

Deprivation of Liberty Safeguards - Case Law Summary 2017-19



April 2019 edition Download from www.edgetraining.org.uk * news/cases added since last edition

EW COP = Court of Protection EWCA = Court of Appeal UKSC = Supreme Court ECHR = European Court of Human Rights

The Mental Capacity (Amendment) Bill [HL] is currently due to replace DoLS with the Liberty Protection Safeguards. Resources and a detailed training course 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] EW COP 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	<i>'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.'</i>
Conditions	Re W [2016] EWCOP 58	<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.
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
Surgery and after-care a deprivation of liberty	* Kings College NHS Foundation Trust v FG [2019] EWCOP 7	A man on a mental health ward needs surgery on his shoulder and will resist. Judge decides he lacks mental capacity and surgery should proceed in his best interests. Covert sedation authorised and a deprivation of liberty.
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	<i>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.</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.