

Deprivation of Liberty Safeguards - Case Law Summary 2017-19



June 2019 edition

EW COP = Court of Protection

EW CA = Court of Appeal

UK SC = Supreme Court

ECHR = European Court of Human Rights

The Mental Capacity (Amendment) Act 2019 became law on 16 May 2019. The Act will replace DoLS with the Liberty Protection Safeguards in the future. It will not come into effect however until the Secretary of State for Health & Social Care confirms an implementation date (probably 2020).

Much of the existing DoLS case law will still be relevant to LPS as it relates to the application of the ECHR and because LPS has many similarities to DoLS. At present, the cases marked* are likely to be applicable to LPS.

A series of information sheets and a detailed training course on LPS are available at: www.edgetraining.org.uk

Issue	Case	Summary
Is DoLS ECHR compliant?	R.B. v United Kingdom [2017] no. 6406/15	The European Court of Human Rights confirms the DoLS process and safeguards means it meets the requirements of the ECHR.
*What is a deprivation of liberty?	P v Cheshire West & Chester Council, P & Q v Surrey CC [2014] UKSC 19	Supreme Court: <i>'...the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives...'</i>
Medication: covert and to manage behaviour	AG v BMBC & SNH [2016] EW COP 37	Use of covert medication to manage behaviour for a woman with dementia in a care home. The BIA should record this as a restriction and consider the need for conditions, reviews and shorter duration. Note: BHCC v KD [2016] EW COP B2 confirms this approach.
*Importance of Guzzardi	NRA & Ors [2015] EW COP 59	<i>'It is well established that the approach to the existence of a deprivation of liberty is governed by the Guzzardi principle.'</i> = restrictions assessed - type, duration, effect, manner, degree/intensity
*Unescorted leave	Stankov v Bulgaria [2015] ECHR No. 25820/07	Unescorted leave (permission required, time limited and action taken if a person does not return) can still lead to a deprivation of liberty. See also: *Welsh Ministers v PJ [2018] UKSC 66 – PJ has unescorted leave.
*Article 8: private & family life	Steven Neary v Hillingdon Council [2011] EWHC 1377	DoLS cannot be used to prevent a person from living with their family (ie. for safeguarding reasons) or restricting contact with family. See also: *SR v A Local Authority [2018] EW COP 36
*Authorising signatory	Steven Neary v Hillingdon Council [2011] EWHC 1377	<i>'The responsibilities of a supervisory body, ..., require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision'</i> . See also: P v Surrey County Council & Anor [2015] EW COP 54
Available options	N v ACCG and others [2017] UKSC 22	<i>'... just like P, the court can only choose between the "available options".'</i> Example: DM v Y City Council [2017] EW COP 13
*Harm to others rather than self	P v A local authority [2015] COP No: 12715633	Court discharges DoLS because it was being used to prevent harm to others.
*DoLS appeals (Section 21A applications)	Director of Legal Aid Casework & Ors v Briggs [2017] EWCA Civ 1169	Disputes about treatment or other personal welfare issues where the deprivation of liberty is not the essential issue are not DoLS appeals but instead a person welfare application to the Court of Protection. Disputes about where a person should live or limiting contact with others should be taken as a DoLS appeal. See form COPDLA
*Short Term Restrictions	Kasparov v Russia [2016] ECHR 849	<i>'Article 5 § 1 of the Convention may apply even to deprivations of liberty of a very short length..'</i> See also: [2013] EWCA Civ 69
*Mental capacity assessment	LBX v K, L & M [2013] EWHC 3230 (Fam)	Importance of assessors focussing on the 'salient factors' when assessing mental capacity for residence. See also: Re KK: CC v KK [2012] EWHC 2136 (COP)
* Choice of Representative	AJ v A Local Authority [2015] EW COP 5	<i>'... it is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that involves a deprivation of liberty, to fulfil the functions of RPR..'</i>

*Representatives (and IMCAs) duties	RD, JW, EP, JB & JP v local authorities (x4) [2016] EWCOP 49	Guidance for Representatives and IMCAs on their duties; how they should interpret P's objections and when to appeal (to CoP) on their behalf.
*Appeals	CB v Medway Council [2019] EWCOP 5	'Scepticism and 'doubt' [about the prospects of success of a home care package] is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty.'
Conditions	Re W [2016] EWCOP 58	'..there is a duty on the supervisory body, .. to monitor compliance with conditions.' Also: AG v BMC & SNH [2016] EWCOP 37 – a condition should be included in a DoLS if covert medication is prescribed.
Objecting + care home + Clozapine	BHCC v KD [2016] EWCOP B2	80 year old woman with schizophrenia in a care home + she is objecting + question of whether DoLS can be used to detain her + MCA used to give Clozapine + potential use of covert medication. Yes, to all.
Life-saving treatment (ICU) and DoLS	Re: Ferreira v HM Senior Coroner for Inner South London [2017] EWCA Civ 31	Three weeks in ICU not a deprivation of liberty but rather a restriction of movement: 'any deprivation of liberty resulting from the administration of life-saving treatment to a person falls within this category.' See also Court of Appeal: [2017] EWCA Civ 1169
Children and deprivation of liberty	Re: A-F (Children) (No 2) [2018] EWHC 2129 (Fam) In the matter of D (a child) [2017] EWCA Civ 1695	Creates draft forms to be used for deprivation of liberty applications in the Family Courts (inherent jurisdiction). See also: Re: A-F [2018] EWHC 138 (Fam) and A local authority v D, E & C [2016] EWHC 3473 (Fam) Parental consent may (in certain cases) be used to 'authorise' the care and control for under 18s so there is no Article 5 deprivation of liberty. * Awaiting decision from Supreme Court on this case.
Community deprivation of liberty	SCC v MSA, JA and SCCG [2017] EWCOP 18 Re: X [2014] EWCOP 25	A domestic DoL with family as carers. Man with learning disability in family home cared for by his mother. Care involves physical restraint and use of a padded room in the home. No external carers. For another domestic case living with family see also: <i>In the matter of: AJ [2018] EWCOP 44</i> Procedure for Court of Protection authorised deprivation of liberty + NRA & Ors [2015] EWCOP 59 + JM and others [2016] EWCOP 15
*Imputable to the State	Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27	Note: this case also refers to 'assistive technology' as a restriction (monitoring). See also: LB Haringey v R, P, F & A [2016] EWCOP 33
*Mental Health Act or DoLS	AM v SLaM & Sec State for Health [2013] UKUT 0365	The procedure for admitting a person to a mental health ward and the decision about whether to use MHA 1983 or DoLS.
*Leave of absence (MHA) and DoLS	A Hospital NHS Trust v CD & Ors [2015] EWCOP 74	Woman with schizophrenia under s3 MHA & needs total hysterectomy due to very large ovarian growth. Judge says she can be on s17 leave to general hospital & then DoLS used to detain her for physical treatment.
*Guardianship and DoLS	GW v Gloucestershire CC [2016] UKUT 499 (AAC)	Guardianship does not authorise deprivation liberty. A care plan under guardianship could be a deprivation of liberty and would need DoLS or court order as well. See also: [2016] EWCOP 47 + [2015] UKUT 0125
*Community Treatment Orders	Welsh Ministers v PJ [2018] UKSC 66	A CTO cannot authorise a deprivation of liberty.
*Conditional Discharge and DoLS	Secretary of State for Justice v MM [2018] UKSC 60	Neither the MH Tribunal nor the Secretary of State can order a conditional discharge if the conditions mean the person would be deprived of their liberty. If a person lacks mental capacity, DoLS or a court order may authorise the deprivation of liberty. See also: AB (Inherent Jurisdiction: Deprivation of Liberty) [2018] EWHC 3103
Too young for DoLS and not meeting the MHA criteria?	Buckinghamshire County Council v RT [2018] EWCOP 12	A 17 year old boy with learning disability admitted to mental health ward but not deemed to meet criteria for MHA. He lacks capacity and being on ward is a DoL but not old enough for DoLS. Urgent application to Court of Protection and judgment the same day to authorise the DoL.