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ADASS Advice Note

Guidance for Local Authorities in the light of the Supreme Court decisions on deprivation of liberty

Background

On 19 March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council". The full judgment can be found on the Supreme Court's website at the following link:

http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

The requirement for the Deprivation of Liberty Safeguards are unchanged.

There are still 6 requirements which need to be met:

1. 18 and over
2. Suffering from a mental disorder
3. Lacking capacity for the decision to be accommodated in the hospital or care home
4. No decision previously made to refuse treatment or care, or conflict relating to this such as LPA
5. Not ineligible for DoLS
6. The person needs to be deprived of liberty, in their best interests.

The Supreme Court has now confirmed that to determine whether a person is objectively deprived of their liberty there are two key questions to ask, which they describe as the 'acid test':

(1) Is the person subject to **continuous supervision** and **control**? (all three aspects are necessary)

AND

(2) Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave).

This now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

The following factors are no longer relevant to this:

(1) the person's compliance or lack of objection;

(2) the relative normality of the placement and

(3) the reason or purpose behind a particular placement.

The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

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Deprivation of liberty in "domestic" settings

The Supreme Court also held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements it must be authorised by the Court of Protection.

Implications for Local Authorities

There are implications for Local Authorities as a result of this judgement. There is likely to be an increased number of applications for DoLS Authorisations both Urgent and Standard, which will inevitably place pressure on Local Authority DoLS Teams and on the capacity of Best Interests Assessors.

There is likely to be a need to revisit previous decision making and address it in some cases. There is a need to scope settings outside of residential care homes and hospitals and proceed with those which need to be authorised.

There is a need for the dissemination of factual and helpful material to assist Managing Authorities and other partners to identify when applications are needed.

ADASS urge a measured and proportionate response to the Judgement which recognises the impact of the interpretation but which also recognises the value of the protection for those who most likely should have always been within the remit of the Safeguards.

ADASS also stress that proper application of the MCA principles are at the heart of all decision making in relation to deprivation of liberty.

Recommendations

As a minimum ADASS consider that Local Authorities need to do the following -

1. Develop an action plan to address the implications of the judgement which could be taken forward through local MCA Operational Groups.
2. Provide briefing sheets for all partners including; elected members, staff, Best Interests Assessors, care home staff, hospital staff, supported living and other care environments. These briefings should disseminate information in a measured and accurate way.
3. Scope numbers likely to be affected in care settings outside of hospitals and care homes and develop a strategic response to assessing the possibility that they are deprived of liberty always prompting the need to review care plans and implement less restrictive options.
4. Brief Local Authority legal teams in relation to taking forward applications to the Court of Protection and where applicable brief senior managers of the financial implications of these actions.
5. Revisit previous decision making in relation to DoLS applications where the person was found not to be deprived of liberty and review against the acid test. These could be "paper" reviews initially and prioritisation will be needed of cases most like those considered by the Supreme Court. Managing Authorities will then need to be advised to request authorisations.
6. Ensure all BIA's and DoLS Mental Health Assessors and DoLS authorisers are updated following the judgement and aware of the implications for practice.
7. Local Authority commissioners of the IMCA service will need to meet with their providers to discuss capacity issues.
8. Scope out of area placements making best use of the ADASS DoLS protocol.

Longer Term ADASS would expect local Authorities to

1. Update training materials in relation to MCA and DoLS to reflect the acid test
2. Update all relevant policies and procedures in line with the acid test

Local Authorities may choose to scope the extent of potential new applications for DoLS authorisations and the potential financial and staffing implications of this but many issues remain unknown and local authorities must meet their legal responsibilities.
DH advise reviewing allocation of resources in the light of the revised test given by the Supreme Court to ensure these legal responsibilities are met.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300106/DH_Note_re_Supreme_Court_DoLS_Judgment.pdf

Problem solving

- Some homes or hospitals will feel they need to or will actually put all their residents in as applications; this is not in line with the spirit of the legislation which encourages a person centred view of the restrictions in place for an individual. In these cases it may be helpful to advise them of the need to ensure that they have completed any supporting documentation such as mental capacity assessments, risk assessments and best interest's decisions.
- Where the lack of capacity is confirmed and formally assessed, managing authorities need to be reminded of the need to screen for the acid test i.e. likelihood of free to leave and continuous supervision and control
- Managing authorities also need to be reminded that they must review care plans to consider less restrictive options before DoLS authorisations are requested which may subject the person to unnecessary and intrusive interventions.
- Ultimately if large numbers of authorisations are requested at the same time it is hard to see how these will be processed within the legislative time frame. Local Authority solicitors will advise on this given the unusual legal landscape.
- Local Authorities as supervisory bodies need to consider their BIA pool. Consideration should be given to sharing training to make best use of resources. Independent BIA's may need to be used more frequently. Consideration can be given to a regional resources of Independent BIA's.
- Local Authorities need to encourage the uptake of BIA training from social workers to ensure the pool of BIA's available to ever increasing.

Further guidance for providers from CQC can also be found by following this link

http://www.cqc.org.uk/sites/default/files/media/documents/20140404__dols_briefing_for_health_and_social_care_providers.pdf