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Judgments *for* Children



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A handful of ‘child-friendly’ judgments have emerged in the UK in recent years. This briefing examines why the form and presentation of judicial decisions is an important aspect of children’s access to justice, and why judges have a duty to enhance children’s status and capacities as legal citizens through judgment writing. We identify four potential functions of judgments written for children (communicative, developmental, instructive and legally transformative), and call for greater attention to be paid to how judgments are constructed and conveyed with a view to promoting children’s access to justice.



Introduction

1. It is now well recognised that adaptations need to be made to legal proceedings that involve children, so that their distinct needs and vulnerabilities can be accommodated. This notion is commonly referred to as ‘Child Friendly Justice’.¹ However, in most justice proceedings, efforts to render the process ‘child friendly’ almost entirely focus on the procedures for the treatment of children *pre*-decision, particularly in the context of hearing evidence and enabling children to ‘feel’ part of the proceedings. But there is less focus, and much less clarity and certainty, on how the outcomes of legal proceedings – and in particular, legal judgments – are and should be communicated to the child.
2. This is not to say there have been *no* attempts to communicate judgments to children. In recent years a handful of so-called child-friendly judgments have emerged in the UK that attempt to extend a child-centred approach to the decision-making stage of the legal process.² But these examples are few and far between and risk reinforcing a relatively superficial engagement with child friendly judgments.
3. Our research has therefore sought to undertake a more profound examination of why the form and presentation of judicial-decisions – as much as their substance – act as an important component of children’s access to justice, and the functions that might be served when judges craft their judgments *for* children.

Judicial Decisions Relating to Children: Regulatory Obligations

4. Procedural guidance at international, European and domestic level requires judges to deliver their outcomes in ways children understand. For example, The Council of Europe Guidelines on Child Friendly Justice asserts that ‘Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child’s views and opinions have not been followed.’³ The obligation to ensure that children involved in legal proceedings understand the processes

¹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. (Strasbourg: Council of Europe, 2010).

² For example, see Peter Jackson’s *Re A: Letter to a Young Person* [2017] EWFC 48 and Sheriff Aisha Anwar in *Mr Patrick (a pseudonym) v Mrs Patrick (a pseudonym)* [2017] SC GLA 46.

³ Council of Europe, above n 1, guideline 49. The same point is reiterated in other regional and international guidance. See Stalford and Hollingsworth (2020) at 7-8 for further details.

and outcomes is present also within UK domestic guidance, across different legal contexts (including immigration, family law, court of protection and criminal proceedings).⁴

5. However, despite the overarching expectation in all legal proceedings involving children that the legal outcomes should be communicated *to* the child, the rules regarding what should be communicated, how, and by whom vary significantly depending on the nature and stage of the proceedings. And even the most prescriptive guidance is ambiguous as to the precise role of judges in communicating their decisions to children. Instead, the default position is that other adult proxies (typically the child's legal or welfare representative) will distil and explain the most relevant aspects of court decisions and follow-on options.
6. But such presumptions are problematic. In practice for example, lawyers receive little training on how to adapt their professional approaches to children, and cuts to legal aid constrain the time and motivation to do so. Similar constraints are felt by those providing welfare-type support to children.
7. And even if such issues were resolved to enhance the potential of lawyers and other professionals to communicate decisions to children, there is something unique and fundamental about judges as the protagonists of justice, and about the potentially transformative effects of judges communicating to decisions directly to children, that gives rise – we argue – to a *duty* on judges to assume the primary responsibility for communicating the views of the court to the child.⁵
8. In particular, we suggest that there are four functions that can be achieved when judges write their judgments for children which help to embed a children's rights approach in legal proceedings and better secure access to justice for children.

Judgments for Children: Four Functions

9. Much of the focus on judicial decision-making is on the way judgments are reasoned in substantive terms. But *how* a judgment is written – the tone, language, structure – is equally important. A well-constructed and well-considered judgment can help to shore up for children the rule of law principles of accessibility and open justice, as well as serve more relational and recognitional functions that shapes the individual's experience of justice in a broader sense, for example by promoting procedural and therapeutic justice. To achieve these functions, judgments must be tailored to particular individuals and groups, depending on their age, capacities and experiences.
10. This requires a more radical, functional shift in judges' approaches to crafting their judgments. We suggest that for cases involving children this might be assisted by understanding

⁴ For details, see Stalford and Hollingsworth (2020).

⁵ See Stalford and Hollingsworth (2020) for further discussion of the potential ethical, practical, professional, and legal objections to writing judgments for children.

judgments as performing four functions in particular: the communicative, the instructive; the developmental; and the legally transformative.

- i. **Communicative function:** At a basic level, ‘judgments *for* children’ ensure that the substance and implications of the decision are conveyed to the child in the clearest of terms. It ensures children can understand the decision, comply with it, and potentially mount an appeal against it. This helps fulfil the requirements of Article 6 ECHR (see for example *V v United Kingdom* (1999) 30 EHRR 121 and *SC v United Kingdom* (2005) 40 EHRR 10) and is essential to rule of law principles for children. But it can go beyond this: through the messages it conveys, implicitly and explicitly, the sentence can be pivotal in communicating directly to the child and contributing to a sense of **procedural justice**: it can demonstrate that the judge was neutral, that the child’s voice has been heard, and that s/he has been treated with dignity and respect. This can increase the child’s trust in the system, and the legitimacy of the decision in their eyes; which in turn helps the child to accept the legal outcome.
- ii. **Instructive function:** Where they are published, judgments can help to educate the broader public – including other children - about the law, and about their rights entitlement in particular. For example, there is enormous instructive potential in the landmark children’s rights decision in *Gillick v West Norfolk and Wisbech Health Authority* ([1986] AC 112), but the complexity of the reasoning and concepts and language that were used are likely to mean nothing to most children. In other contexts, for example the criminal or immigration law, through their judgments, judges can debunk the myths and damaging social constructions that might surround certain children (for example those who offend or who are seeking asylum), ensuring that such children are not ostracised or demonised, and are instead treated and regarded as belonging within our society. We argue therefore, that (especially) in key decisions on children’s rights, the obligation on judges for transparency and clarity goes beyond the child at the centre of the proceedings; it is also about ensuring that judgments, as far as possible, are comprehensible to children as a wider community of legal citizens affected by the decision. This should include a commitment to developing ‘**children’s jurisprudence**’.
- iii. **Developmental function:** Exposure to positive, rights-affirming legal procedures as a child can have a long-term impact, helping to ensure not only acceptance and reconciliation with the specific decision in question but also to contribute to the child’s longer-term overall development, including as a legal citizen. Children’s encounters with the law and with the professionals – including judges - with whom they interact thus become a memorable, potentially formative, experience in and of itself. It provides an opportunity for the law – and the judge in particular as the personification of the legal system – to contribute to the child’s development and future wellbeing as a legal citizen (understanding and respecting the law, but also

having the framework to identify injustice as well). It also helps to develop the child's 'attitudes to self' – self-worth, self-trust, and self-esteem - thus contributing to the child's developing autonomy.

iv. **Legally transformation function:** Form and substance are two sides of the same coin and judgments written *for* children are more likely to pass muster as a children's rights judgment per se in at least two ways. First, it can prompt a shift in perspective and the judge's approach to the actual adjudication. It requires the judge to consider the case from the child's perspective and is likely to encourage (for example) a much deeper engagement with the child's rights, interests and perspectives. For example, it can force the judge to explain how the child's rights and interests have been assessed in light of the other parties involved in the case, or they might have to explain how laws and rights primarily designed with adults in mind can and should be applied to the child. In doing so, judges might be more inclined to draw some interpretative inspiration on the provisions and principles of the UNCRC. Or, for example in the criminal context, if a judge is trying to communicate the sentence to a child with severe communication difficulties, this may prompt the judge to consider further the child's culpability where the child's limited capacity becomes more apparent. Second, a judgment written *for* the child demands more meaningful participation during the proceedings so that the judge can reflect this back to the child and demonstrate that s/he has fully considered all the relevant factors including the child's own views. It therefore supports the participatory approach advocated above.

11. We argue that having a clearer appreciation of these functions would enable judges to move beyond a superficial, sentimentalised notion of 'child friendly judgments' and discharge their duties to children in a more authentic and far-reaching way. Furthermore, we suggest this approach can and should be adopted in *any* legal proceedings and for *any* child (though the functions might not be achievable with equal measures in all contexts or for all children); but it is especially urgent in the legal contexts where children are more likely to come into contact - family, immigration and criminal law.⁶

Recommendations

12. We would not wish to be prescriptive in what judgments that fulfil the functions above should look like; this will vary in each case depending on the characteristics of the individual child and the complexity and circumstances of the case. Furthermore, our understanding of how

⁶ On the applicability of these principles to the sentencing context, and on children's views about sentencing remarks *for* children, see Kathryn Hollingsworth, 'Sentencing Remarks *for* Children: A New Approach' (2019) Newcastle Law School Research Briefing No.14: <https://www.ncl.ac.uk/media/wwwnclacuk/newcastleuniversitylawschool/files/JANUARY%202020%20Research%20briefing%20sentencing.pdf>.

these functions can be achieved in practice must be informed by empirical work informed by the views and experiences of children themselves.⁷

13. Judges can, however, be guided by four principles:

- ❖ **Clarity:** the judgment should be accessible, and language should be tailored to suit the language level of the child you are addressing; obtuse phrases and emotive language should be avoided and technical and legal terms explained;
- ❖ **Caring:** judges should employ empathy and give explicit recognition to the child's experiences;
- ❖ **Integrity:** judges should be mindful of tone and the messages conveyed through the sentence whilst being legally robust;
- ❖ **Informed:** it should be informed by children's rights principles (as reflected in law and guidance), by full information about the child's welfare, and by the child's own experiences.

More specifically, judges can:

- ❖ Gather as much information about the child as possible. For example, in the criminal court context, this might be done by addressing questions through the YOT if you feel the pre-sentence report does not address this fully, or questions to the child in court (ensuring they are supported to do so) by providing some questions to counsel before the sentence hearing;
- ❖ Use the child's first name or pseudonym, not an initial (this personifies the child); ensure every word of the sentence is understandable for that particular child (remember that even common words used in legal decisions (welfare, consent, culpability, for example) are not understood by most children); avoid obtuse phrases and idioms;
- ❖ Explain the basis of the decision and the reasons as simply as possible, using a clear structure and short paragraphs and sentences;
- ❖ Ensure that the judgment shows the child that you have listened to them (by reflecting back what they have told you) and that you understand any difficulties or challenges they have faced, so that the child feels valued and respected;
- ❖ Consider whether alternative means of communicating with the child would be helpful – e.g. through pictorial representations or video (and who might support judges to do this);
- ❖ Provide the child with a written version of the judgment to take away to digest later with their parents or guardian, or social worker.

⁷ For example, we have undertaken a small pilot project that explores with children their experiences of sentencing and their views of a sample 'sentence for a child'. See the reference above in n 6.

We would be delighted to hear from you if you have any feedback on this briefing or if you would like to find out more the project. Please contact:

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Stalford H, Hollingsworth K and Gilmore S (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017, Oxford: Hart Publishing).



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