

Giving effect to RD and Ors:
Challenges to Deprivation of Liberty (DoL) under MCA s21A
Practice Guidance for Best Interests Assessors (BIAs)

Reminder: the function of s21A

The MCA's s21A may be used to challenge standard and urgent authorisations. For the purpose of this guidance, only standard authorisations are referenced.

Under s21A, the Court of Protection (CoP) may determine any question relating to any of the following matters –

- a) whether P meets one or more of the qualifying requirements
- b) the duration of the standard authorisation
- c) the purpose for which the standard authorisation is given
- d) the conditions to which the standard authorisation is subject.

If the CoP determines any question (a) to d) above), it may make an order to vary or terminate the standard authorisation, or direct the supervisory body (SB) to vary or terminate the standard authorisation. It can also make an order about a person's liability for any act done in connection with the authorisation prior to its variation or termination.

Once its jurisdiction is invoked, the CoP has discretion to declare whether P has/ lacks capacity to make particular decisions. Where P lacks capacity, the CoP may make further decisions regarding P's health and welfare and property and affairs (in respect of acts done, or proposed).

Reminder: establishing when a s21A challenge should be made

In very basic summary, a s21A challenge should be lodged with the CoP where:

- a) P has capacity to ask to apply to the CoP and wishes to do so
- b) P does not have capacity to ask to apply, but indicates by their words or behaviour (currently or previously) that they would wish to apply if they had capacity to do so
- c) P does not have capacity to ask to apply and is not indicating that they wish to do so, but their RPR considers that it is in P's best interests to apply.

This guidance focuses on situations where P lacks capacity to ask to apply/ P's wishes are unclear. For guidance on identifying wishes to apply/ objection, see 'When Should an Application be made under MCA s21A: RD and Ors' and Guidance for RPRs, in the DoL Ops Handbook.

Part 8 review or s21A application?

BIAs are reminded that "there is an obligation on the state to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court" (AJ v a Local Authority [2015] EWCOP 5). A Part 8 review does not offer *independent* scrutiny of whether the criteria for authorisation are met; it therefore does not (and is not intended to) meet the requirements of Article 5. Access to the CoP via s21A is crucial to Article 5 compliance.

Whilst there can be no *requirement* to request a review before making an application under s21A, BIAs are urged to encourage resolution of issues without litigation wherever possible, including prompting consideration of a Part 8 review when appropriate. The CoP Handbook (Keene, Edwards, Eldergill and Miles, second edition) suggests the following could indicate that use of a review *first* would be appropriate:

- There is reason to believe that there is a realistic possibility that agreement to terminate or vary the authorisation will be reached
- The person wishing to challenge the authorisation is not likely to get Legal Aid (i.e. the person is not P, their RPR, or likely to be appointed as P's litigation friend)
- There is no risk that P will suffer distress/ harm if the status quo continues pending review.

Where a Part 8 review is pursued first, it should be clear that its purpose is to explore the issues with P's arrangements and secure resolution where possible. At the very least, the review should serve to narrow the issues on which any subsequent litigation will focus. For further consideration of when a Part 8 review may/ may not be appropriate, please refer to the pre-action protocol.

For the avoidance of doubt, all references to Relevant Person's Representatives (RPRs) in this guidance include paid and unpaid RPRs.

Expectations of BIAs – in all cases

1. BIAs must satisfy themselves that the proposed RPR meets the criteria in regulation 3 and paragraph 140 of Schedule A1 (the RPR will maintain contact with P, and represent and support P in all matters connected with Schedule A1)
2. Before an RPR is recommended, situations in which there is likely to be a conflict of interest should be carefully scrutinised e.g. where a family member has been closely involved in arranging a placement for P which they believe to be in P's best interests, it may be difficult for them to fulfil the duties of RPR
3. BIAs should avoid taking a 'blanket' approach to adding conditions i.e. applying conditions to all authorisations without considering the relevance to P, and the potential impact on the Business Services Team in monitoring them. BIAs should carefully select which conditions are appropriate and proportionate for P's circumstances
4. BIAs should consider utilising the role of P's lead care practitioner (where applicable) or others in following up any issues identified in relation to P, by way of conditions or recommendations. For example, where P has a lead care practitioner, they may be able to support identification of any issues P may have with their arrangements, and consideration of appropriate adjustments. For clarity, BIAs should discuss their thinking directly with P's lead care practitioner (or others) prior to selecting a condition/ recommendation. Where P does not have a lead care practitioner, BIAs will need to consider pragmatically what other resources might be available to support resolution of issues for P.

Expectations of BIAs - on first authorisation

See also the flowchart headed 'MCA s21A (New Objection / New Authorisation) – Stage 1'

1. When the BIA is satisfied that the RPR is appropriately appointed and it is clear that P is objecting and wishes (or would wish) an application to be made, the BIA must reiterate the RPR's responsibility in representing and supporting P to ensure that their objections are addressed. The following may be relevant:
 - a) Where no mitigating actions are likely to be effective, an application should be made immediately, and RPRs should be directed to appropriate support to enable this. Where an immediate application is anticipated, an authorisation of no more than 3 months may be appropriate to enable preparation of court papers. BIAs should consider attaching the condition at Appendix A (1)
 - b) Where it appears possible that mitigating actions may be effective in reducing or removing objection, BIAs should refer to the paragraph headed 'Part 8 review or s21A application?' RPRs should be referred to local guidance to facilitate their decision making as to the timeliness of an application. BIAs should consider

following the approach listed below (numbers 6 - 8) i.e. recommending an authorisation of no more than 6 months to facilitate action and decision making

2. When the BIA is satisfied that the RPR is appropriately appointed, but has concerns that P may be objecting and/ or it is unclear whether P wishes (or would wish) an application to be made, a short authorisation of no more than 6 months should be recommended. The purpose of the maximum six month period is to allow time for the RPR to work with relevant parties to establish whether P *does* in fact object and if so what to, and whether amendments to P's arrangements can mitigate or remove such objections. For example, a medication review may result in a decrease to P's sedation and improve the clarity of any objection and/ or express their wishes regarding an application
3. The expectation is that at the end of the maximum 6 month period, any necessary investigations into P's possible objections and/ or activity to mitigate it will have been concluded. This expectation should be clearly conveyed to the RPR and Managing Authority, and Independent Mental Capacity Advocate (IMCA) support offered to the RPR where appropriate
4. Where an authorisation of no more than 6 months is recommended, the BIA should consider attaching the conditions at Appendix A (2)
5. The DoLS Team will notify NELC legal team immediately of any potential application of which they are aware (a potential application means an application which is being explored or is intended). The legal team will meet with the RPR prior to issue if possible, in accordance with the pre-action protocol.

Where objections remain, and authorisations of 6 months plus a further 3 months have been provided to facilitate exploration and application, but no such application has been made - immediate reference must be made to the DoLS Team. The DoLS Team will liaise with NELC's legal team with a view to the Council making its own s21A application (if the RPR has failed to make an appropriate application, the responsibility for doing so will default to the Council). This means that from identification of P's possible objection/ wish to make an application to submission of the application, P should wait no longer than 9 months.

Expectations of BIAs – subsequent authorisation (renewal)

See also the flowchart headed 'MCA s21A (Sustained Objection / Subsequent Authorisation) – Stage 2'

1. Where on renewal of an authorisation a failure to make a required s21A application is apparent, BIAs should establish why. This could be because:
 - a) The RPR is **unwilling** to make an application despite knowing that P objects and P either has capacity to request that an application is made, or would request it if they had capacity to do so
 - b) The RPR is **unable** to make an application despite knowing that P objects and P either has capacity to request that an application is made, or would request it if they had capacity to do so
 - c) The RPR **does not understand** their duties.
2. Removal of an RPR may be inappropriate where there are extenuating circumstances. Where, following discussion with the RPR, the BIA is satisfied that the RPR *is* now willing and able to make an application/ understands their role, the BIA must explore with the RPR what (if any) additional support they need to make it and refer them accordingly. The BIA must update the DoLS Team, to enable them to liaise with the IMCA if there is one, or if not, consider whether one should be appointed either for P or for the RPR – to progress an application. An authorisation of no more than 3 months should be recommended to facilitate submission of the application. It should be explained to the RPR that this is the key purpose of the further short authorisation

3. Where the RPR remains unwilling or unable to make an application, or does not understand their role - even with additional support - the BIA should not recommend their reappointment. Unless there is an appropriate family member/ friend willing to act as RPR and take prompt action, it may be more appropriate to select a paid RPR who is better able to do so. The BIA must update the DoLS Team, to enable them to liaise with the IMCA if there is one, or if not, consider whether one should be appointed either for P or for the RPR (unless the RPR is a paid RPR) – to progress an application. An authorisation of no more than 3 months should be recommended to facilitate submission of the application. It should be explained to the RPR that this is the key purpose of the further short authorisation
4. The BIA may consider referring to NELC legal team for an informal discussion/ advice if they are unsure of the best course of action (dolsenquiries.admin@nelincs.gov.uk)
5. The DoLS Team will notify NELC legal team immediately where an application is intended. The legal team will meet with the RPR prior to issue if possible, in accordance with the pre-action protocol.

Note: this guidance is not focused on the situation where no objection by P is identified on first authorisation but it becomes evident on a subsequent authorisation that that P has begun objecting and wishes (or would wish) an application to be made, or might do. In this situation, the same principles outlined above should be followed i.e.

- a) If the objection is clear, an immediate application should be made
- b) If the objection is unclear, or mitigation may be possible, an authorisation of no more than 6 months may be appropriate to facilitate action and decision making
- c) If on subsequent authorisation the objection has not been resolved and no application has been made, an authorisation of no more than 3 months should be recommended to facilitate submission of the application.

After a s21A Order has been received

1. Two thirds of the way through the authorisation period directed by the Order (e.g. if the authorisation period is for 12 months, at month nine), a Part 8 Review should be undertaken to establish whether P's objection/ wish to apply to the CoP subsists
2. Where continuing objection/ wish to apply is identified, identifying it in reasonable time before the expiration of the Order, will allow for creation of CoP papers and return to Court within no more than 12 months from the date of the Order
3. If no continuing objection/ wish to apply is identified, P's DoL can be authorised in the usual way on expiration of the Order.

Appendix A

- (1) When it is clear that P is objecting and wishes (or would wish) an application to be made, and no mitigating actions are likely to be effective, an application should be made immediately. Where such application is anticipated, an authorisation of no more than 3 months may be appropriate to enable preparation of court papers. BIAs should consider attaching the following condition:

The Managing Authority (Care Home Manager) will make a detailed log of any established objections to the placement and/ or care provided (starting from the date of authorisation), detailing the type of objection and any actions taken to attempt to mitigate such objections.

The Managing Authority will then:

- i. Supply the Supervisory Body with a summary of findings from the Objections Log no less than 6 – 8 weeks before expiry of the authorisation and/ or at any DoLS review, whichever is the soonest
- ii. Make the 'Objections Log' available to the Supervisory Body when requested and when any DoLS review and/ or repeat DoLS assessments are carried out by the Supervisory Body's Best Interests Assessors. This includes any assessments or investigations made as part of court proceedings.

- (2) When there are concerns that P may be objecting and / or it is unclear whether P wishes (or would wish) to make an application, a short authorisation of no more than 6 months should be recommended. BIAs should consider attaching the following conditions:

a) Actively scope objections

The Managing Authority (Care Home Manager) will work with the Relevant Person's Representative (RPR) to facilitate a rigorous programme of activity designed to establish the nature of any objection expressed by [] to the placement and/ or care provided and whether and what action could be taken to remove or reduce []'s objection. As a minimum, this programme of activity must include a mid-authorisation review of progress in establishing objections and mitigating actions, on which the Managing Authority must report to the Supervisory Body

b) Involve others in scoping objections

The Managing Authority (Care Home Manager) will notify []'s [case worker/ relevant support worker etc.] of the intended programme of activity in order that they may be involved in consideration of whether and what action could be taken to remove or reduce []'s objection

c) Log objections and mitigating actions

The Managing Authority (Care Home Manager) will make a detailed log of any established objections to the placement and/ or care provided (starting from the date of authorisation), detailing the type of objection and any actions taken to attempt to mitigate such objections.

The Managing Authority will then:

- i. Supply the Supervisory Body with a summary of findings from the Objections Log no less than 6 – 8 weeks before expiry of the authorisation and/ or at any DoLS review, whichever is the soonest
- ii. Make the 'Objections Log' available to the Supervisory Body when requested and when any DoLS review and/ or repeat DoLS assessments are carried out by the Supervisory Body's Best Interests Assessors. This includes any assessments or investigations made as part of court proceedings.

The above three conditions are intended as a suite: to address the need to scope, involve in, and record established objections. Not all three may necessarily be appropriate for all Ps. The suspected nature and extent of P's objections will direct what is/ is not appropriate to include.