



# **Deprivation of liberty: The latest developments in case law**

Alice Cullingworth, Solicitor, Irwin Mitchell, 28 September 2016

# Topics

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- Refresher: What is a DoL?
- Refresher: How to authorise a DoL
- *R (Ferreira) v HM Senior Coroner*
- *Re X*
- *NRA*
- *AJ*
- *SRK*
- *Re O*
- DoLs for children

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# Refresher: What is a DoL?

# What is a DOL?

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The *P v Cheshire West and Chester Council* ‘acid test’:

Is P:

a. under continuous supervision and control

and

b. not free to leave?

If so, then P may be deprived of his liberty

# What is a DOL?

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Not relevant to the application of the test:

- The person's compliance or lack of objection;
- The relative normality of the placement (whatever the comparison made); and
- The reason or purpose behind a particular placement (“a gilded cage is still a cage...”)

# What is a DOL?

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“Imputable to the State”:

- To be classed as a deprivation of liberty it must be imputable to the State, i.e. in a care home, hospital, or where P is receiving state-funded care
- Currently, does not apply if you are looking after P at home as parents without support of the LA (more on this later)

# What is a DOL?

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## Examples:

P is likely to be deprived of his/her liberty where:

- Movements are subject to control or are limited/restricted
- Medication/treatment given against their will or without knowledge
- Surveillance or monitoring by carers that intrudes upon P's privacy
- P is unable to do what he or she would otherwise want to do, e.g. leave the care home/go outside/see family etc.
- Restricted in the choices that can be made
- Significant care packages

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# Refresher:

## How do you authorise a DoL?

# How do you authorise a DoL?

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Any DoL must be authorised, otherwise it is unlawful and in breach of P's human rights

## **Article 5 – Right to liberty – ECHR**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

... e. the lawful detention ... of persons of unsound mind...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

# How do you authorise a DoL?

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- Deprivation of liberty must be authorised
- Under the statutory scheme ‘deprivation of liberty safeguards’ where the patient is in a:
  - Hospital (NHS or private)
  - Care home (registered with CQC)
- In any other type of placement, deprivation of liberty can only be authorised by an order from the Court of Protection.
- If no authorisation in place, deprivation of liberty is unlawful – risk of declaration and/or damages

# How do you authorise a DoL?

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Deprivation of liberty safeguards process overview:

1. Identification of the need for an authorisation (NB urgent authorisations)
2. Application for authorisation by managing authority
3. Initial consideration by the supervising authority
4. Assessment – best interests assessor, consult
5. Assessment outcome, appoint RPR
6. Review
7. Right of appeal to COP under section 21A MCA 2005 – non means tested legal aid

# How do you authorise a DoL?

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## Process overview, non schedule 1A cases:

- If DOL in supported/community placement then needs to be authorisation by the court under section 4A Mental Capacity Act
- Application to the Court of Protection to be made by public body
- Uncontroversial – application to Court under *Re X* process
- Controversial – full CoP application – P likely to be made a party and will have to meet his legal costs

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# *R (Ferreira) v HM Senior Coroner*

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How does Cheshire West apply to a hospital setting?

- The position remains uncertain
- Never delay in the delivery of emergency care whilst authorisation is awaited
- Likely that immediate provision of life-sustaining care will not be considered a DoL
- On-going care and increased duration makes a DoL more likely

# *R (Ferreira) v HM Senior Coroner*

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*R (Ferreira) v HM Senior Coroner for Inner South London*  
[2015] EWHC 2990 (Admin) (2)

- Maria Ferreira suffered from Down's syndrome, severe learning disability, limited mobility and required 24 hour care
- Died while in intensive care in hospital aged 45
- Admitted to hospital with a working diagnosis of pericarditis and pneumonia
- She had a strong dislike of hospitals and found the procedure frightening

# *R (Ferreira) v HM Senior Coroner*

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- Condition worsened so she was heavily sedated and transferred to the hospital's intensive care unit ("ICU")
- Remained sedated and on a mechanical ventilator as a life-saving treatment intervention
- While in ICU, the nursing staff put mittens on her hands to prevent her from reflexively grabbing at and disconnecting the endotracheal tube. A few days later she nevertheless dislodged the tube and despite attempts at resuscitation she went into cardiac arrest and died

# *R (Ferreira) v HM Senior Coroner*

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- An inquest was to be held into her death
- The Senior Coroner held that she was not deprived of her liberty for the purposes of Article 5 (and thus no mandatory requirement to summon a jury)
- Her sister sought judicial review of this decision

# *R (Ferreira) v HM Senior Coroner*

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- High Court decided that Cheshire West did not require treating all patients in an ICU who lacked capacity to consent to treatment for more than a very brief period as subject to a deprivation of liberty
- One of the reasons for this was the practical considerations
- Permission to appeal has been granted by the Court of Appeal . . .
- What about other hospital settings?

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***Re X***

# Re X

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*Re X and Others* (Deprivation of Liberty [2014] EWCOP 25:

- The objective of the President of the Court of the Protection, Sir James Munby, was to devise a “streamlined’ process, compatible with all the requirements of Article 5, which will enable the Court of Protection to deal with all DoL cases in a timely but just and fair way.”
- Controversially, the President concluded that P did not need to be joined as a party in all cases.
- A streamlined process was set out in detail and was implemented (e.g. new forms and practice directions etc).

# Re X

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- On appeal, the Court of Appeal
  - Decided that the President's rulings were (for technical reasons) a procedural nullity and therefore had no effect.
  - Expressed the view that the President had erred in finding that P did not need to be joined as a party in all cases involving a deprivation of liberty (obiter).
  - Each of the judges considered that P did need to be a party, with all the procedural consequences that flowed from that (again obiter).

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# ***NRA***

*Re NRA & Ors* [2015] EWCOP 59: The latest update in the *Re X* saga. Mr Justice Charles, Vice President of the Family Division, concluded:

1. The streamlined “*Re X*” procedure devised by Sir Munby should be reintroduced, subject to a number of improvements;
2. Family members, in particular family members that have been devoted to caring for P for years, are generally to be trusted by the Court as capable of advocating for P’s best interests;

3. In the large number of cases in which there is every reason to trust the judgment of family members, P need not therefore be joined as a party to proceedings;
4. In practice it may be preferable for family members to be formally appointed as representatives under the new COP rule 3A;
5. Where there was no suitable family member to consult then, the Court should fill the deficit itself by taking on a more inquisitorial role rather than join P as a party.

# NB: Rule 3A representatives

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- Rule 3A was brought into force on 1 July 2015
- It requires in each case the Court to consider whether it should make directions from a 'menu' relating to P's participation, including:
  - Joining P as a party
  - P's participation being secured by the appointment of a representative whose primary function is to give P a 'voice' by relaying information as to P's wishes and feelings;
  - Specific provision for P to address (directly or indirectly) the judge; or
  - No direction / an alternative direction.

# NB: Rule 3A representatives

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- Rule 3A provides that an accredited legal representative can be appointed to represent P, whether or not P is a party. If P is a party, then an ALR may be appointed without a litigation friend.
- It is planned that ALRs will be available from April 2017

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*AJ*

## *AJ (by her litigation friend the Official Solicitor) v A Local Authority* [2015] EWCOP 5:

- AJ was a 88 women living with her niece and husband, Mr & Mrs C since 2002
- Develops vascular dementia and becomes more reliant on Mrs C
- 2013 Mr and Mrs C went away on holiday leaving carers to visit the property, AJ refused to cooperate, leaving her keys in the door so that the carers could not get in, and declining offers of personal assistance.
- On 12 April 2013, AJ signed Lasting Powers of Attorney (“LPAs”) in respect of both health and welfare and property and financial affairs naming Mr and Mrs C as donees.

- AJ was referred to social services by a psychiatric nurse.
- A local authority case co-ordinator visited on 22 April 2013 and Mrs C raised the possibility of respite care for AJ to prevent the breakdown of the care arrangements.
- June 2013, Mrs C informed social services she and Mr C were going on holiday. She said that she now felt that permanent residential care was required.
- The local authority identified X House for respite purposes.
- On 13 June Mr and Mrs C took AJ to X House. Upon arrival, she stated that she did not wish to be there and repeatedly asked to leave.
- No assessment under Schedule A1 to the MCA 2005 had been carried out. An urgent authorisation under the Schedule was granted by the manager at X House on 14 June.

- The urgent authorisation recorded inter alia that AJ had been placed at the home while Mr & Mrs C were on holiday “with a view to [AJ] staying here on a permanent basis”. A standard authorisation request for 21 days was made and granted.
- Mr C was appointed AJ’s RPR, on the basis that he was donee under the LPA. It was clear at this stage that Mr C supported AJ continuing to be accommodated in a care home, even though it amounted to a deprivation of her liberty.
- A s.39D IMCA was also appointed, a Mr R.

- At the start of July 2013, AJ was moved to Y House, and remained there subject to repeated standard authorisations.
- Despite AJ's known opposition to living at Y House, no legal challenge was made to the standard authorisations for several months.
- As Baker J noted, “[t]he reasons for this failure lie at the heart of this case” (paragraph 18). A critical reason was the lack of effective communication between Mr C and Mr R.

- Mr R and Mr C finally spoke in November 2013
- Mr R agreed to act as AJ's litigation friend and instruct solicitors to make an application to the court on her behalf.
- Proceedings were eventually issued in December 2013, challenging the standard authorisation made in July 2013. Mr R was replaced in March 2014 as AJ's litigation friend by the Official Solicitor.
- Ultimately the substantive challenge under s.21A MCA 2005 was not actively pursued due to evidence as to a deterioration in AJ's condition and behaviour and the fact that there was no care agency willing to provide care.

- The Official Solicitor :
  - (1) raised concerns as to the extent to which the care plan accurately reflected the type and degree of physical interventions being used; and
  - (2) pursued a claim for a declaration under s.7 HRA 1998 that AJ's rights under Article 5(1), 5(4) and 8 ECHR had been breached (but not a claim for damages).
- Baker J conducted a hearing in May 2014 at which he heard oral evidence from Mr R, Mr C and the local authority's BIA, Ms G, and then subsequently sought (and received) extensive written submissions, inter alia, on the effect of the *Re X* judgment).

- Baker J was called to determine a number of questions in relation to the provisions relating to s.39D IMCAs.
- In summary form, he concluded that:
  - An IMCA appointed under section 39D does not have a broader, general role of representing or supporting P, and is not under a general duty to assist in determining what is in P's best interests but, rather, to perform the specific functions set out in section 39D(7), (8) and (9).
  - That is, in very broad terms, supporting the RPR and the relevant person to understand matters relating to the authorisation and helping them exercise their rights to apply to court or for a Part 8 review (see paragraph 108).

- Mr Justice Baker considers that an IMCA appointed to act for 'P' must act with '*diligence and urgency*' to ensure that P can challenge a standard authorisation.
- The Judge also stated that "*the local authority must make sufficient resources available to assist an IMCA and keep in touch with the IMCA to ensure that all reasonable steps are being taken to pursue P's Article 5 rights.*"
- At paragraphs 120 and 121 of the judgment Baker J notes the LA do have the resources to fund an IMCA to be litigation friend, but Mr R did not make any enquiries. He also criticises Mr R for failing to take appropriate action to bring this case to the attention of the court more quickly.

## Key principles:

- Standard authorisations must be applied for in advance of a move save for exceptionally urgent cases.
- Look out for cases where P admitted for respite where underlying plan is for permanent placement.
- RPR should only be selected where BIA satisfied RPR will comply with requirements and duties.
- LA must be satisfied with BIA's decision.

- Likely to be conflict of interest where relative or friend believe in P's best interests to move to residential care.
- IMCA must act "with diligence and urgency" to ensure any section 21A appeal brought expeditiously.
- LA must monitor whether RPR representing P in accordance with duty and IMCA has sufficient resources.
- LA ultimately responsible for bringing matter before the court where RPP and IMCA have failed.

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***SRK***

## *Staffordshire County Council v SRK & Another* [2016]

### EWCOP 27

- SRK has a brain injury following a round traffic accident. His personal injury award is administered by IMTC which pays for his care from private care providers in his own home which has been adapted for him. He receives 24 hour care and assistance seven days a week. He is wheelchair-bound and requires assistance with all aspects of personal care and daily living. He has very limited communication.

- His care package he is constantly monitored either by support workers or by the use of assistive technology. His accommodation and care package was arranged and is provided without any input from the Applicant Council or any other public authority. The care is arranged by a specialist brain injury case manager and is provided by private carers.
- All agree that there is no direct State involvement.
- All agree care package is in his best interests.

- The judge ruled that this is a DoL because it is imputable to the State
- It is imputable to the State because a welfare order by the CoP is needed to provide a procedure that protects P from arbitrary detention and so avoids a breach of positive obligations under Article 5
- This is based on the fact that the State knows or ought to know about the situation on the ground
- The court awarding damages, the CoP when appointing a deputy, and the deputy trustees should all be aware that the regime creates a (private) deprivation of liberty

Deputies should take steps to ensure:

1. that the relevant local authority with duties to safeguard adults knows of the regime of care
2. if, as here, the least restrictive available care regime to best promote P's best interests creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty (and so a derivation of liberty within Article 5) a welfare order based on that regime of care is made by the COP.

It is the LA that should make the application.

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***Re O***

# *Re O*

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Watch this space!

The judgment is not yet published, but the case concerns when an application should be made to the CoP under s 21A to challenge a standard authorisation on behalf of P and gives detailed guidance on the duties of S39D IMCAs and RPR to support P to bring their case to the court.

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# DoLs for children

# DoLs for children

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- Article 5 applies regardless of age
- Spotting a DOL of a child is more difficult than with adults, because all children are subject to universal constraints (otherwise it would be neglect)
- The greater the deviation is from the typical freedoms expected for a child of that age who is not disabled, the more likely it is a DOL
- How to authorise a DOL depends on the age of the child

# DoLs for children

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16 and 17 year olds:

- The general principal is that a parent cannot consent on behalf of a 16 or 17 year old child to a package of care that would otherwise amount to a DoL
- *Cheshire West* involved one claimant, MEG, who was 17. A care order was in place. It was found that she was being DOLed, regardless of the consent of those with parental responsibility

# DoLs for children

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*Birmingham City Council v D* [2016] EWCOP 8:

- By the time of this appeal, D was 16 years old and resided in a self-contained residential unit at a placement set within its own grounds, funded by the local authority, with his parents' consent, under section 20 of the Children Act 1989.

# DoLs for children

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- Mr Justice Keehan found that D was deprived of his liberty: *“I have come to the clear conclusion that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person’s liberty.”*

Remember that the MCA applies from 16 years old, so to authorise a DOL the LA will need to apply to the Court of Protection.

# DoLs for children

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Children under 16 years old, *A Local Authority v D* [2015] EWHC 3125 (Fam):

- LAs are under a duty to consider whether children in need or looked after children are being DOLED, applying *Cheshire West*
- Child accommodated under s 20 of the Children Act 1989 – not clear – but it may be parental consent is sufficient where it is an appropriate exercise of parental responsibility

# DoLs for children

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- If the child is under an interim or final care order, LAs cannot consent to the confinement of a child of any age. Care reviews are not sufficient to comply with article 5. DOL must be authorised by the court
- If a child is under a secure accommodation order (section 25 of the Children Act) he/she is lawfully DOLed, as is a child detained under the Mental Health Act 1983

Where there is a DOL that requires authorisation, the LA has to make application to the High Court (under the inherent jurisdiction).

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# Questions?

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**Alice Cullingworth**

Solicitor

Public Law Department

Irwin Mitchell LLP

0207 400 8743

Alice.Cullingworth@IrwinMitchell.com