In March 2014, the Supreme Court issued a judgment on Deprivation of Liberty which clarified the types of situations where authorisation under the Deprivation of Liberty safeguards or by the Court of Protection is needed.

A panel of Mental Capacity Act experts discuss case studies in light of the ruling.

This is the second film made by SCIE on this subject and follows a film on the principles of Deprivation of Liberty since the Supreme Court judgment.

It’s been about a year now since the Supreme Court gave its landmark ruling really about Deprivation of Liberty, which has caused a huge amount of interest in our world, the world of the Mental Capacity Act and DoLS. We’re going to talk about a couple of case studies here. These are real examples of people that were involved in the Deprivation of Liberty Safeguards processes.
In this case study, the situation of Mr. and Mrs. Jones, who have been married 61 years, is discussed. They live together at home, both with some degree of dementia, until Mrs. Jones has a fall and goes into hospital. Mr. Jones journeys every day by bus to see her, and would like her to come home. She also wants to go home, and as her physical condition improves, she makes determined efforts to leave. On one occasion she is brought back from the car park, and a doctor prescribes her sedative medication to help deal with her anxiety. The hospital staff caring for Mrs. Jones consider discharging her, and Mrs. Jones is asked to do a standard capability test - to see if she can operate an electric kettle.

Rachel Griffiths, MCA Practice Consultant and MCA National Professional Advisor to CQC:

Mrs Jones put the electric kettle on top of the hob, which alarmed staff and they felt that she wouldn’t be safe at home. So when they told Mr Jones that they wanted her to go into a care home, he got really angry because he was frightened and upset. And he said that well, if she couldn’t come home with the hospital’s blessing then he’d just take her home on the bus. Well, this did alarm the staff, they said they’d heard them arguing in raised voices, Mr and Mrs Jones, and they thought there might be a safeguarding risk to Mrs Jones if she went home. So the hospital gave itself an urgent authorisation under the Deprivation of
Liberty Safeguards, which they can do for up to seven days, provided that at the same time they apply for a standard authorisation. And their intention, and this was in the notes, was that this wasn’t just to make it lawful to keep her there, but also because they wanted to stop Mr Jones from visiting her on the ward because they were frightened that if they took their eye off him, he’d whisk her out and home on the bus. So at this point, this is the point at which the Best Interests Assessor is about to come onto the ward. But what are your thoughts about this situation now - again this is a real situation.

Janet Tudor, Best Interests Assessor, Cambridgeshire County Council:

00:03:41 Well, I would want to take it back to looking at her capacity. She could discharge herself if she wanted to, because it says her physical condition improved, so she was medically fit for discharge. And I do wonder, she became more agitated about wanting to leave, because she felt better and she wanted to go home. You know, as simple as that.

Lorraine Currie, MCA DoLS Manager, Shropshire County Council, ADASS Lead MCA/DoLS:

00:04:06 I think often what happens is there’s a tendency to use something like the kettle test actually as evidence that you lack capacity. So rather than doing it the other way around. Your discharge shouldn’t stand or fall by being able to carry out this kettle test. And in the same way here I think we subsequently find out that she had a different type of kettle at home. You know, it’s about not using evidence for our own ends really because everybody feels, in this very paternalistic way, that perhaps she ought to be in a care home now.

Tim Hunter, Independent Mental Capacity Advocate and Service Manager, Voiceability:
00:04:39 It's the sense that safeguarding is being done to a person, instead of enabling that person. It feels incredibly risk averse, to the extent that it's really the hospital getting its own way, and not actually thinking about the individual really.

Joseph Yow, Mental Capacity Act Manager, Cambridgeshire County Council:

00:04:55 I think this is where the best interests come in to really try and inject an objective view about the whole situation. And try and ask questions about is this the least restrictive, is this proportionate to the potential harm. All these are part and parcel of the process of DoLS.

Lorraine Currie, MCA DoLS Manager, Shropshire County Council, ADASS Lead MCA/DoLS:

00:05:19 I think they're also trying to use DoLS here for a purpose that it was not intended for, which is to limit contact between Mr Jones and Mrs Jones, which is an Article 8 issue about the right to private and family life, and that's something that would need to be decided by the Court of Protection if they wanted to put into place those restrictions. So they're also seeking to use DoLS for an inappropriate reason here I think.

Rachel Griffiths, MCA Practice Consultant and MCA National Professional Advisor to CQC:

00:05:47 Yes, and I think - I mean in a situation like this, because of the conflict with Mr Jones, and because of the Article 8 issues about both of their rights to a private and family life, there is no way that any Best Interests Assessor could recommend this for authorisation. This is a situation that is serious enough in the breach of people's natural rights that it would have to go to the Court of Protection.

Yes? So we have then the Best Interests Assessor about to arrive, he's called
Prakash, and he decided that she certainly was being deprived of her liberty, because she was not free to leave and she was under continuous or complete supervision and control. The question was, whether this was in her best interests, and I guess particularly whether it was necessary to prevent harm to her and proportionate to the risk and the seriousness of that harm. And he did explain that in the situation where Mr Jones was so bitterly opposed to his wife remaining in hospital or going to a care home, that DoLS couldn’t be used anyway.

**VO:**

00:07:13 By the actions of the Best Interests Assessor, Mrs Jones was able to return home with her husband, where they continue to live together happily.

**Words on screen:**

00:07:13 Mr and Mrs Jones, happily together at home

**Lorraine Currie, MCA DoLS Manager, Shropshire County Council, ADASS Lead MCA/DoLS:**

00:07:23 I think it’s a great example of what BIAs do. You know it is about looking at every bit of detail, so not only deciding it wasn’t in the person’s best interests, but looking at the medication, should that be reduced, trying to encourage her to make some of her own decisions, you know, looking at her capacity returning to having greater ability because she’s no longer sedated as much. And yes, I think it’s one of the great benefits of the DoLS process. So even though we’re saying it’s not going to be authorised, in a sense it’s only because it came into the process, that the Best Interests Assessor was able to give scrutiny.

**VO:**

00:08:04 Mike is 19 and has a learning disability and autism; he lives in a care home. When Mike
is out of the care home, if he thinks something is in the wrong place, he may try to eat it. In the past he has eaten inappropriate things such as dog mess, cigarette ends and ring pulls. He is supervised by two staff when he is out, so that he can go on excursions such as swimming, which he really enjoys. The staff at the care home are concerned as to whether they should apply for a standard authorisation to cover if this is a deprivation of liberty.

Words on screen:

00:08:04  Mike, who lives in a care home
He will sometimes try to eat inappropriate things
He is supervised on excursions by two members of staff
Should the home apply for a Standard Authorisation?

Joseph Yow, Mental Capacity Act Manager, Cambridgeshire County Council:

00:08:37  Well the first thing that comes to my mind in cases like this is this interpretation about - between supervision and support.

Lorraine Currie, MCA DoLS Manager, Shropshire County Council, ADASS Lead MCA/DoLS:

00:08:49  Yes, I think in the two cases that the Supreme Court looked at, which are commonly referred to as MIG and MEG, MIG, everything that she experienced was described as support, but it was still found to meet the acid test of continual or complete supervision and control. So even though all these things are really really positive, it’s a great example of why DoLS shouldn’t be seen as that terribly negative thing because of the word ‘deprivation’ which just sounds so awful. But actually it’s a really positive thing, very enabling, and this chap’s got the quality of life that he has, but it still amounts to this technical thing which is a deprivation of liberty. And he’s provided with rights, human rights, access
to have that looked at again, and the right not to be deprived of liberty unless someone has authorised it, which are really key human rights.

Janet Tudor, Best Interests Assessor, Cambridgeshire County Council:

00:09:52 I think the other point is, if he was, and I think he could easily be, living in a supported living arrangement or living in his own home, with the same regime in place, that that would still be, now, a deprivation of liberty. And you could use the Deprivation of Liberty Safeguards, but you’d have to use a different route to get to the Court of Protection, really, I think. But what we’ve said already would still apply, and I think that is one of the effects of the Supreme Court judgment really.

Tim Hunter, Independent Mental Capacity Advocate and Service Manager, Voiceability:

00:10:29 And I would add, once the application goes in, and presumably we’re all in agreement that an application should be made, once an application is made, this person may be entitled to an advocate. If there are family involved then perhaps not in the first instance. But if the advocate is there, they are working with Mike, to find out what he wants and what his views are. If a DoLS authorisation was granted, then a representative would be appointed, who would meet with him regularly, to talk with him about it, to see if there were adjustments that could be made, or if he was unhappy, to challenge it at the Court of Protection. So I think there’s a lot of additional support that DoLS provides this person here. So I think that’s one of the very positive elements of it.

Rachel Griffiths, MCA Practice Consultant and MCA National Professional Advisor to CQC:

00:11:13 What I have really gained from this discussion this afternoon is this huge recognition that the Deprivation of Liberty Safeguards are not just some kind of a
Title: Key Learning Points

Authorisations under Deprivation of Liberty Safeguards (DoLS) can be used creatively to enhance people’s daily lives

The scrutiny a care plan receives under DoLS can help make it more supportive and positive for the person

Any restrictions on someone’s freedom and ability to make their own decisions must be in their best interests - necessary to prevent harm to the person and proportionate to the likelihood of that harm

IMCAs and BIAs have an important role in making sure people’s rights and quality of life are protected

END