

## **Guidance as to reporting in the family courts.**

### **Response to consultation by Dr Julie Doughty, Cardiff University**

I am a Lecturer in Law at Cardiff University School of Law and Politics. I have been undertaking research on privacy and openness in the family courts since 2004. Relevant publications are listed at the end of this response. I am also a trustee of The Transparency Project, which is also submitting a response. My individual response is separate but complementary.

In 2016-2017, I was principal investigator in a research project funded by the Nuffield Foundation on the implementation of the transparency guidance issued by the previous President, Sir James Munby, in January 2014. Our report, Doughty, Twaite and Magrath: *Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people* is available at <http://orca.cf.ac.uk/99141/>

#### **General observations:**

1. I agree that there is a need for greater clarity and guidance in relation to applications by journalists to vary or lift statutory restrictions, as highlighted in *Re R* [2019] EWCA Civ 482.
2. As submitted by The Transparency Project, it would be helpful if this guidance was explicitly extended to cover legal bloggers.
3. The process as set out at paras 7-16 is succinct and clear (subject to two points made below).
4. The evaluation of the effect of the 2014 guidance, referred to above, found three main reasons inhibiting judges from sending their judgments to BAILII: 1. Concerns that protecting the child's identity cannot be guaranteed 2. Lack of time, especially the time that thorough anonymisation requires, and 3. A perception that routine cases do not merit publication. All of these factors may well come into play when a judge is considering an application from a journalist/blogger. I appreciate that the purpose of the current draft is to introduce a simple process as quickly as possible. However, I hope that the wider consultation that is planned will take account of the views of the judiciary, lawyers, journalists and young people that feature in our report.

## Specific observations:

**Para 4:** the penultimate sentence states:

“Where the court is asked to lift/extend reporting restrictions, a balancing exercise is required between ECHR Articles 6, 8 and 10.”

However, Art 6 may not always be engaged. Other rights such as Art 2 or 3 may be engaged. I suggest that the wording in para 19 of the 2014 guidance is adapted here.

“In deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings.”

I also suggest adding the relevant paragraph (17) from Lord Steyn’s judgment in *Re S* [2004] UKHL 47:

“First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

Adapting the 2014 guidance here would provide for more consistency across family court decision making. Furthermore, ‘Having regard to all the circumstances’ echoes the public interest element in defamation law (section 4(2) Defamation Act 2013). Quoting Lord Steyn’s test connects the guidance to the case law on privacy.

**Para 5:** the Press Association Copy Direct service is now known as the Injunction Alert service at <http://www.medialawyer.press.net/courtapplications/notificationsystem.jsp>

**Para 6:** In view of the dwindling number of family court judgments being published on BAILII, it would be helpful to confirm here that the 2014 guidance is

still in place. This is suggested in paras 8.1 and 11, but it is not clear in para 6 how the three sets of guidance are intended to work together.

**Para 8.1:** states that the Court must consider publication on BAILII in every case, but the 2014 guidance states that only those cases that come within paras 16 and 17 must be considered for publication.

**Para 14:** Further to my suggestion regarding para 4 above, I suggest that this paragraph could be more simply expressed as follows:

“Having considered the relevant evidence and submissions, the court should conduct the balancing exercise as set out in para 4 above.”

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### **Relevant publications:**

Doughty, J., Reed, L. and Magrath, P. 2018. *Transparency in the family courts: publicity and privacy in practice*. Bloomsbury Professional.

Doughty, J., Twaite, A. and Magrath, P. 2017. *Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people*. Nuffield Foundation/Cardiff University.

Doughty, J. and Magrath, P. 2016. Opening up the courts: the Court of Protection transparency pilot. *Communications Law* 21(2), pp. 37-45.

Series, L. Fennell P., Doughty J. and Clements, L. 2015. *Transparency in the Court of Protection: report on a Roundtable*. Project Report. Cardiff University.

Doughty, J. 2013. Confidentiality and the Family Courts: Ethical dilemmas for health and social work practice. In: Priaulx, N. M. and Wrigley, A. eds. *Ethics, Law and Society Vol. 5*. Farnham: Ashgate, pp. 313-328.

Doughty, J. 2010. Opening up the family courts - what happened to children's rights? *Contemporary Issues in Law* 10(1), pp. 50-75.

Doughty, J. 2006. Opening up the family courts: an end to secrecy or to privacy?  
*Seen and Heard* 16(3), pp. 34-39.