. The Minister has a duty to balance the demands made in relation to particular children with a host of other demands in relation to his duties across the whole range of public health and social services. We have no doubt that the legislature intended that the Minister's duty under article 19 should be exercised against the background of his other duties and the funds allocated to the Health and Social Services budget. The provisions of article 16 of the Public Finances (Jersey) Law 2005, which allows money to be drawn down from the consolidated fund either where a state of emergency has been declared or there "exists an immediate threat to the safety of all or any of the inhabitants of Jersey" have no application in this case. 44. Mr Hanson also submitted that the Minister's decision was tainted by illegality on the ground that Article 19 imposed a duty to follow the unanimous expert and professional opinion that the X Children should be sent to England. For the reasons given above, we reject that submission. There is no absolute duty to follow professional advice. The Minister has a discretion, which he must of course exercise judicially and reasonably. 45. Finally, Mr Hanson submitted that the Minister's decision was unlawful because it was not certain that the funds necessary to implement the Williamson recommendations and to provide the resources locally for the X Children would be forthcoming. Mr Pollard acknowledged that that was a possibility. He did not envisage such a turn of events, but he would if

necessary have to reconsider all the other options including placements in England. We did not entirely understand how the greater funds could be found for placements in England if the lesser funds were not allocated for the implementation of the Williamson recommendations, but we accept that the Family Division will have to consider carefully whether any revised Care Plan is acceptable before making the orders sought by the Minister. Irrationality 46. Counsel submitted that the Minister's decision was irrational because:- (i) he had taken irrelevant factors into account, (ii) he had failed to take account of relevant factors, and (iii) the decision was Wednesbury unreasonable. The irrelevant factors were said to be:- (a) the non-availability of funding, (b) the conclusions of the Placements Panel and the SMT were flawed and unfair, and (c) the purported desirability of pursuing funding for the Williamson Implementation Plan. We have already dealt with the funding issue. As to the Placement Panel we see no ground for viewing their conclusion as being flawed. One may disagree with it, but it appears that there was a full discussion of the different options and that the business plan put forward by the Children's Service was given fair consideration. We are not sure that the very limited discussion before the SMT added very much one way or another, but their endorsement of the Placement Panel's conclusion cannot be said to have been an irrelevant factor. Finally, the fact the early implementation of the Williamson Recommendations for the X Children would have the incidental benefit of providing resources for other children in need does not appear to us to be an irrelevant consideration. 47. The relevant factors which, counsel asserted, had not been taken into consideration by the Minister were:- (i) the immediate need for specialist therapeutic placements for the children; (ii) the fact that the provision currently available in Jersey was not sufficient to meet the needs of the X Children; (iii) the fact that the provision would not become available within a timescale that could meet the immediate nature of those needs; (iv) the fact that such provision as might become available in Jersey would not be tried and tested; (v) the unanimous opinion of the experts and professionals that specialist therapeutic placements in England were the only means of meeting the needs of the X Children within a suitable timescale; and (vi) the fact that in the absence of such provision the X Children would be required to remain in manifestly unsuitable placements. 48. In our judgement the totality of the evidence shows that all these factors were indeed considered by the Minister. Mr Pollard was clearly conscious of the need to ensure that the necessary resources were in place locally at the earliest possible juncture. He told us in evidence that work was already being done to prepare the accommodation for the X Children and to plan for the training and deployment of staff. He acknowledged that the needs of the X Children were pressing and urgent. He was aware of the reservations of Dr Silver and others as to the ability of the Department to meet the needs of the X Children in Jersey. Mr Pollard was aware of all these things and of the weight of professional opinion in favour of sending the X Children to England, but he did not agree and he made a contrary decision. Was this irrational? We do not think that the Minister's decision can possibly be characterised in that way. One may disagree with it, but it was well within the margin of discretion which the law allows to a Minister exercising his judgement in balancing the different considerations. Mr Pollard was

concerned that removing the children from Jersey and transporting them to the very different environment of the United Kingdom was not paying sufficient regard to their cultural background as he was required to do by article 19(3)(b) of the Children Law. Furthermore he thought that there might be difficulty in re-integrating them into Jersey whenever the placements came to an end. These are, in our view, legitimate considerations. He was aware of the financial constraints and determined upon a deployment of resources which would benefit not only the X Children but also, ultimately, other deprived or damaged children in the community. We think that the evidence shows that Mr Pollard conscientiously and carefully took into account all the material factors, listened to or read the different arguments, and made a difficult decision. It was not irrational. On the contrary, we think it was perfectly reasonable.

Conclusion

49. In summary, notwithstanding our reservations about the process adopted by the Minister, we did not find that it was appropriate to strike down the Minister's decision. If we had done so on the ground of procedural impropriety, what purpose would have been served? It is clear that all the relevant arguments have in fact been marshalled and taken into account by the Minister. The submissions made by the Guardian in January 2009 after receipt of the Williamson Implementation Plan, or the relevant parts of it, were essentially those made to the Minister in December 2008. Mr Pollard made it clear that, if difficulties ensued in relation to funding, he retained an open mind as to how to fulfil the Minister's statutory duty to safeguard the welfare of the X Children. It was for all these reasons that we dismissed the application for judicial review of the Minister's decision of 19th December 2008. *Authorities* Public Finances (Jersey) Law 2005. *Children (Jersey) Law 2002*. *R v Cornwall County Council ex parte LH* [2000] 1 FLR 236. *R v North Yorkshire County Council ex parte M* [1989] 1 FLR 203. *UN Convention on the Rights of the Child*. *R v East Sussex County Council ex parte Tandy*

[1998] AC 714 . *Children Act 1989*. *Re T* [2004] 1 FLR 601. *R v Barnet London Borough Council and Others*

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