

Deprivation of Liberty Safeguards - case law summary



July 2021 edition

EW COP = Court of Protection

EW CA = Court of Appeal

UK SC = Supreme Court

ECHR = European Court of Human Rights

- The Liberty Protection Safeguards (LPS) are due to replace DoLS in April 2022. 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.
- This guide and a series of detailed information sheets on LPS are available from: <https://www.bookswise.org.uk/lps> or <https://www.edgetraining.org.uk/dols-lps-resources>
- A series of detailed training courses on LPS are available from: <https://www.edgetraining.org.uk>
- Click on any of the case law references below for the full judgment.
- *Text in italics in the left column indicates new additions since the last edition of this summary sheet*

Cases decided during the Covid-19 pandemic

The DHSC has published guidance on the MCA and DoLS during the pandemic. 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</p>	<p><u>BP v Surrey County Council & RP [2020] EW COP 22</u> In the earlier judgment of this case (EW COP 17) the 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.</p>
<p>Discharge home from a care home</p>	<p><u>VE v AO & Ors [2020] EW COP 23</u> It was in the best interests of a terminally ill woman to return home to live with her daughter and 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).</p>
<p>Discharge from a hospital</p>	<p><u>Cornwall Council v NP & BKP [2020] EW COP 44</u> 69 year old man with a rare neurological disorder and married for 35 years. In a neuro-rehab unit under DoLS. His recovery had 'plateaued' and he was ready for discharge. The local authority although initially opposed to him returning home, no longer objected but were still concerned about whether his needs would be met. The couple wanted him to return home with a package of care. The Judge agreed and ordered he be allowed to return home for a 3 week trial period. A care home bed was left 'open' in the interim.</p>
<p>COVID-19 vaccine</p>	<p>There are four published cases involving the COVID-19 vaccine for people who lack mental capacity (at least one person was under DoLS). We have produced a separate information sheet on these cases available from: https://www.edgetraining.org.uk/copy-of-dols-lps-resources</p>
<p>Care home visiting</p>	<p><u>Davies v Wigan Council & Anor [2020] EW COP 60</u> Section 21A application by a husband to challenge the level of contact he was permitted to have with his wife. The judge stated: <i>'The scope of contact must be evaluated on an individual and not a generic basis. Her identified needs will then have to be assessed in the context of the realistically available options.'</i> Upon enquiry by the judge, the care home swiftly agreed to reinstate window visits as a first step.</p>

Pre Covid-19 cases

<p>*Failure to assess and authorise a DoLS for a person in a care home</p>	<p><u>London Borough of Haringey v Emile [2020] MHLO 70 (CC)</u> £143,000 damages for 7 years and 10 months for false imprisonment of an older woman with dementia in a care home. Haringey failed to assess or authorise DoLS. The judge stated: <i>'...as a result of the local authority's failures the Defendant's freedom was unlawfully compromised for the greater part of the last decade of her life where less intrusive options of accommodation and care should have been considered. The good intentions and benign motives of the local authority are scant consolation to the person deprived of their liberty.'</i></p>
---	---

	<i>'The District Judge was entitled to conclude that the local authority's failure to comply with the Mental Capacity Act 2005 particularly with regard to the best interests provisions of Schedule A1 were substantial and causative of harm.'</i> as there were potential less restrictive options available.
Is DoLS ECHR compliant?	<u>R.B. v United Kingdom [2017] no. 6406/15</u> The European Court of Human Rights confirmed the DoLS process and safeguards means it meets the requirements of the ECHR.
*What is a deprivation of liberty?	<u>P v Cheshire West & Chester Council, P & Q v Surrey CC [2014] UKSC 19</u> 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	<u>AG v BMBC & SNH [2016] EWCOP 37</u> 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: <u>BHCC v KD [2016] EWCOP B2</u> confirms this approach.
*Importance of Guzzardi	<u>A Borough Council v E [2021] EWHC 183 (Fam)</u> Mr Justice MacDonald: <i>'In Guzzardi v Italy [1980] 3 EHRR 333 the ECtHR observed that to determine whether someone has been "deprived of his liberty" within the meaning of Art 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.'</i> See also: <u>Hertfordshire CC v NK & AK [2020] EWHC 139 (Fam)</u> and <u>NRA & Ors [2015] EWCOP 59</u> and <u>CB v Medway Council [2019] EWCOP 5</u>
*Unescorted leave	<u>Stankov v Bulgaria [2015] ECHR No. 25820/07</u> (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: * <u>Welsh Ministers v PJ [2018] UKSC 66</u> and <u>A local authority v AB [2020] EWCOP 39</u>
*Article 8: private & family life	<u>Steven Neary v Hillingdon Council [2011] EWHC 1377</u> DoLS cannot be used to stop a person from living with their family (ie. for safeguarding reasons) or restricting contact with family. See also: * <u>SR v A Local Authority [2018] EWCOP 36</u>
*Authorising signatory	<u>Re: YC [2021] EWCOP 34</u> A DoLS signatory copied and pasted standard text into Form 5 which included repeated use of the wrong person's name. However, this did not invalidate the DoLS as the other content on the Form 5 did match the correct person and the DoLS assessments it was based upon were valid: <i>'The impression is indeed created that standardised phrases have been used in the administrative process of writing up a decision – which, I would suggest, is very poor practice...'</i> <i>'Nothing in this decision should be taken as undermining the seriousness of the requirements for proper scrutiny by supervisory bodies when considering granting standard authorisations. The errors in this case should not have happened.'</i> The judge provided guidance: 1. The person authorising must carefully check the Form 5 for errors 2. Another member of the DoLS team should also check the Form. 3. Send Form 5 with a cover letter to the RPR to request they check the form. Note: the judge made it clear the RPR is not legally responsible for checking Form 5 however. <u>Steven Neary v Hillingdon Council [2011] EWHC 1377</u> <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: <u>P v Surrey County Council & Anor [2015] EWCOP 54</u> Note: Local Government and Social Care Ombudsman case of delay in completing a DoLS authorisation partly due to a shortage of DoLS signatories. April 2019 - <u>Herefordshire Council (Ref: 18 010 932)</u>
Available options	<u>N v ACCG and others [2017] UKSC 22</u> <i>'... just like P, the court can only choose between the "available options".'</i> <u>DM v Y City Council [2017] EWCOP 13</u>

	<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.'</i>
*Harm to others rather than self	<u>P v A local authority [2015] COP No: 12715633</u> Court discharged a DoLS because it was being used to prevent harm to others.
*DoLS appeals (Section 21A applications)	<u>London Borough of Enfield v DL [2019] EWCOP BI</u> 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: <u>CB v Medway Council [2019] EWCOP 5</u> <u>Director of Legal Aid Casework & Ors v Briggs [2017] EWCA Civ 1169</u> 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	<u>Re Z (A child: deprivation of liberty: transition plan) [2020] EWHC 3038 (Fam)</u> A two hour journey taking a 14 year old boy with autism from his family home to a residential school (52 week placement) was found to be a deprivation of liberty. See also: <ul style="list-style-type: none"> ▪ <u>Kasparov v Russia [2016] ECHR 849</u> ▪ <u>The Commissioner of the Police for the Metropolis v ZH [2013] EWCA Civ 69</u>
*Mental capacity assessment	<u>LBX v K, L & M [2013] EWHC 3230 (Fam)</u> The 'salient factors' when assessing mental capacity for residence. See also: <u>Re KK: CC v KK [2012] EWHC 2136 (COP)</u> <u>DP v London Borough of Hillingdon [2020] EWCOP 45</u> Mr Justice Hayden: <i>'I remain convinced that the failure to inform P as to what an assessment is actually addressing will probably be "fatal to" or, at least, "gravely undermine" the reliability of any conclusion.'</i>
*Representative Selection	<u>AJ v A Local Authority [2015] EWCOP 5</u> <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	<u>London Borough of Hillingdon v JV, RV & PY [2019] EWCOP 61</u> The identification and appointment of Representatives by BIAS. See also: <u>RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAs) (Rev 1) [2016] EWCOP 49</u> . Guidance for Representatives and IMCAs on their duties; how they should interpret P's objections and when to appeal (to CoP).
Conditions	<u>Re W [2016] EWCOP 58</u> <i>'...there is a duty on the supervisory body, .. to monitor compliance with conditions.'</i> Also: <u>AG v BMC & SNH [2016] EWCOP 37</u> – a condition should be included in a DoLS if covert medication is prescribed. Note: Local Government and Social Care Ombudsman case of failure to meet conditions of a DoLS authorisation. Sept 2019 – <u>Barchester Healthcare Homes Ltd (Ref: 18 005 493)</u> . Barchester agreed to pay £5,000 compensation. The Care Quality Commission has also cited failure to meet conditions in inspection reports for care providers.
Objecting + care home + Clozapine	<u>BHCC v KD [2016] EWCOP B2</u> 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	<u>Re: Ferreira v HM Senior Coroner for Inner South London [2017] EWCA Civ 31</u> 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: <u>[2017] EWCA Civ 1169</u>

<p>*Children and deprivation of liberty</p>	<p>Note: In preparation for the start of the Liberty Protection Safeguards (LPS), we now have a separate detailed information sheet on children and deprivation of liberty. This is available from: https://www.edgetraining.org.uk/dols-lps-resources. Listed below are two cases from this year.</p> <p><u><i>A Borough Council v E [2021] EWHC 183 (Fam)</i></u> A 15 year old girl on a mental health ward where detention under Section 2 has been assessed as inappropriate. The court authorised her deprivation of liberty on the ward and also a proposed placement in an unregistered children’s home.</p> <p><u><i>Lancashire County Council v G (No 4) [2021] EWHC 244 (Fam)</i></u> A 16 year old girl discharged from Section 2 of the Mental Health Act into an unregistered children’s home. The judge stated: ‘..I once again and wearily must authorise the continued deprivation of G in an unregulated placement that is not fully equipped to meet her complex needs by reason of the fact that I have no other option but to do so.’ Note: this is the 4th published case on G, all concerning her continued deprivation of liberty in inappropriate placements.</p>
<p>Community deprivation of liberty</p>	<p><u><i>London Borough of Havering v AEL [2021] EWCOP 9</i></u> A 31 year old woman with a severe learning disability, visual impairment and profound deafness. Living at home with parents and direct payments for carers. The family dispute the suggestion that her care is a deprivation of liberty. The judge finds that it is a deprivation of liberty and states: ‘I do not regard that as in any way a criticism of JSL [father] or her other carers.’</p> <p><u><i>A local authority v AB [2020] EWCOP 39</i></u> A 36 year old woman with Asperger’s syndrome in supported living under a Guardianship order (Mental Health Act). The case reinforces the point that a care plan with relatively few restrictions can still meet the acid test set out in <i>Cheshire West</i>.</p> <p><u><i>A Local Authority v H (No 2) [2019] EWCOP 51</i></u> A woman with a learning disability living in supported living.</p> <p><u><i>London Borough of Barnet v JDO & OD & DD [2019] EWCOP 47</i></u> Guidance on the duty to consult, objecting and ‘renewal’ process for community DoL cases at the Court of Protection.</p> <p><u><i>Re: X [2014] EWCOP 25</i></u> Procedure for Court of Protection authorised deprivation of liberty</p> <p>Domestic examples with family as carers: <u><i>A local authority in Yorkshire v SF [2020] EWCOP 15</i></u> and <u><i>SCC v MSA, JA and SCCG [2017] EWCOP 18</i></u> and <u><i>In the matter of: AJ [2019] EWCOP 44</i></u>.</p>
<p>Assistive technology</p>	<p><u><i>Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27</i></u> A man with severe injuries including brain injury living alone with 24 hour care provision. ‘Pursuant to his care package he is constantly monitored either by support workers or by the use of assistive technology.’ A community DoL was authorised by the judge.</p>
<p>*Imputable to the State</p>	<p><u><i>Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27</i></u> Considers the meaning of ‘imputable to the state’. CQC registration is not evidence that the deprivation of liberty is imputable to the state. See also: <u><i>LB Haringey v R, P, F & A [2016] EWCOP 33</i></u></p>
<p>Mental Health Act and DoL(S)</p>	
<p>*Mental Health Act or DoL(S)</p>	<p><u><i>AM v SLaM & Sec State for Health [2013] UKUT 0365</i></u> The procedure for admitting a person to a mental health ward and the decision about whether to use MHA 1983 or DoLS.</p>
<p>*Leave of absence (MHA) and DoL(S)</p>	<p><u><i>A Hospital NHS Trust v CD & Ors [2015] EWCOP 74</i></u> A woman with schizophrenia under Section 3 of MHA and needs a 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.</p>
<p>*Guardianship and DoL(S)</p>	<p><u><i>A local authority v AB [2020] EWCOP 39</i></u> A 36 year old woman with Asperger’s syndrome in a supported living placement. Her care plan meets the acid test. Because Guardianship does not authorise a deprivation liberty, a court order to authorise the deprivation of liberty is necessary. If she was in a care home, DoLS could have been used instead. See also: <u><i>GW v Gloucestershire CC [2016] UKUT 499 (AAC)</i></u></p>

<p>*Community Treatment Orders</p>	<p><u>Welsh Ministers v PJ [2018] UKSC 66</u> 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.</p> <p><u>Sunderland City Council v AS [2020] EWCOP 13</u> CTO plus DoL court order in a supported living placement.</p>
<p>*Conditional Discharge and DoL(S)</p>	<p><u>Secretary of State for Justice v MM [2018] UKSC 60</u> 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:</p> <ul style="list-style-type: none"> ▪ <u>Birmingham City Council v SR and Lancashire County Council v JTA [2019] EWCOP 28</u> ▪ <u>Hertfordshire County Council v AB [2018] EWHC 3103 (Fam)</u> ▪ <u>MC v Cygnet Behavioural Health Ltd and the Secretary of State for Justice [2020] UKUT 230 (AAC)</u>

This case law sheet is produced by the authors of:

The Deprivation of Liberty Safeguards (DoLS) Handbook ISBN: 978-0-9931324-0-7

by Steven Richards & Aasya F. Mughal

Order direct from the publisher: www.bookswise.org.uk or from: amazon.co.uk

Other free resources from the book are available from: www.bookswise.org.uk

