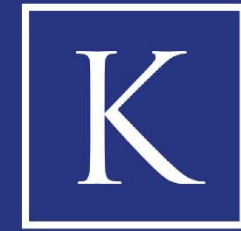


Kings CoP Bitesize

Covert medication and best interests

*Re A (Covert Medication: Residence) [2024] EWCOP 19*

Sam Karim KC  
Aisling Campbell



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# Agenda

- Facts
- Legal framework – covert medication
- Application to this case
- Legal framework – best interests, balance sheet approach
- Application to this case
- Key takeaways

# Facts

- P is a young female adult
- Diagnosis of a mild LD, Asperger's and primary ovarian failure, such that despite her adult age, she had not achieved puberty
- Lacked capacity in all areas including medical treatment
- P and mother abjectly refused diagnosis of POF at the relevant time
- In 2019 [2019] EWCOP 68 determined (1) P's lack of capacity, and (2) that it was in P's best interests to receive medical treatment for POF, because absence of treatment would die prematurely by cardio vascular problems or a serious fracture and would have psychological/social impact; to some extent, life sustaining treatment
- Achieved puberty by way of covert medication, and being HRT as maintenance medication (again covertly)
- This judgment considered P's long-term residence and covert medication

# Legal framework – covert medication

*An NHS Trust v The Patient* [2014] EWCOP 54 –  
Holman J

- ◆ Surgery to investigate and treat cancer
- ◆ The Trust was required to inform P in clear and sensitive and appropriate terms of what was going to happen to him, before it actually happened

# Legal framework – covert medication

*AG v BMBC* [2016] EWCOP 37 – District Judge Bellamy

- ◆ Medication – diagnosis of Alzheimer’s disease
- ◆ Likely to be contributory factor giving rise to DOL
- ◆ Safeguarding by review is essential - procedural guidance at paragraph 43

# Legal framework – covert medication

*BHCC v KD* [2016] EWCOP B2 – HHJ Farquhar

- ◆ Schizophrenia, frontal lobe dementia – antipsychotic medication
- ◆ Court authorised ongoing administration

# Legal framework – covert medication

*A Local Authority v P* [2018] EWCOP 10 – Baker J

- ◆ Insertion of contraceptive device
- ◆ Court approved plan to keep it and not tell P

# Legal framework – covert medication

*An NHS Trust v XB* [2020] EWCOP 71 - *Theis J*

◆ SMT Practice Guidance [2020] EWCOP 2

◆ Royal College of Psychiatrists



# The decision on covert medication

- Principle conclusion was that residence cannot be divorced from covert medication [46]

## The decisions

- Return home
- Covert medication to cease
- P to be informed that she has been covertly medicated
- Mother to seek to persuade P to take the HRT
- The LA to provide support when P returns home to reside with mother

# The decision on covert medication: justification

- Residence cannot be divorced from covert medication [46]
- HRT protects against early loss of bone density and “very significant risk” of cardio-vascular disease [47]; it will lead to “physical disability and premature death” thereby engaging Articles 2 and 3
- He is concerned about the sustainability of covert medication at the placement or a ISL [51]
- Covert medication should be time limited [67]

# The decision on covert medication: justification

- There is little prospect of P overtly taking HRT at home/placement/ISL [56] [59]
- HRT is for life and not short term [59]
- P can only be persuaded to take HRT if
  - § She is told about being covertly medicated
  - § With the input of mother [63]
- There is a “substantial” risk of harm flowing from mother’s relationship to P [70]
- It is not possible to negate mother’s influence on P [71]

# Legal framework – best interests

Mental Capacity Act 2005

☞ Sections 1(5) and 1(6)

☞ Section 4

# Legal framework – best interests

*Aintree University Hospitals NHS Trust v James* [2014]  
AC 591

☞ Best interests from P's point of view

☞ Look at welfare in the widest sense

# Legal framework – best interests

*N v ACCG* [2017] UKSC 22

☞ Jurisdiction limited to decisions that a person is unable to take for themselves

☞ The decision is about what would be best for this particular individual, taking into account their individual characteristics, likes and dislikes, values and approach to life

# Legal framework – best interests

*ITW v Z* [2009] EWCOP 2525 – Munby J

☞ Paragraph 35 – how to take into account P's wishes and feelings

# Legal framework – best interests

*Wye Valley NHS Trust v V* [2015] EWCOP 60 – Peter Jackson J

☞ The weight to attach to P’s wishes and feelings

☞ Lack of capacity is not an “off-switch” for rights and freedoms



# Legal framework – balance sheets

*“In this case and many others, the assessment of best interest involves consideration of very different concepts such as medical risks and benefits, human rights, wishes and feelings, autonomy, and relationships. Those disparate matters have to be taken into account but a balance sheet exercise may not be particularly helpful. When such disparate matters are balanced, it is simplistic to suppose that if the list of advantages flowing from a certain decision is longer than the list of disadvantages, then the decision must be in P's best interests”*

# Legal framework – balance sheets

✓ *In the Matter of Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882 – McFarlane LJ

✓ *NHS Foundation Trust v QZ* [2017] EWCOP 11

# Residence & best interests

- As mentioned above, residence and covert medication connected
- Whilst did not adopt a balanced sheet approach, set out at [65] [73] a list of “complex issues” that required consideration including
  - HRT and health
  - Refusal to take HRT voluntarily
  - Serious harm if P were to discover that she was covertly medicated and so forth

# Residence & best interests

- The Court observed that in terms of mother:
  - Evasive in her evidence
  - Reluctant to accept responsibility
  - Lacked “realism” in P’s future care needs
  - Was unrealistic that she would be able to convince P to take HRT
  - Is in a enmeshed relationship with P [69]
  - There is “nothing” which demonstrates that mother has changed [70]

# Residence & best interests: conclusion

*83. I am conscious that by making a decision that it is in A's best interests now to allow her to return home to live with B, I am acting contrary to the positions taken by the Local Authority, the Trust, and the Official Solicitor. I have taken pains to provide my reasoning for allowing B's application in the face of their opposition. I am conscious of the guidance of Baroness Hale in both Aintree and N v ACCG (above) that there is no such thing as a care order for adults – the Court of Protection has to put itself in the shoes of P and make the decision about what would be best for this particular individual taking into account, so far as practicable, their individual characteristics, likes and dislikes, values and approach to life.*

# Residence & best interests: conclusion

84. *The assessment of best interests in this case is complex. Whatever decision is made, or if no decision is made, there will be both positive and negative consequences for A. I acknowledge the risk that my determination of A's best interests will result in her returning home to an unhealthy relationship and will expose her to the harmful consequences of ceasing HRT. However, those risks are outweighed by the benefits of ending the deprivation of A's liberty and the serious interference with her Art 8 rights, and of avoiding the risk of an unmanaged disclosure to her of the covert administration of HRT. The Court is enjoined to seek to achieve purposes "in a way that is less restrictive of the person's rights and freedom of action" (MCA 2005 s1(6)). Here, severe restrictions have been imposed in order to achieve the benefit of medical treatment. Now, the continuing and remaining benefits of treatment are not sufficient to justify the continued restrictions.*

# Key takeaways

- Covert medication is a big deal – it is likely to be subject to even greater scrutiny after this decision and judges may be slow to authorise it without looking closely at the purpose of the regime. Orders may be time limited with a requirement for a transition plan towards open medication
- Balanced sheet approach is not always required
- The Court is the ultimate arbiter of BI: not always a *fait accompli*
- Significant weight to be placed on least restrictive

# Thank you

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