

Deprivation of Liberty Safeguards - Case Law Summary



May 2020 edition – new cases are in *italics* in middle column

EW COP = Court of Protection EW CA = Court of Appeal UK SC = Supreme Court ECHR = European Court of Human Rights

When DoLS is eventually replaced by the Liberty Protection Safeguards, much of the existing DoLS case law will still be relevant because it relates to the application of the ECHR and LPS has many similarities to DoLS.

In our view, 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

NEW: if you click on any of the case law references below you will be taken to the full judgment.

Issue	Case	Summary
<p>Cases decided during Covid-19 pandemic with judgments reflecting this.</p> <p>The DHSC has published guidance on the MCA and DoLS during the pandemic. This is available with many other related resources at www.edgetraining.org.uk. It is important to note that in England and Wales the Mental Capacity Act and DoLS (or the Codes of Practice) have NOT been changed or amended by the Coronavirus Act 2020.</p>		
Assessing mental capacity + COVID-19 restrictions	BP v Surrey County Council & RP [2020] EWCOP 22	Judge reinforces that assessment via video call facilities are acceptable due to COVID-19. If a DoLS assessor is uncomfortable assessing remotely, a new assessor should be instructed. In the earlier judgment of this case (EWCOP 17) the same judge confirmed that mental capacity assessments for DoLS could be undertaken using video call facilities, even though: <i>'... its general undesirability is manifest. Assessments in these circumstances will require vigilant scrutiny. This said, with careful and sensitive expertise, it should be possible to provide sufficient information.'</i> The judge approved BP's discharge from the care home to return to live with his family as agreed between the family and the LA.
Discharge home from a care home	VE v AO & Ors [2020] EWCOP 23	It was in the best interests of a terminally ill woman to return home to live with her daughter and extended family. Weight given to large, close extended family with adequate support at home, culture, language and Article 8 ECHR rights (to die surrounded by family). Judge confirms that collecting AO from a care home is not a breach of the Health Protection (Coronavirus Restriction) Regulations 2020 (SI 2020/350).
Pre Covid-19 cases		
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] EWCOP 37	Use of covert medication to manage behaviour for a woman with dementia in a care home. <i>'Medication without consent and covert medication are aspects of continuous supervision and control that are relevant to the existence of a DOL.'</i> The BIA should record this as a restriction and consider the need for conditions, reviews and shorter duration. Note: BHCC v KD [2016] EWCOP B2 confirms this approach.
*Importance of Guzzardi	NRA & Ors [2015] EWCOP 59 CB v Medway Council [2019] EWCOP 5	Mr Justice Charles, former Vice President of the Court of Protection: <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 Mr Justice Hayden, Vice President of the Court of Protection: <i>'To determine whether someone has been 'deprived of his liberty' de facto,</i>

		<i>within the meaning of Article 5, the starting point must always be a consideration of their specific situation .. The approach is illuminated in Guzzardi v Italy 7367/76 Chamber Judgment [1980] ECHR 5 (06 November 1980) and requires to be stated...'</i>
*Unescorted leave	Stankov v Bulgaria [2015] ECHR No. 25820/07 (the original judgment is in French)	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 stop a person from living with their family (ie. for safeguarding reasons) or restricting contact with family. See also: * SR v A Local Authority [2018] EWCOP 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] EWCOP 54 Note: The Local Government and Social Care Ombudsman found fault with a council due to delays in completing a DoLS authorisation partly because of a shortage of DoLS signatories. April 2019 - Herefordshire Council Council (Ref: 18 010 932)
Available options	N v ACCG and others [2017] UKSC 22 DM v Y City Council [2017] EWCOP 13	<i>'... just like P, the court can only choose between the "available options".'</i> <i>'DM really wants to move to a flat. This, however, is not an option since the local authority is not willing to commission the necessary support services that DM would require in order to live independently. This seems a reasonable funding-decision by the local authority, and realistically it is not challenged on DM's behalf by the Official Solicitor.'</i>
*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)	London Borough of Enfield v DL [2019] EWCOP BI Director of Legal Aid Casework & Ors v Briggs [2017] EWCA Civ 1169	Guidance on several issues in relation to DoLS appeals. <i>'In my judgment Article 5 rights do not become less precious because of the administrative burden of cases reliant on them.'</i> See also: CB v Medway Council [2019] EWCOP 5 Disputes about treatment or other personal welfare issues (not the deprivation of liberty) should not be taken to the Court of Protection under Section 21A (DoLS appeal) instead, a person welfare application should be made. Disputes about where a person should live or limiting contact with others should be taken as a DoLS appeal. 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: The Commissioner of the Police for the Metropolis v ZH [2013] EWCA Civ 69
*Mental capacity assessment	LBX v K, L & M [2013] EWHC 3230 (Fam)	The 'salient factors' when assessing mental capacity for residence. See also: Re KK: CC v KK [2012] EWHC 2136 (COP)
* Representative Selection	AJ v A Local Authority [2015] EWCOP 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	London Borough of Hillingdon v JV, RV & PY [2019] EWCOP 61	The identification and appointment of Representatives by BIAs. See also: RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS) (Rev 1) [2016] EWCOP 49 Guidance for Representatives and IMCAs on their duties; how they should interpret P's objections and when to appeal (to CoP).

Conditions	Re W [2016] EWCOP 58	<p><i>'..there is a duty on the supervisory body, .. to monitor compliance with conditions.'</i> Also: AG v BMC & SNH [2016] EWCOP 37 – a condition should be included in a DoLS if covert medication is prescribed.</p> <p>Note: The Local Government and Social Care Ombudsman was critical of a care home for following to meet the conditions of a DoLS authorisation. Sept 2019 – Barchester Healthcare Homes Ltd (Ref: 18 005 493). Barchester agreed to pay £5,000 compensation.</p> <p>Note: the failure to meet conditions attached to a DoLS has been reported as a breach of Regulation 13 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 [Safeguarding service users] by the Care Quality Commission resulting in enforcement action. See inspection report of 16 January 2020, Lovestar Ltd, Homeleigh Residential Care Home. A number of other inspection reports for different providers also reflect this approach.</p>
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: <i>'any deprivation of liberty resulting from the administration of life-saving treatment to a person falls within this category.'</i> See also Court of Appeal: [2017] EWCA Civ 1169
*Children and deprivation of liberty	In the matter of D (a child) [2019] UKSC 42 Hertfordshire CC v NK & AK [2020] EWHC 139 (Fam)	<p>Lady Black: <i>'I would hold that as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty.'</i></p> <p>For children aged 15 or under however parental responsibility may 'authorise' the deprivation of liberty of a child.</p> <p>Provides a useful list of relevant factors that could indicate a child (AK was 16) is not deprived of their liberty and is simply subject to the 'normal' restrictions that apply to a child of their age.</p>
Community deprivation of liberty	London Borough of Barnet v JDO & OD & DD [2019] EWCOP 47 A local authority in Yorkshire v SF [2020] EWCOP 15 Re: X [2014] EWCOP 25	<p>Guidance on the duty to consult, objecting and 'renewal' process for community DoL cases at the Court of Protection.</p> <p>Woman with learning disability and dementia living at home with her husband where the arrangements amount to a DoL.</p> <p>Procedure for Court of Protection authorised deprivation of liberty (Community DoL). Related judgments: NRA & Ors [2015] EWCOP 59 and JM and others [2016] EWCOP 15.</p> <p>See also: SCC v MSA, JA and SCCG [2017] EWCOP 18 – a domestic DoL with family as carers and In the matter of: AJ [2018] EWCOP 44.</p>
Assistive technology	Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27	A man with severe injuries including brain injury living alone with 24 hour care provision. <i>'Pursuant to his care package he is constantly monitored either by support workers or by the use of assistive technology.'</i> A community DoL was authorised by the judge.
*Imputable to the State	Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27	Considers the meaning of 'imputable to the state'. CQC registration is not considered to evidence that the deprivation of liberty is imputable to the state. See also: LB Haringey v R, P, F & A [2016] EWCOP 33
Mental Health Act and DoLS		
*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 section 3 MHA and needs total hysterectomy due to very large ovarian growth. Judge says she can be on section 17 leave to general hospital and then DoLS used to detain her for physical treatment.
*Guardianship and DoLS	GW v Gloucestershire CC [2016] UKUT 499 (AAC)	Guardianship does not authorise a deprivation liberty. Guardianship and DoLS or Court DoLS will be needed where a care plan is a deprivation of liberty. See also: N v A Local Authority [2016] EWCOP 47 and NM v Kent County Council [2015] UKUT 0125 .
*Community Treatment Orders	Welsh Ministers v PJ [2018] UKSC 66 Sunderland City Council v AS [2020] EWCOP 13	A CTO cannot authorise a deprivation of liberty. CTO and DoLS or Court DoL will be needed where a care plan is a deprivation of liberty. CTO plus DoL court order in a supported living placement.
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 (18 + only). Urgent application to Court of Protection and judgment the same day. Note: The Local Government and Social Care Ombudsman was critical of a local authority for failing to authorise a DoLS on a mental health ward promptly. January 2020 - London Borough of Haringey (Ref: 19 003 309) . The Ombudsman stated: <i>'I am satisfied this caused a significant injustice to Y as a result. The Council's failure deprived him of his rights, particularly to challenge his stay at hospital.'</i>
*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: Birmingham City Council v SR and Lancashire County Council v JTA [2019] EWCOP 28 .