Transparency Implementation Group Anonymisation and Publication Subgroup

Draft Publication Guidance for Judges

Introduction

1. This is the report of the Publication Guidance Subgroup of the wider Anonymisation and Publication Subgroup of the TIG.

2. The remit of this subgroup was to prepare guidance and recommendations on two issues:
    a. the number of judgments that judges ought to publish; and,
    b. the types of judges that might be deemed priority for publication.

3. It was not the task of this subgroup to provide an overview or commentary on the legal framework as it currently exists in respect of the publication of judgments.

4. Membership of this subgroup was as follows:
    a. HHJ Madeleine Reardon (Anonymisation and Publication TIG Subgroup Chair)
    b. District Judge Adem Muzaffer (Publication Guidance Subgroup Chair)
    c. Dr. Julie Doughty (Senior Lecturer in Law at Cardiff University)
    d. Tom Foley (Legal Adviser)
    e. Charles Hale QC (Barrister at 4PB Chambers)
    f. Femi Ogunlende (Barrister at No5 Chambers)

5. Members of the subgroup met remotely on 21st March, 25th April and 6th June 2022.

Context – the past and the future

6. The *Practice Guidance on 'Publication of Judgments'*, issued by Sir James Munby P in January 2014, requires publication of anonymised judgments in certain categories of cases, and encourages publication in others. By way of summary:

    a. Judgments were to be sent to BAILLI for publication in every case where the judge concludes that publication would be in the public interest.
    b. In other cases, judgments were to be sent to BAILII for publication in certain categories of cases unless there are compelling reasons why the judgment should not be published. These cases, listed within two schedules, include by way of example judgments relating to substantial contested fact-finding hearings, public law orders, deprivation of liberty, and the giving or withholding of serious medical treatment.
    c. In all other cases (i.e, not those identified within the schedules), the starting point is that permission may be given for the judgment to be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that permission for the judgment to be published should be given having regard to the legal framework.

7. The Guidance only applies to judgments delivered in the Family Court by Circuit Judges and High Court Judges (and persons sitting as judges of the High Court), and to all judgments delivered by High Court Judges exercising the inherent jurisdiction. As identified in the President's October 2021 transparency review, the Guidance is not followed in many cases, largely due to the increased burden that the task of proof-reading and anonymisation places on judges.

8. As part of the President's detailed proposals for change, it was indicated that revised guidance should stress that one aim of the publication of judgments is for there to be general access to knowledge of how the court approaches the mainstream of cases, and not just the high profile or the most serious issues. To this end, the President indicated that he would ask *all* judges to publish anonymised versions of at least 10% of their judgments each year. The President did not suggest that this same figure should apply to magistrates, expressing the view that the way in which magistrate decisions may be published requires further consideration.

Focus Groups

9. Judgments are prepared and delivered in very different ways across the levels of judiciary, and by individual judges. As such, the subgroup acknowledged from the outset that a 'one size fits all' approach is unlikely to work. It was decided that a series of focus groups would assist in achieving a better understanding of the volume of judgments prepared by different judges; the typical length and subject matter of judgements; and whether judgments are delivered orally or in writing. It was also thought important to gather judicial views on the types of judgment that might be prioritised for publication in the context of the President's aim to increase public confidence in family justice.

10. Further to an open invitation to all tiers of the judiciary and to Legal Advisers, six focus groups were arranged to take place over May and June 2022. Participants were assured of confidentiality to the extent that individuals would not be identified in any outputs from the sub-group, in order to encourage a free exchange of views. The breakdown of the groups and participants was as follows:
    a. Legal Advisers – four participants.
    b. District Judges and Deputy District Judges – 10 participants over two sessions.
    c. Circuit Judges and Recorders – 10 participants over two sessions.
    d. High Court Judges and Deputy High Court Judges – four participants.

11. The following is a summary of the themes that emerged from the focus groups.

12. Publishing judgments – current practice:
    a. District Judges: Very few District Judges had ever considered publishing a judgment. Disincentives to doing so included the unknown additional workload that publication would create, and the sense that there would be little interest in a decision of a District Judge given their non-binding nature. A concern was raised that important cases *"could get lost amongst a tsunami of published judgments*." One participant was put off by having their low profile compromised in what was a rural area. Only two participants had ever published a judgment. Both described having received

encouragement to do so from judicial colleagues in cases concerning matters of public interest.

b. Circuit Judges: Some Circuit Judges were familiar with 2014 Guidance, but a number were not. Very few of the participants had ever published a judgment, although one routinely published between 10 and 20 each year. There was a sense that the Guidance was honoured in the breach, and it was rarely referred to by parties or advocates. One Circuit Judge had recently published a judgment at the request of an advocate, but the Guidance had not been mentioned. More than one participant described being put off by a lack of clear procedure and the fear of making an error when it came to anonymisation.

c. High Court Judges: The High Court Judges were far more familiar with the 2014 Guidance and all were aware of its terms. One mentioned that even prior to the Guidance, their default position was that a judgment should be published unless there was a reason not to publish. One participant singled out Hague Convention cases as being the only type of judgment that they do not routinely publish due to the fact specific and ex tempore nature of the judgments handed down. Another participant flagged location-specific reasons for not publishing every judgment on the basis that effective anonymisation was unrealistic. Concerns were expressed about the capacity of District Judges and Circuit Judges to manage publication without an increase in resources or a reduction in caseloads.

13. Length and method of judgment delivery:

a. Legal Advisers: All judgments delivered by Magistrates are written. Legal Advisers described using a template pro forma of some description to capture the Magistrates' facts and reasons. This prompts a structure for background, law, evidence, and analysis. The consensus was that a contested final hearing judgment might take between 10 and 30 pages, whereas a consent order would be two pages or less.

b. District Judges: The vast majority of District Judges described giving oral judgments only. Some indicated that they wrote a small proportion of their judgments if time allowed. It was emphasised that the relentless workload and quick decision making required of District Judges simply did not allow for written judgments on a routine basis. One participant prioritised the parties having a decision on the day, stating that if a judgment was to be given with publication in mind, this would require polishing and a process of *"putting me into it"*. The judgment would have to be expressed differently and it would end up taking longer. One participant stated that *"When I read about a proposal of 10% of all judgments being published, I feel a sense of despair, like it's the final thing that might tip us over the edge"*. Others agreed with this sentiment. It is noted that the additional pressures that publication would bring to District Judges were echoed by both Circuit Judges and High Court Judges. In terms of length of judgments, responses varied but a few suggested that a 'typical' oral judgment might run to between 20 and 30 pages once transcribed.

c. Circuit Judges: The prevailing tendency was for more oral than written judgments, although the percentage of written judgments was notably higher than that described by District Judges. One participant indicated that most of their judgments were typed (if not handed down in writing). Another suggested that they delivered written judgments in 60-70% of cases, even though they *"take days and days to write"*. The view of one participant was *"I don't have enough time to write them. The*

short pithy judgments the Court of Appeal want us to do require time we haven't got." Another participant suggested that *"If I wasn't given time to do it properly, I'd probably walk."* The length of judgments varied. One Recorder suggested that one complex six-day hearing recently had resulted in a judgment of 90 pages, whereas another participant suggested 25 pages for a standard five-day welfare final hearing.

d. High Court Judges: Two of the participants indicated a strong preference for ex tempore oral judgments and would only prepare written judgments in cases of particular complexity. One suggested that although the split was probably 60% oral judgments to 40% written judgments, the written judgements took up 80% of their time. However, the other two participants expressed a preference for written judgments after any substantive hearing.

14. Prioritisation of judgment publication: There was a level of consensus across the tiers of judiciary that although the specified cases in the 2014 Guidance provided a logical starting point, providing an accurate reflection of the work undertaken in the Family Court required space for *"ordinary cases featuring ordinary people"*. The opposing view voiced by some was that publishing a large number of similar cases was unlikely to assist anybody. One participant suggested the need for a mechanism to report on the cases that are settled by consent, particularly in cases where there has been judicial led dispute resolution. Another agreed, suggesting that there might be an approach analogous to the personal injury quantum reports that feature in the publication *Kemp and Kemp*, namely a short precis of the facts and the decision made.

15. It was not the purpose of the focus groups to discuss issues that arise in connection with anonymisation. However, it is right to record the high degree of anxiety voiced about anonymisation and the additional pressure that this will put on judges who do not have the administrative support of those sitting at High Court level. The almost universal view was that judges should not be responsible for the anonymisation process, and that this work should run via a separate unit. There was a great deal of mistrust as to whether this would be appropriately funded and supported. In addition, more than one participant also raised concerns about the prospect of effective anonymisation in cases based within small or rural communities.

Discussion – numbers of judgments to be published

16. There appears to be wide support for the principles that underpin the ambitions of the TIG. None of the focus group participants sought to argue against increased transparency in the Family Court. However, there is a palpable anxiety that the TIG's plans for publication are only going to add pressure to an already overwhelmed judiciary. This subgroup considers that the strength of feeling expressed within the focus groups cannot be ignored.

17. At the outset, the aim should be to win both hearts and minds with realistic targets that will allow for the necessary change in culture to embed itself. Pushing too hard on the numbers will only alienate an already sceptical judiciary. The reality is that the extent of the support that will be provided to judges is still extremely uncertain. As it stands, it seems likely that judges will still be required to verify judgments post anonymisation, however it is proposed anonymisation takes place. Delivering written judgments, amending and approving

transcripts, and cross-checking anonymisation are all tasks that require dedicated time and space that does not currently exist.

18. The President has indicated that the 10% figure in the Review was a starting point to be considered further by this subgroup. It is this subgroup's firm view that requiring a fixed percentage of judgments to be published (e.g, 10%) is unworkable.. For one, most judges would find it extremely difficult to determine what this number might be. The number of judgments that a judge delivers varies from month to month, and it would be a laborious task to keep tabs on a figure over the course of a year. Moreover, a meaningful percentage, such as 10%, is likely to provide a number that is higher than many judges, especially District Judges, can reasonably be expected to manage. It is noted that some judges reported delivering more than 150 judgments each year (including interim hearings).

19. The subgroup considered whether there was merit in exploring a 'publication light' model on the basis of the aforementioned analogy with personal injury quantum reports in *Kemp and Kemp.* A precis approach to publication would undoubtedly ease the burden on judges, particularly the District Bench. However, the collective view was that whilst this would increase the number of decisions in the public domain, it would not assist the public to understand and scrutinise the process that led to those decisions being made. It was recognised that was one of the key tenets of the TIG aim to increase public confidence in the Family Court.

20. On balance, it is considered that the best approach is to require judges to publish a fixed number of judgments each year. The number needs to be realistic and tailored to each level of the judiciary. One size will not fit all. The volume and complexity of cases, as well as the availability of time and administrative support, varies from tier to tier.

21. In respect of cases at Magistrates level, the number of judgments will logically have to be attached to individual Legal Advisers rather than individual Lay Justices. It is proposed that Legal Advisers publish a guideline five judgments from cases that they have sat on each year. This number reflects the fact that preparing written judgments will not be a significant deviation from existing practices.

22. It is proposed that District Judges publish a guideline five judgments each year. It is hoped that this figure is realistic and will strike the balance between meaningful change and sustainability.

23. It is proposed that Circuit Judges publish a guideline five to ten judgments each year. Although this number may appear unambitious given the expectations that already exist pursuant to the 2014 Guidance, the reality is that this was not effectively implemented. In respect of embedding a change in practice, the majority will be starting from scratch.

24. The reality is that is that publishing these number of judgments for Legal Advisers, District Judges, and Circuit Judges will provide a very significant increase on the present output.

25. For High Court Judges, it is considered that existing practices ought to be supported. Many judges already publish a relatively high number of judgments pursuant to the 2014 Guidance, and it would plainly be self-defeating to impose a rule that may disincentivise this

continuing. As such, it is proposed that High Court Judges publish a guideline of a minimum of ten judgments each year.

26. The subgroup also considered the approach to be taken for fee-paid judges. The number of days that a fee-paid judge sits each year varies from one judge to the next. Some may only sit 15 days, whilst others will sit far more than this. As such, it was not considered realistic to set a prescriptive guideline number of judgments to be published. Instead, fee-paid judges should be subject to a general expectation that they publish judgments in a number that is relative to their sitting commitments.

27. Plainly any judge can publish more than the guideline numbers if they wish to do so. The intention is to bring judges on board with the necessary change in practices in a way which is sustainable and unlikely to alienate support from the outset. If better than expected funding emerges for effective administrative support (particularly in respect of anonymisation), it would always be possible to review and potentially increase these numbers in the years to come.

28. In terms of a mechanism for monitoring the number of judgments being published by individual judges, the subgroup considers that this will need to be undertaken by leadership judges at a local level.

29. It is important to note that as far as this subgroup is aware, the precise number of judges that undertake children work with a degree of regularity is unknown. It is hoped that the Judicial Office will be able to assist by providing a register of judges holding the necessary tickets. This figure will clearly be important when assessing implementation of the guidance.

Discussion – cases to be prioritised for publication

30. Whilst it is acknowledged that the 2014 Guidance provides a sensible starting point for identifying the types of cases that might be suitable for publication, the subgroup ultimately concluded that a closed list is the wrong approach.

31. In order to provide the public with a realistic representation of the work undertaken in the Family Court, judges need to be given a wide discretion to publish cases that are representative of their individual caseloads. The guidance must have scope to include the routine, including private law disputes that might be described as typical cases on contact and residence. There were mixed feelings amongst focus group participants about the publication of fact-finding and other interim judgments.

32. It is important to note that not all judges undertake both private and public law children work, particularly at Magistrate and District Judge level. Having guidance that is focused on public law work runs the risk of excluding many judges from the process.

33. Accordingly, although a steer on types of cases is likely to be helpful, judges know their caseloads best and ought to be trusted to self-select cases that provide an accurate reflection of the work that they undertake.

Conclusion

34. It is recommended that the draft guidance set out within the attached appendix be incorporated into the wider publication and anonymisation guidance being formulated across the wider Publication and Anonymisation Subgroup.

District Judge Adem Muzaffer

HHJ Madeleine Reardon

Dr. Julie Doughty

Tom Foley

Charles Hale QC

Femi Ogunlende

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Appendix A: Draft Publication Guidance for Judges

Application of Guidance

1. This Guidance applies to all judgments delivered in the Family Court and by High Court Judges exercising the inherent jurisdiction to make orders in respect of children.

Number of judgments to be published

2. It is recognised that the volume and complexity of cases, as well as the availability of time and administrative support, varies throughout the Family Court. Further to research and analysis undertaken by the Transparency Implementation Group, judges are expected to publish anonymised versions of their judgments as follows:
    a. Legal Advisers: a guideline of five judgments from cases that they have sat on each year.
    b. District Judges: a guideline of five judgments each year.
    c. Circuit Judges: a guideline of five to ten judgments each year.
    d. High Court Judges: a guideline of a minimum of ten judgments each year.

3. Fee-paid judges are expected to publish judgments in a number that is relative to their sitting commitments.

Judgments that should be considered for publication

4. Judges should always consider publishing a judgment in any case where:
    a. the judge concludes that publication would be in the public interest for a fact specific reason; and,
    b. a written judgment already exists in publishable form or the judge has already ordered that the judgment be transcribed.

5. Save for the above, there is no requirement for a case to fall within a certain category for it to be deemed suitable for publication. A judge is invited to exercise their discretion to consider as potentially publishable such cases that are representative of the judge's individual caseload.

6. This may include judgments arising from:
    a. contested fact-finding hearings;
    b. final hearings on applications for orders under section 8 of the Children Act 1989;
    c. the making or refusal of an enforcement order under section 11J of the Children Act 1989;
    d. the making or refusal of an order under section 91(14) or section 91A of the Children Act 1989;
    e. the making or refusal of a final care order or supervision order under Part 4 of the Children Act 1989, or any order for the discharge of such order;
    f. the making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order for the discharge of such order;
    g. the making or refusal of any declaration or order authorising a deprivation of liberty, including an order for a secure accommodation order under section 25 of the Children Act 1989;
    h. any application for an order involving the giving or withholding of serious medical treatment;
    i. any application for an order involving a restraint on publication of information relating to the proceedings; and
    j. successful appeals.

7. The question of whether a judgment should be published will be influenced by the options for anonymisation and redaction and the application of the wider legal framework. All parties (including children who are represented) should have the opportunity make representations in advance of a decision being made.