

Deprivation of Liberty Safeguards - case law summary



June 2023 edition

EW COP = Court of Protection

EW CA = Court of Appeal

UK SC = Supreme Court

ECHR = European Court of Human Rights

- Click on any of the case law references below for the full judgment.
- *** indicates new additions since the last edition of this summary sheet
- Liberty Protection Safeguards (LPS) cannot start before late 2025 and may never be implemented.

Discharge home from a care home	<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).
Discharge from a hospital	<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.
Care home visiting	<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.
Failure to assess and authorise a DoLS for a person in a care home	<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>
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] UK SC 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>
Best interests assessment Risk v Restrictions	<u>AH, Re (Re Best Interests) [2023] EW COP 1</u> A 46 year old woman with mild learning disability, personality disorder (not formally diagnosed) and type 1 diabetes. In a care home under DoLS. She wanted to return to live in her own home. The judge ruled she should return home despite a high risk that the management of her diabetes would deteriorate and place her at considerable risk: <i>'There are a number of assessments of AH's quality of life from others, based upon her health and her engagement with other people. They characterise her quality of life in positive terms. However, AH's own assessment is very different. It is her life. She is 46. The plan the Applicants ask me to approve envisages an indeterminate stay in Placement 1. That could be for decades and it is a place she does not want to be.'</i> <u>MM v A City Council [2021] EW COP 62</u> A man in his mid 20s with mild learning disabilities and Dissocial Personality Disorder. A DoLS appeal considering the level of restrictions versus risk and happiness of the individual. <i>'Any restrictions on Michael's freedom beyond the present care-plan with residence at Placement 1, and the curfew, would be counterproductive.'</i> and <i>'...the present restrictions underpinned by the standard authorisation are what is necessary and proportionate to secure Michael's safety, in so far as it can be secured.'</i>

<p>Best Interests assessment</p> <p>Wishes, feelings, statements, beliefs, values</p>	<p><u>XX v West Northamptonshire Council & Anor [2022] EWCOP 40</u></p> <p>An 89 year old man with advanced dementia in a care home. He was born in Jamaica and came to live and work in the UK in his mid-thirties. A DoLS appeal considering if he should return to Jamaica to be cared for by his extended family in his final years. The LA believe he should remain in the care home where he is settled. The judge decided he should return to Jamaica for several reasons including: <i>‘There are also other intangible benefits that still matter to any human being despite having lost capacity and perhaps having limited understanding of the outside world. The benefit of being in the place of his childhood, with the smells of that place, with the food of his childhood and also surrounded by religion of his family that was certainly important to him in the past.’</i></p> <p><u>K v N Council [2022] EWCOP Case 1377538T</u></p> <p>An 89 year old woman with dementia and schizophrenia who had lived in Poland until she was 86 years old. A DoLS appeal considering if she should move from a Polish care home to one near to her closest relative: The judge decided she should stay in the Polish care home: <i>‘...a magnetic factor in this case, namely the need for K to be able to communicate freely 24/7, unhindered by any language barrier.’..</i></p>
<p>Article 2 ECHR:</p> <p>Right to life</p>	<p><u>Lancashire & South Cumbria NHS Foundation Trust & Lancashire CC & AH [2023] EWCOP 1 ***</u></p> <p>A 46 year old woman with type 1 diabetes. She had difficulty managing her diabetes alone leading to ketoacidosis which required hospital treatment and she nearly died. She was moved a care home under DoLS after discharge from hospital. Following a previous hearing, a plan was put in place during which she went home one day a week. Her home was hugely important to her and staying in the care home would mean surrendering her tenancy. The case returned to court and the judge decided she should return home even though there was a real risk she would not manage her diabetes which could ultimately lead to her death. The judge stated: <i>‘She has the right to her liberty and to remove it from her would be a devastating blow to her and would not properly recognise her right as a disabled person to be afforded respect and dignity for the way she wishes to live her life.’</i></p>
<p>Article 8 ECHR:</p> <p>private & family life</p>	<p><u>Steven Neary v Hillingdon Council [2011] EWHC 1377</u></p> <p>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></p>
<p>Article 9 ECHR:</p> <p>freedom of thought, conscience and religion</p>	<p><u>London Borough of X v MR & Ors [2022] EWCOP 1</u></p> <p>MR was described by the judge as a: <i>‘...devoted and committed Jew’</i> should be moved in his best interests to a Jewish care home. Despite the risks and MR stating he was happy where he was, the judge recognised MR’s strongly held religious beliefs <i>‘and the importance of his Jewish community to him.’</i> Balancing the competing interests of Article 2 (life) and Article 9 (religion) of the ECHR the judge stated: <i>‘I find that when MR had capacity he and his wife envisaged spending their last days living and dying in a Jewish care facility.’</i></p>
<p>Medication: covert and to manage behaviour</p>	<p><u>AG v BMBC & SNH [2016] EWCOP 37</u></p> <p>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.</p> <p>Note: <u>BHCC v KD [2016] EWCOP B2</u> confirms this approach.</p>
<p>Importance of Guzzardi</p>	<p><u>A Borough Council v E [2021] EWHC 183 (Fam)</u></p> <p>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></p> <p>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></p>
<p>Short Term Restrictions</p>	<p><u>Re Z (A child: deprivation of liberty: transition plan) [2020] EWHC 3038 (Fam)</u></p> <p>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:</p> <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>

Available options	<p><u>N v ACCG and others [2017] UKSC 22</u> <i>‘.., just like P, the court can only choose between the “available options”.’</i></p> <p><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></p>
Unescorted leave	<p><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></p>
Authorising signatory	<p><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> 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.</p> <p><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></p>
Preventing Harm to P or Others?	<p><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.</p> <p><u>DY v A City Council & Anor [2022] EWCOP 51</u> DY is in his 20s and has Autistic Spectrum Disorder, Generalised Anxiety Disorder and Pedophilic disorder. He lived in a care home and was under a standard DoLS authorisation. He was always supported by male staff outside and checked four times at night. The court considered whether he met the legal criteria for DoLS including the risk of harm to self rather than others. The judge stated: <i>‘If he were to reoffend he would be very distressed, and engage in self loathing. There would also be the risk of retribution from the public.....It is a false dichotomy to conclude that the protection of P cannot also include protecting him from harming members of the public. As in that case, it is strongly in DY’s best interests not to commit further offences, or place himself at risk of further criminal sanctions. In my judgment this falls squarely within the meaning of the qualifying requirement in paragraph 16 schedule A1, ‘to prevent harm to the relevant person’. That this harm would come about by his harming others does not detract from this.’</i></p> <p>Note: the judge decided DY had mental capacity so the DoLS authorisation was terminated anyway.</p>
DoLS appeals (Section 21A applications)	<p><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></p> <p><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.</p>

Mental capacity assessment	<p><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></p> <p><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></p>
Representative Selection	<p><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></p>
Representatives (and IMCAs) duties	<p><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).</p>
Conditions	<p><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.</p>
Objecting + carehome + Clozapine	<p><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.</p>
Life-saving treatment (ICU) and DoLS	<p><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>In preparation for the start of the Liberty Protection Safeguards (LPS), we will have a separate detailed case law information sheet on children and deprivation of liberty in the near future. This will be available from: https://www.edgetraining.org.uk/dols-lps-resources.</p>
Community deprivation of liberty	<p>In preparation for the introduction of the Liberty Protection Safeguards (LPS), we have produced a separate dedicated case law sheet on community deprivation available from: https://www.edgetraining.org.uk/dols-lps-resources</p>
Assistive technology	<p><u>Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27</u> 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.</p>
Imputable to the State	<p><u>Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27</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>LB Haringey v R, P, F & A [2016] EWCOP 33</u></p>

Mental Health Act and DoL(S)

Mental Health Act or DoL(S)	<p><u>Manchester University Hospital NHS Foundation Trust v JS and Manchester City Council [2023] EWCOP 12 ***</u></p> <p>A 17 year old woman with autism, ADHD, learning disability and attachment disorder. History of self harm and absconding. Detained under Section 2 on an acute adult medical ward. When this lapsed, the hospital incorrectly claimed she did not meet the threshold for detention under Section 3 of the Mental Health Act despite being held in hospital under significant levels of restriction including physical and chemical restraint. She was objecting so did not meet the 'eligibility' test. The judge criticised the hospital for not using the Mental Health Act and attempting to (unlawfully) detain her under the 'common law' after the Section 2 MHA expired. The judge said: <i>'There seems to be a belief... that the decision to use the MHA should be viewed in isolation from what is available elsewhere at the time the decision to detain or not detain is taken.'</i> And: <i>'...where there is literally no</i></p>
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	<p><i>option in which that young person will be safe, or as safe as possible in the circumstances...then it seems clear to me the patient should not be detained under the MCA but rather under the MHA.'</i></p> <p><u>AM v SLAM & Sec State for Health [2013] UKUT 0365</u></p> <p>The procedure for admitting a person to a mental health ward and the decision about whether to use MHA 1983 or DoLS.</p>
Leave of absence (MHA) and DoL(S)	<p><u>A Hospital NHS Trust v CD & Ors [2015] EWCOP 74</u></p> <p>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>
Guardianship and DoL(S)	<p><u>A local authority v SE & Ors [2021] EWCOP 44</u></p> <p>The Court of Protection authorised a deprivation of liberty order to run alongside the existing Guardianship order amongst other issues addressed in this case.</p> <p><u>A local authority v AB [2020] EWCOP 39</u></p> <p>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>GW v Gloucestershire CC [2016] UKUT 499 (AAC)</u></p>
Community Treatment Orders	<p><u>Welsh Ministers v PJ [2018] UKSC 66</u></p> <p>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></p> <p>CTO plus DoL court order in a supported living placement.</p>
Conditional Discharge and DoL(S)	<p><u>Secretary of State for Justice v MM [2018] UKSC 60</u></p> <p>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>

*****NEW EDITION*******

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ISBN: 978-0-9931324-2-1, A4 paperback, 245 pages, £22.50

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