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PRESIDENT'S GUIDANCE

GUIDANCE AS TO REPORTING IN THE FAMILY COURTS

On 15 February 2019, the Court of Appeal [Sir Andrew McFarlane P and King LJ] heard the case of *Re R (A Child) (Reporting Restrictions) [2019] EWCA 482 Civ*, which was an appeal brought by a journalist, Ms Louise Tickle, against a Reporting Restrictions Order (RRO). Whilst the substantive outcome of the case was ultimately agreed between the parties, the matter demonstrated that there remained a need for greater clarity and guidance in relation to applications by journalists to vary/lift statutory reporting restrictions; the purpose of this Practice Guidance is to meet that need.

<u>Reporting in the Family Court</u>

1. Family Proceedings are normally held in private, however rule 27.11 of the Family Procedure Rules 2010 ['FPR 2010'] allows duly accredited representatives of news gathering and reporting organisations to attend such hearings, save in certain circumstances where the court may direct that such representatives shall not attend [see r27.11(3)]. Since October 2018, a pilot scheme under Practice Direction 36J, extends r 27.11 to allow "duly authorised lawyers attending for journalistic, research or public legal educational purposes" [in short, "legal bloggers"] to attend such hearings.

2. The right to attend hearings does not, however, grant the right to report on proceedings or publish details of proceedings. Section 12(1) of the Administration of Justice Act 1960 ['AJA 1960'], which applies, provides as follows:

   "(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

   (a) where the proceedings –

   (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989 or the Adoption and Children 2002; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor…"

3. Further, Children Act 1989, s 97(2) ['CA 1989'] provides as follows:

"(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify –

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in such proceedings."

4. AJA 1960, s 12 and CA 1989, s 97(2) establish automatic restrictions on reporting and publication in family cases involving children although it must be noted that, whilst s 12 prohibits publishing even after the conclusion of proceedings, restrictions under s 97(2) cease on the termination of proceedings. In addition, the court has the power to extend reporting restrictions in appropriate cases using its inherent jurisdiction. Both sections also give the court the power to lift the reporting restrictions – see s 12(4) and s 97(4). Where the court is asked to lift/extend reporting restrictions, a balancing exercise is required between ECHR Articles 6, 8 and 10. It is to be noted that an application to lift or to extend the statutory reporting restrictions may lead to the making of a RRO.

5. Guidance as to the procedure for applying for RRO's in the Family Division founded upon ECHR Convention rights can be found within FPR 2010, Practice Direction 12I and a CAFCASS Practice Note: *'Applications for Reporting Restrictions Orders'* [2005] 2 FLR 111. The application must be made in the High Court and notice must be given to the press through the Copy Direct service [Human Rights Act 1998, s 12(2)].

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Publication of judgments

6. In 2014, Sir James Munby P issued Practice Guidance on the publication of judgments: *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230. This has been supplemented by recent Practice Guidance on anonymisation: *Practice Guidance: Family Court – Anonymisation Guidance* https://www.judiciary.uk/publications/practice-guidance-family-court-anonymisation-guidance/

Guidance on the approach to take to applications by journalists to vary or lift automatic reporting restrictions

7. First, an application to vary or lift reporting restrictions can be made by way of an application to the High Court in Form C66, accompanied by a draft Order and served in accordance with the procedure for a RRO. However, such a procedure (which will usually need to be accompanied by payment of the requisite fee) should not be necessary in many cases. It is time-consuming and expensive process and may generate additional unnecessary public expense or delay in a straightforward case. In particular:

   8.1. No formal application is required for the Court to consider whether to publish its judgment which it must consider in every case, whether a request is made or not (*Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230, para 16).

   8.2. Where a journalist or legal blogger has attended a hearing pursuant to FPR, r. 27.11, an application to vary the automatic statutory reporting restrictions can be made orally, whether or not notice has been given in advance to the court that is hearing the case. Although such notice is encouraged it can, for example, be given by way of an email to the court office or the judge's clerk, which has been copied to the parties.

   8.3. Where a journalist or legal blogger wishes to apply for reporting restrictions to be lifted after the hearing is over, this, too, may be

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done without a formal application being made, for example by way of an email to the court or the judge's clerk (copied to the parties). In such cases the court must ensure that all parties are notified of the application and given an opportunity to respond.

8.4. Courts should be astute to assist journalists and legal bloggers seeking to attend a hearing, or to relax reporting restrictions, and should provide them with relevant contact details of the court office, the judge's clerk and the parties where requested, unless there is good reason not to do so.

9. Second, where a journalist or legal blogger has given an indication that they wish to make an application to vary the automatic reporting restrictions, it will often be helpful for the court to adjourn for a short period to allow the parties to discuss the terms of a proposed order. In many, if not most, cases agreement will be possible without the need for any formal application at all: see Bodey J's remarks in *Tickle v North Tyneside BC* [2015] EWHC 2991 at [7]. In all cases it will be helpful for a written copy of the order that is sought to be prepared by the parties, highlighting any wording that is contentious and upon which a ruling is required.

10. Third, where agreement cannot be reached, the journalist or legal blogger should be invited to make oral submissions. The court, and any advocate appearing for parties to the proceedings, should provide assistance in terms of the relevant law and procedure to be followed. Any party opposing the application may then make submissions. The journalist or legal blogger should then be given an opportunity to reply.

11. Fourth, whenever an application to lift reporting restrictions is made the judge should also consider whether a copy of any judgment should be published, applying the *Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230 and the guide to anonymisation set out in the *Practice Guidance* of December 2018.

12. Fifth, in deciding whether to lift automatic reporting restrictions and/or to publish the judgment, the court may need to consider whether, in order to allow such reporting, *additional* reporting restrictions need to be imposed under the inherent

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jurisdiction (for example, anonymising any children and their parents after the conclusion of the proceedings, when CA 1989, s 97(2) no longer applies). In such cases, consideration should be given to transferring the issue for determination by a judge with High Court jurisdiction.

13. Sixth, in sufficiently important cases consideration should be given to the need to adjourn the application to allow further evidence and/or submissions and to provide other media organisations with an opportunity to make representations.

14. Seventh, having considered the relevant evidence and submissions the court should conduct the balancing exercise between privacy and transparency by balancing ECHR, Article 8 and Articles 6 and 10.

15. Eighth, the Court should give a reasoned judgment on the application to vary reporting restrictions and on the question of publication of its judgment(s). While this need not be a 'full detailed and compendious judgment' (*Re C (A Child)* [2015] EWCA Civ 500 at para [23]; *H v A (No. 2)* [2015] EWHC 2630 (Fam) at para [22]), a fuller judgment may be called for where the complexity of the facts and issues warrant it and, in any event, the reasons must be sufficient to meet the requirements of natural justice, namely (*Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, per Thorpe LJ at [11] and see also *Re W* [2014] EWCA Civ 1303 at para [49]):

> '… does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings and then his conclusions.'

16. Finally, in seeking to vary/lift reporting restrictions, the standard approach as to costs in children cases will apply and a journalist should not be at risk of a costs order unless he or she has engaged in reprehensible behaviour or has taken an unreasonable stance.

Sir Andrew McFarlane
President of the Family Division
May 2019

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