

Deprivation of liberty in the time of Covid-19

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DOLS and Covid

- Key point: principles of MCA and DOLS safeguards continue to apply
- Nothing in the Coronavirus Act 2020 that attenuates them
- DHSC has published guidance MCA and DOLS During the Covid-19 Pandemic: Guidance for Hospitals, Care Homes and Supervisory Bodies
- Current version is dated 9 April, v 0.1
- Clearly intended to be a living document: paragraph 32 provides contact details if you want to provide feedback for potential updated
- Guidance emphasises that it applies only during the Covid-19 pandemic; it is not intended to create a new normal

DHSC Guidance

- Paragraph 1 – principles of MCA and DOLS Safeguards still apply
- Paragraph 2 – recognises that it may be necessary to change a person’s usual care and treatment arrangements e.g. to provide treatment to prevent deterioration; to move them to better use resources; to protect them from becoming infected.
- Paragraph 3 – emphasises that **“any decision made under the MCA is made in relation to that individual; MCA decisions cannot be made in relation to groups of people”**
- Paragraph 5 – also crucial – should continue to seek consent on all aspects of care and treatment to which a person can consent

DHSC Guidance

- Paragraphs 9 – 11 – DHSC guidance applies/extends the decision in *R (Ferreira) v HM Senior Coroner for Inner South London* [2017] EWCA Civ 31 to the context of life-saving treatment being provided in a care home:

“Where life-saving treatment is being provided in care homes or hospitals, including for the treatment of COVID-19, then this will not amount to a deprivation of liberty, as long as the treatment is the same as would normally be given to any patient without a mental disorder. This includes treatment to prevent the deterioration of a person with COVID-19. During the pandemic, it is likely that such life-saving treatment will be delivered in care homes as well as hospitals, and it is therefore reasonable to apply this principle in both care homes and hospitals. The DoLS process will therefore not apply to the vast majority of patients who need life-saving treatment who lack the mental capacity to consent to that treatment, including treatment to prevent the deterioration of a person with COVID-19.”

DHSC Guidance

- *Ferreira* concerned the question whether there was a need to hold an inquest following a death in an ICU on the basis that the patient was in state detention, which overlaps with DoL applying the acid test in *Cheshire West*:

“10...Applying Strasbourg case law, Maria was not deprived of her liberty at the date of her death because she was being treated for a physical illness and her treatment was that which it appeared to all intents would have been administered to a person who did not have her mental impairment. She was physically restricted in her movements by her physical infirmities and by the treatment she received (which for example included sedation) but the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital.”

DHSC Guidance

- Decision makers in care homes and those acting for supervisory will need to take a proportionate approach
- Any decisions must be taken specifically for each person and not for groups of people
- In most cases changes to a person's care or treatment will not constitute a new DOL; but they may. If they do, consideration will need to be given as to whether a new DOLs authorisation is needed
- If a new authorisation is needed, decision makers should follow standard process; there is a shortened urgent authorisation at Annex B
- DoLS assessors should not visit unless a face to face visit is essential

DHSC Guidance: Life-saving treatment

- DHSC guidance suggests the *Ferreira* principle applies in care homes:
- 9. Where life-saving treatment is being provided in care homes or hospitals, including for the treatment of COVID-19, then this will not amount to a deprivation of liberty, as long as the treatment is the same as would normally be given to any patient without a mental disorder. This includes treatment to prevent the deterioration of a person with COVID-19. During the pandemic, it is likely that such life-saving treatment will be delivered in care homes as well as hospitals, and it is therefore reasonable to apply this principle in both care homes and hospitals. The DoLS process will therefore not apply to the vast majority of patients who need life-saving treatment who lack the mental capacity to consent to that treatment, including treatment to prevent the deterioration of a person with COVID-19.
- This means that, for example, a person who is unconscious, semi-conscious or with acute delirium, and needs life-saving treatment (for COVID-19 infection or anything else) is highly unlikely to be deprived of liberty. They must be treated based on a best interests decision. (The exception to this is people described at para 8.)
- Para 8 relates to advance decisions and donees of LPA or deputy

DHSC Guidance: Life saving treatment

- *R (Ferreira) v Inner South London Senior Coroner* [2017] EWCA Civ 31; [2018] Q.B. 487:
- Paragraph 88: “The Strasbourg court in *Austin's case* 55 EHRR 14 has specifically excepted from [article 5.1](#) the category of interference described as “commonly occurring restrictions on movement”. In my judgment, any deprivation of liberty resulting from the administration of life-saving treatment to a person falls within this category.”
- Subject to the qualification at 89: In my judgment, what these qualifications mean is in essence that the acute condition of the patient must not have been the result of action which the state wrongly chose to inflict on him and that the administration of the treatment cannot in general include treatment that could not properly be given to a person of sound mind in her condition according to the medical evidence.
- Further reason given at paragraph 93: no general need in case of physical illness for person of unsound mind to have benefit of safeguards against DoL, where the treatment is in good faith and materially the same as would be given to person of sound mind

DHSC: DOLS summary

- 15. If the proposed arrangements meet the acid test, then decision makers must determine how to proceed. The starting point should always be to consider whether the restrictions can be minimised or ended, so that the person will not be deprived of liberty. If this is not possible then the key principles to consider are:
 - (a) Does the person already have a DoLS authorisation, or for cases outside of a care home or hospital does the person have a Court Order? If so, then will the current authorisation cover the new arrangements? If so, in many cases changes to the person's arrangements for their care or treatment during this period will not constitute a new deprivation of liberty and the current authorisation will cover the new arrangements, but it may be appropriate to carry out a review.
 - (b) Are the proposed arrangements more restrictive than the current authorisation? If so, a review should be carried out.
 - (c) If the current authorisation does not cover the new arrangements, then a referral for a new authorisation should be made to the supervisory body to replace the existing authorisation. Alternatively, a referral to the Court of Protection may be required.

DHSC: More restrictive arrangements

- “16. In many cases, where a person has a DoLS authorisation or Court Order then decision-makers will be able to put in place new arrangements to protect the person within the parameters of the authorisation or Order. Decision-makers should avoid putting more restrictive measure in place for a person unless absolutely necessary to prevent harm to that person. DoLS cannot be used if the arrangements are purely to prevent harm to others.”
- *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58- consider the extent of interference with the person’s residual liberty; | [\[2006\] 2 A.C. 148](#) *Munjaz v UK* [2012] M.H.L.R. 351
- Paragraph 19 and 20 – notes that only a shorter urgent authorisation form is needed; time limits remain the same

DHSC:

- The Department recognised the additional pressure the pandemic will put in the DoLS system. Fundamentally, it is the Department's view that as long as providers can demonstrate that they are providing good quality care and/ treatment for individuals, and they are following the principles of the MCA and Code of Practice, then they have done everything that can be reasonably expected in the circumstances to protect the person's human rights. (my emphasis)
- 22. Where the person is receiving end of life care, decision makers should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person's care or treatment.

DHSC: Role of supervisory bodies

- Paragraphs 25 – 28 recognise that remote techniques should be used as far as possible for DOLS assessments
- Current assessments may take into account evidence from previous assessments – should consider whether it remains relevant and valid to inform current assessment.
- Alternatively, if the assessment was carried out within the last 12 months, this can be relied upon without the need for a further assessment.
- 28. Where the person is receiving end of life care, supervisory bodies should use their professional judgement as to whether an authorisation is necessary and can add any value to the person's care.

DOLS cannot be used to impose restrictions for purpose of public health

- Paragraphs 29 ff of the guidance give guidance in relation to the powers conferred on Public Health Officers under the Coronavirus Act 2020
- 30: (a) The person's past and present wishes and feelings, and the views of family and those involved in the person's care should always be considered. (b) If the measures are in the person's best interests then a best interest decision should be made under the MCA. (c) If the person has a DoLS authorisation in place, then the authorisation may provide the legal basis for any restrictive arrangements in place around the measures taken. Testing and treatment should then be delivered following a best interest decision. (d) If the reasons for the isolation are purely to prevent harm to others or the maintenance of public health, then PHO powers should be used. (e) If the person's relevant capacity fluctuates, the PHO powers may be more appropriate.

BP v Surrey County Council

- Application s 21A brought on behalf of BP by his daughter as litigation friend seeking her discharge from a care home, following the imposition of restrictions prohibiting visitors, unless visits were permitted again
- Application brought on 23 March; just pre-dating that evening's introduction of the 'lockdown' and heard on 25 March; pre-dated the government guidance to care homes providing that visits should be barred
- BP lacked capacity to make decisions with regards to residence and care; the family had been divided as to whether she should live in a care home or receive a package of care at home. Received frequent visits after being placed in a home
- BP deaf and could not use a telephone or skype

BP v Surrey County Council [2020] EWCOP 17

- Court referred to Articles 5, 8 and 14 ECHR; Article 25 (Health) CRPD; Article 11 CRPD:

“Article 11 of the UN Convention of the Rights of Persons with Disabilities (“CRPD”) provides that rights persist through “situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”

- Referred to guidance from the European Committee for the Prevention of Torture which states:

“...restrictive measures taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time.”

- Court said at Paragraph 23:

“In the context of Coronavirus, the State's obligation is to ensure equality for people with disabilities and to guard against them being inadvertently left behind by a system which deprioritises them in the urgency of a response to crisis.”

- Note there was no particular reference to Article 2 – at that stage, risk in care homes perhaps not appreciated as it now is but plainly a further, highly material factor

BP v Surrey County Council

- Interestingly, Court appeared to consider that the circumstances may be such that the Court can derogate from the ECHR:
- 27. *It strikes me as redundant of any contrary argument that we are facing "a public emergency" which is "threatening the life of the nation", to use the phraseology of [Article 15](#). That is not a sentence that I or any other judge of my generation would ever have anticipated writing. The striking enormity of it has caused me to reflect, at considerable length, before committing it to print. [Article 5](#) protects the fundamental human right both to liberty and, it must be emphasised, to security. It requires powerful reasons to justify any derogation. Those reasons must be confirmed on solid and compelling evidence before any court finds them to be established. The spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential. Ms Harvey referred me to the relevant case law concerning the procedure for derogation. In particular, my attention was drawn to Lawless v Ireland 332/57; Greek case 176/56. I am clear that on a proper construction of these authorities, it is not essential to signal in advance a notification of derogation to the Council of Europe. In any event it would simply not be practical to do so. I will send notification of my decision. It also requires to be stated, in the clearest of terms, that this derogation is to cover a limited period and has been necessary in consequence of an unprecedented pandemic public health crisis. In reaching the conclusion that I have, I bear in mind that fundamental rights and freedoms require to be protected as vigilantly in times of crisis as in less challenging circumstances.*
- Query: Can the Court decide to derogate? As distinct from reviewing a decision to derogate?
- And in any event, having said this at paragraph 27, it's not clear Court does actually derogate

BP v Surrey County Council

- Court went on to say that in considering impact of general restrictions, had to consider them in relation to the particular individual under consideration: paragraph 29
- Court went on to note that capacity assessments may need to take place remotely; which will call for ‘vigilant scrutiny’: paragraphs 37 – 38
- Visits from local advocacy service were stopped so “heightened vigilance to ensure that BP's fundamental rights are not eclipsed by the exigencies of the Coronavirus pandemic” (paragraph 9)

BP v Surrey: Creativity around contact

- Key point of the judgment may be the expectation that those concerned with best interest decision making, including care homes, think care fully about how restrictions and their impact can be minimised: paragraph 36:

Their significance is that the care staff and the family, with the help of their advocates, began to absorb some of the stark realities of their present situation. A great deal of effort was made to see whether it might be possible to unlock a fire door and provide for a visit at a suitably safe distance. In the end and for a variety of reasons that was not possible. The plan that was ultimately put together provides for BP's education in to the world of Skype with creative use of a communication board and the exploration of concurrent instant messaging. Additionally, the family can, by arrangement, go to BP's bedroom window which is on the ground floor and wave to him and use the communication board. All this will require time, effort and some creativity. I am clear that there is mutual resolve by all concerned. When I asked FP what she thought her father would want if he was addressing this question objectively with his full faculties intact, she unhesitatingly told me that the last thing he would want would be to burden her or her family. Approaching this challenging situation from that perspective appeared to give FP some comfort. I am entirely satisfied that this is a balanced and proportionate way forward which respects BP's dignity and keeps his particular raft of needs at the centre of the plan. Equally, I have no doubt that this application, for all the reasons that I have alluded to, was properly brought. It has been important to recognise that in addition to his Alzheimer's BP's deafness is a separate and protected characteristic, as defined in [Section 148\(7\) of the Equality Act 2010](#) . As such, it requires to be identified and considered as a unique facet of BP's overall needs.

- May be an opportunity to think about creative DOLS conditions given the likely duration of the epidemic