

ICLR

Publication of listed judgments: towards a new benchmark of digital open justice

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Executive summary

In its first three full months of operation, the new Find Case Law database operated by The National Archives struggled to meet its aim of publishing all handed down judgments from the senior courts of England and Wales on the day of delivery. But that was mainly because they were not all being sent from the courts.

The rate at which judgments listed in the Daily Cause List were published varied from court to court, but on average about 62% were published on the day of judgment, with that figure increasing to just over 74% when including those published late. However, that still left over a quarter of the listed cases not being published at all.

The National Archives launched its database in mid-April 2022, under a new judgment publication system mandated by the Ministry of Justice. ICLR has been systematically monitoring the publication of listed cases under this new system from the beginning of May. This report is based on its performance from May until the end of the Trinity law term in July.

Over that period, the appeal courts were the most efficient at getting substantial numbers of listed judgment published – with the Court of Appeal, Civil Division, sending more than 95% each month, and the Criminal Division 88%. Next most efficient were various sub-divisions of the Queen’s Bench Division, such as the Technology and Construction Court with 84%, and the London Administrative Court with 82%.

Some courts managed even higher rates simply by virtue of having very few cases: of the eight cases listed for judgment in the Patents Court over the three months, 100% were published, along with another 10 unlisted cases. Prompt publication of a single case listed in the Admiralty Court also achieved the 100% score.

The least productive was the Property, Trusts and Probate list, with an average rate of around 46%, and cases in the Family Division and Court of Protection with around 55% of listed cases being published. While there might be good reasons for non-publication of cases involving confidential matters affecting children and vulnerable parties, particularly since most of them would have been heard in private, the lack of publication in other courts raises questions about transparency and open justice.

Some of the listed courts published no judgments at all. Nothing was published from the Central London County Court, for example, yet the fact that its judgments are listed in the Daily Cause List suggests they must be substantial enough to reserve and deliver in writing. While technically there may not be any legal precedents to report, there is still a transparency gap there waiting to be filled.

Most courts appear to have published more in July than previously. While there were delays in publishing around 17% of the listed cases, it is of far more concern that so many judgments were not published at all.

A large number of the published cases were unlisted – i.e. they had not been listed for judgment in the Daily Cause List. That might be because the court was not one of those listed there, or that the judgment in a listed case was given at the hearing and not reserved. But that raises a question about the fate of those judgments that are neither listed nor published. It is much harder to follow up what happened in such a case. We currently have no way of determining how many such missing judgments there might be.

Overall, there might be a number of reasons why judgments did not appear as quickly as intended, or failed to appear at all. Ultimately, The National Archives are only part of the overall system, and a lot also depends on the courts and the judiciary. Wherever they arise, however, these issues need to be resolved if the system is to achieve its potential of a truly comprehensive and efficient system of open public data.

PART ONE

Introduction

The publication of judgments is a cornerstone of open justice. For significant cases, which may change or clarify the law, it is also essential to the proper functioning of the doctrine of precedent in our common law system.

In the past, the mechanisms for achieving such publication were often haphazard and contingent. It was to address these problems that ICLR was set up in 1865 with the object of *“preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of Reports of Judicial Decisions of the Superior and Appellate Courts in England and Wales.”* (Memorandum and Articles of Association, 1870)

More recently, the development of information technology has not only made it easy to write and distribute judgments in digital form, but has in effect established a baseline expectation of online publication as a standard component of open justice.

While the practical and cost limitations of print publication may once have justified selecting for preservation only those cases meriting publication as precedents, the limitless possibilities of online publication have enabled the establishment of online platforms such as BAILII (the British and Irish Legal Information Institute) offering free access to primary legal materials.

In these circumstances, anything less than automatic and free publication of all judgments could potentially now be viewed as a derogation from open justice, requiring to be justified either on the usual grounds of confidentiality, national security, the interests of vulnerable parties, or to protect the subject matter of the dispute; or by reference to practical considerations of cost and efficiency.

The establishment in April this year of the new national database of judgments for England and Wales, operated by The National Archives (TNA) in conjunction with its existing statutory obligation to maintain a nation archive of court documents, has inevitably reinforced such an expectation. Although it will not replace BAILII, or ICLR, or any of the commercial legal publishers of case law, TNA has now begun to operate as an official distribution hub for judgments of the senior courts and tribunals of England and Wales, with a power to licence onward distribution to and publication by others, as well as providing access through its own online search form.

The TNA's Find Case Law (FCL) database¹ (<https://caselaw.nationalarchives.gov.uk/>) can therefore be regarded as one of the key components of the information ecosystem of the courts.

Another key component of this ecosystem is the Daily Cause List, published by HM Courts and Tribunals Service (HMTCS), which provides information about hearings in the senior courts and tribunals (mainly in London). This includes information about the delivery of judgment in cases where it has been reserved and will, therefore, usually be delivered in written form.

¹ There remains some uncertainty as to what its official title is. Most judgments refer on their title page to The National Archives, eg in the text of rubrics about the manner and time of publication; the government's own announcements refer to the Find Case Law service, which is how it appears on its own website; but the email address and URL of the website use the single word Caselaw. By way of initialism, TNA seems more popular and obvious than FCL, but it remains to be seen what will stick with popular usage.

While not every judgment delivered in writing is necessarily listed in advance, it is still possible by checking the Daily Cause List each day to ascertain where, when and how judgments on a particular day will be disseminated by the courts, and to check that expectation against the actual publication of judgments on FCL.

This report

Our primary purpose in this report has therefore been to measure the performance of TNA in publishing the judgments which it can be expected to publish, both in terms of volume and speed. The report covers the first three full months of operation of the Find Case Law platform, i.e. May, June and July 2022.

A secondary purpose has been to measure the reliability of the Daily Cause List in providing accurate information about judgments being given by the senior courts and tribunals.

However, the Cause List is limited in its ambit and does not cover all of the courts whose judgments may be published by TNA and others. Other courts may be listed on CourtServe (<https://www.courtserve.net/>), which covers the Crown Court, county courts and magistrates' courts around the country; or on separate pages on the Gov.uk domain; but monitoring of all those listings for occasional notices of judgment is beyond the resources of this project.)

It is also important to note that there remain a large number of judgments which are not listed anywhere, because they were given extempore (delivered orally at the time of the hearing) and have not been transcribed. Even when transcribed they may not have been sent for publication. There is currently no system for achieving the routine transcription of extempore judgments, even in the most senior courts. It was not part of the initial plan drawn up by the Ministry of Justice and Judiciary for the establishment of the TNA's national judgments database. It may, perhaps, be addressed in due course. But in the meantime, as the House of Commons Justice Committee noted in its recent report **Open Justice: court reporting in the digital age** (HC 339)², the publication of extempore judgments remains largely the preserve of the commercial publishers who pay for their transcription.

Subject to that caveat, the benchmark expectation must be that any judgment listed for delivery in the Daily Cause List should, eventually, appear on FCL – unless its exclusion can be justified on one of the accepted grounds for derogation from open

² <https://committees.parliament.uk/publications/31426/documents/176229/default/>

justice. This report therefore examines how well that process was managed in the new system's first three months of operation.

ICLR's role

ICLR has welcomed the establishment of the national database of judgments managed by TNA, from whose statute law database (www.legislation.gov.uk) ICLR already sources the primary and secondary legislation which can be searched and viewed on its platform, and from whom it is now licensed to retrieve and republish all the judgments of the courts and tribunals of England and Wales.

The practical effect of this will be that anyone using the ICLR.4 platform will be able to find and view any judgment published on FCL, in addition to all ICLR's law reports published since 1865 and a host of other material, such as all the published judgments of the European Court of Justice. ICLR's online citator also includes many cases from other jurisdictions, such as the Session Cases from Scotland, and recent judgments from Ireland, Northern Ireland, and the Channel Islands, with links to the content itself on BAILII or elsewhere.

ICLR's intention is to support and expand public and professional access to case law and related legal information. Most of it is provided free on ICLR.4: you only need a subscription to view our full text law reports and to use our premium AI-driven case search tool, Case Genie.

Methodology

The data gathering process consisted of, on a daily basis, logging all of the cases listed for judgment in the Daily Cause List in a spreadsheet, then later checking The National Archives to see how many of these cases went on to be published, and how quickly (as well as any other discrepancies). In this way, both the Daily Cause List and TNA could be tested; cases that did not appear on FCL could be marked out and Unlisted cases (published cases that did not first appear in the Daily Cause List) could also be marked down separately.

All of these recorded cases were then grouped together by month and placed into 4 different categories:

1. **Published** Cases (those that were listed in the Cause List, then appeared on TNA the same day),
2. **Late** Cases (those that appeared on TNA at a later date),
3. **Not Published** (not appearing on TNA at all); and

4. **Unlisted** cases (published on TNA without being listed in the Daily Cause List).

Doing this enabled us to have a clear picture as to what happened to cases that appeared in the Cause List, and how efficiently they were published, as well as determining how many additional (Unlisted) cases were appearing there also.

The Live list Cases

Occasionally, cases that were not included in the archived Cause Lists sent out via email would appear in the live version of the Cause List – the page on the gov.uk website one can visit during the day. These cases, obtained using the Wayback Machine³, have been included in the overall data as they are still technically on the list.

Unfortunately, due to the Cause List being updated for the next day at often random intervals, it may not have been possible to capture every single instance of a judgment appearing on the live Cause List. The cut off point for retrieving this data was thus 12pm, as this was the latest time one could reliably see only cases from the correct day on the list.

Other observations

At the time of its launch, the new publication regime mandated by the Ministry of Justice replaced a system that had been working well for nearly two decades providing rapid and comprehensive publication. Inevitably there was some frustration when, initially at least, the volume and rate of publication dramatically fell. It took time for the new system to bed in.

Under the old regime, judges or their clerks simply emailed judgments (or indeed revisions to judgments) to a mailing list of recipients. First among these was BAILII, who had developed a rapid and efficient conversion process that enabled the judgment and a downloadable PDF or RTF version to be uploaded within hours, if not minutes. Other recipients included press and law reporters (including ICLR) and commercial legal publishers.

Under the new regime, judges were told to stop sending their judgments to BAILII and instead to send them to TNA. Instead of using email, the new system requires judges or their clerks to upload the judgment via a portal created by TNA for this

³ https://web.archive.org/web/20220000000000*/https://www.gov.uk/government/publications/royal-courts-of-justice-cause-list/royal-courts-of-justice-daily-cause-list

purpose. There have been some training or IT issues associated with the use of this portal, which could explain the delay or absence of publication.

Moreover, judgments can only be uploaded if they already have a neutral citation number. In some cases, notably for non High Court judges in the Family Court, existing practice guidance prevented them being assigned official neutral citations by the Court Recording and Transcription Unit (CRATU). Under the previous regime, BAILII simply assigned an unofficial neutral citation to such cases, and published them anyway. But TNA could not or would not undertake that role. The matter was eventually resolved by changing the rules so that *any* judgment made available for publication could be assigned a neutral citation, regardless of the status of the judge. Until this happened there was a delay of some weeks before any Family Court judgment by a non High Court judge could be released via the new service. This frustrated the aims of increasing family case transparency through publication of judgments, as expected under existing judicial guidance from the President of the Family Division.

TNA have explained that they employ a number of editors, not to edit the content provided by judges, but simply to check for any possible publication problems, such as failures of anonymisation or redaction, or accidental breaches of reporting restrictions. We have been told judgments on arrival are placed in one of three categories. If low risk, they are published almost immediately. If of medium or high risk, they need to be checked. High risk cases may require referral back to the judge. (Under the previous regime, BAILII had neither the staff nor the mandate to check judgments, relying entirely on judges to consider any removal or updating of content, for example if inadequately anonymised or redacted.)

There have been instances where judgments have simply not been sent to TNA, yet they have appeared elsewhere. This may be because a judgment handed down or circulated by email to the legal representatives has been passed on to another person, such as a legal commentator, or a firm's or chambers' website, and has become available to public view without having been officially published by TNA. Or the Judiciary website may have published a judgment considered to be of media or public interest, but the case has not also been sent to TNA. Some judges may still be sending judgments direct to BAILII. But there have equally been instances where the judgment has simply got lost or held up somewhere in the system.

So there may be a number of reasons why judgments have not appeared as quickly as before or have failed to appear at all. Such problems need to be resolved if the new system is to achieve its full potential of a truly comprehensive and efficient system of open public data.

PART TWO

The data

Month	Published	Late	Not Published	Total	% Published	% Late	Unlisted
May	121	3	51	175	69%	2%	228
June	98	30	44	172	57%	17%	174
July	138	39	54	231	60%	17%	234

Monthly publication rates varied (from 57% to 69%) but so did the number of cases listed. What this table also shows is that the number of unlisted cases that were published was far greater than those included in the Daily Cause List. Nevertheless, of those listed, a substantial proportion were not published, which is a matter of concern.

The following sections provide an overview for each of the three months, May, June, and July.

In **Appendix 1** we include some charts showing the performance over the whole period of the main individual courts or divisions.

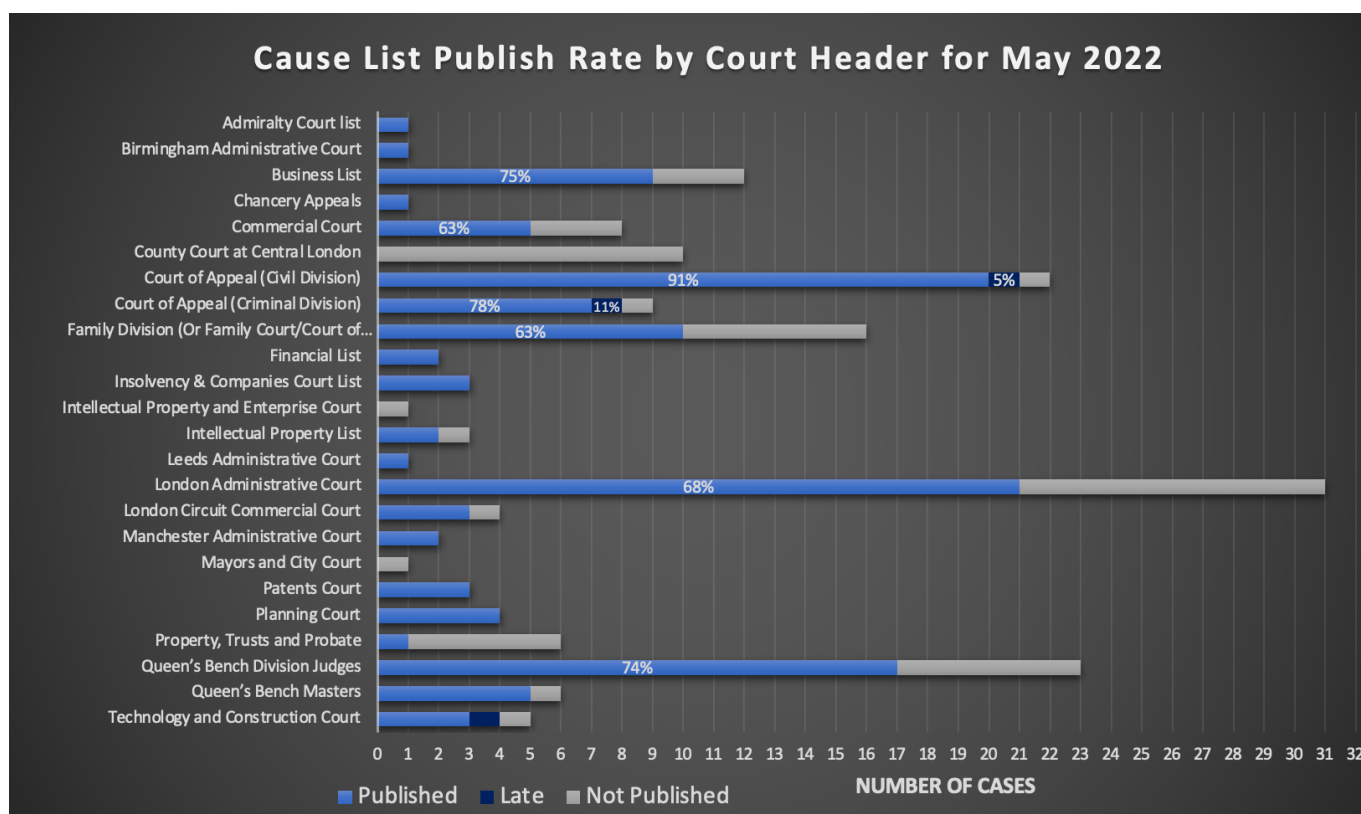
Finally, in **Appendix 2**, we reproduce the full publication tables for each of the courts whose judgments were ultimately listed and/or published, using the court header descriptions in the Daily Cause List where available.

Overall picture

Comparing the performance across the three months, while the rate of publication (including late publication) seems to have been around 74%, the volume of publication, having dipped in June, increased again fairly dramatically (up by almost 35%) in July. This suggests that the capacity and efficiency of publication were steadily improving, though more months' data would be needed to confirm a trend.

We have continued to monitor both the reliability of the Daily Cause List and the speed of publication of judgments over the rest of the year and will provide an update to this report in due course.

May 2022



In total there were **403** recorded cases (listed for or given as a judgment) for May 2022. Of these cases, **175** appeared on the Cause List and **228** were unlisted. Of the 175 cases that appeared on the cause list, **124** appeared on the National Archives the same day or later, giving a **71%** overall publish rate.

However, **51** listed judgments never appeared on The National Archives this month.

Because the data for May was compiled later and over a longer period, and there were problems obtaining copies of original mailed out version of the Daily Cause List (some archived snapshots were obtained using the Wayback Machine) it has not been possible to provide accurate data on how many cases were published late (ie after the date of judgment). Most late cases for May are therefore embedded in the figures for published cases. Judgments published by The National Archives do not explicitly show the date or time of publication, or (unlike on BAILII) whether the version displayed has been updated.

What the data for May shows is that the Appeal Courts were the most efficient at having cases published, though many were unlisted. Queen's Bench Division Judges also had a high proportion of unlisted cases published, compared to the

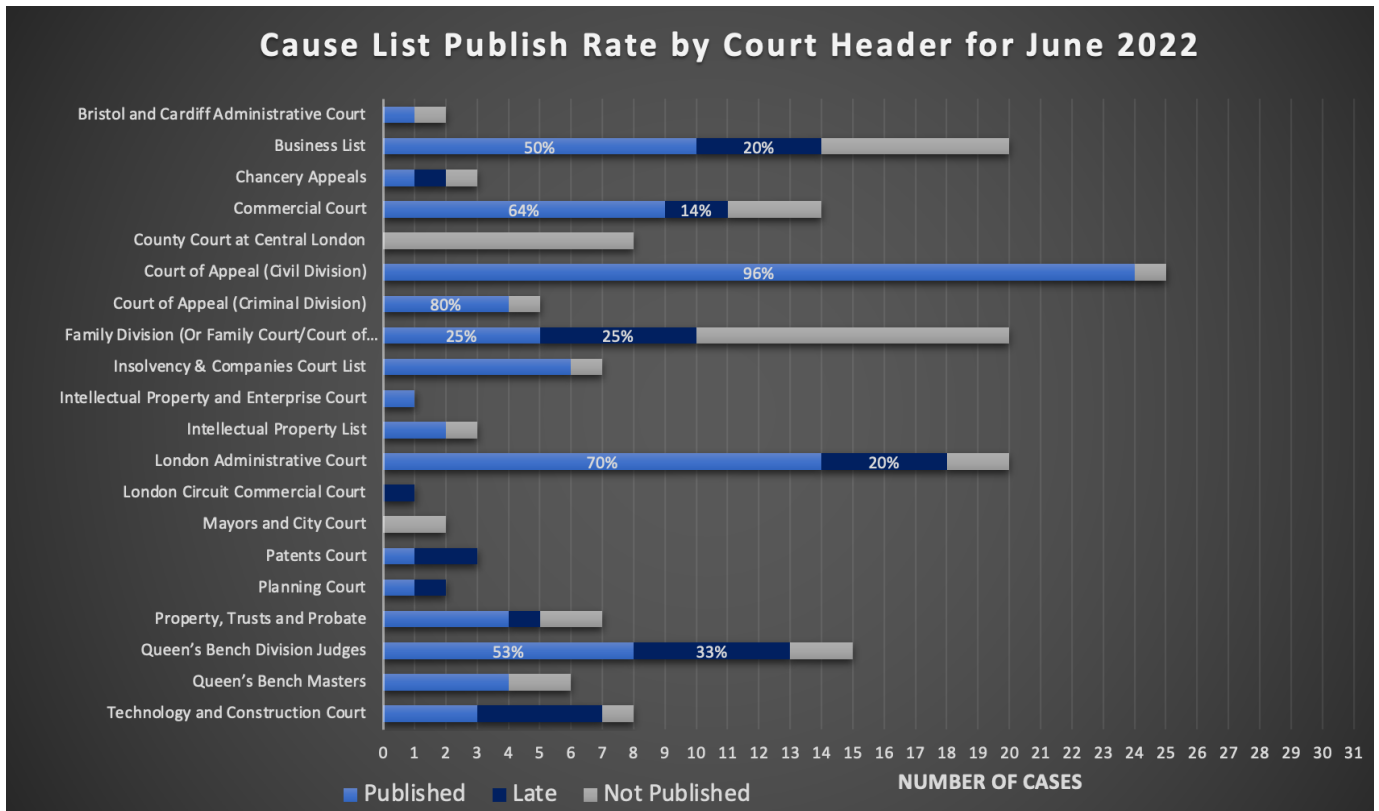
other months, as did the Insolvency & Companies Court, while the Commercial Court had a lot fewer cases overall compared to the average month.

Smaller courts like the Admiralty court, Patents court, Planning court, and the Insolvency and Companies court achieved 100% publication rate largely by virtue of the very small numbers of cases involved.

Compared to June and July, we can see that the London Administrative Court had a smaller proportion of published cases than usual (around a third of those listed were unpublished). However the Family Division had a rather higher proportion published, over 60%, suggesting that these cases are making it to the National Archives at a much slower rate over time (possibly because of the checking process).

Overall, even allowing for the extra time to record their appearance, for most courts the publish rates remained similar to those in other months.

June 2022

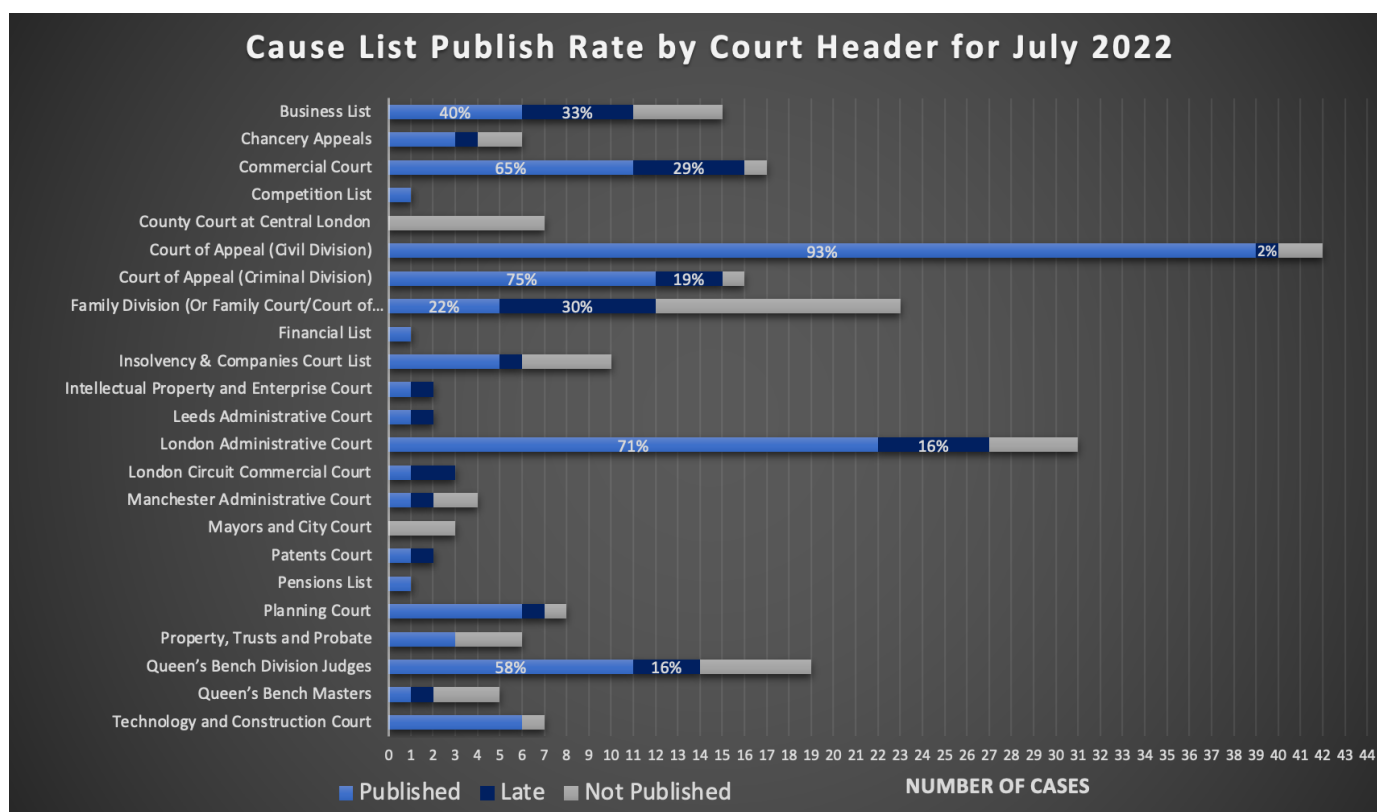


In total there were **346** recorded cases (listed for or given as a judgment) for June 2022. Of these cases, **172** appeared on the Cause List and **174** were unlisted. Of the 172 cases that appeared on the cause list, **98** appeared on the National Archives the same day giving a **57%** overall publish rate. However this number increases to **128** if we included Late cases, raising this to a **74%** publish rate.

Overall, **44** cases never appeared on the National Archives.

The Court of Appeal (Civil Division) had by far the best publish rate relative to the overall number of cases during the month. London Administrative Court also did reasonably well, whereas the Family Division only managed to publish half of its listed cases, and none of those listed in the County Court made it onto Find Case Law (although arguably they are not part of its brief). Once again, the smaller lists, such as those dealing with intellectual property or planning, had proportionately greater rates of publication.

July 2022



In total there were **465** recorded cases (listed for or given as a judgment) for July 2022 (up by **119** cases compared to June). Of these cases, **231** appeared on the Cause List (up by **59** cases) and **234** were unlisted (up by **60** cases). Of the 231 cases that appeared on the cause list, **138** appeared on Find Case Law the same day giving a **60%** overall publish rate (up by 3% compared to June). This number increases to **177** if we include Late cases, raising this to a **77%** publish rate (also up by 3%).

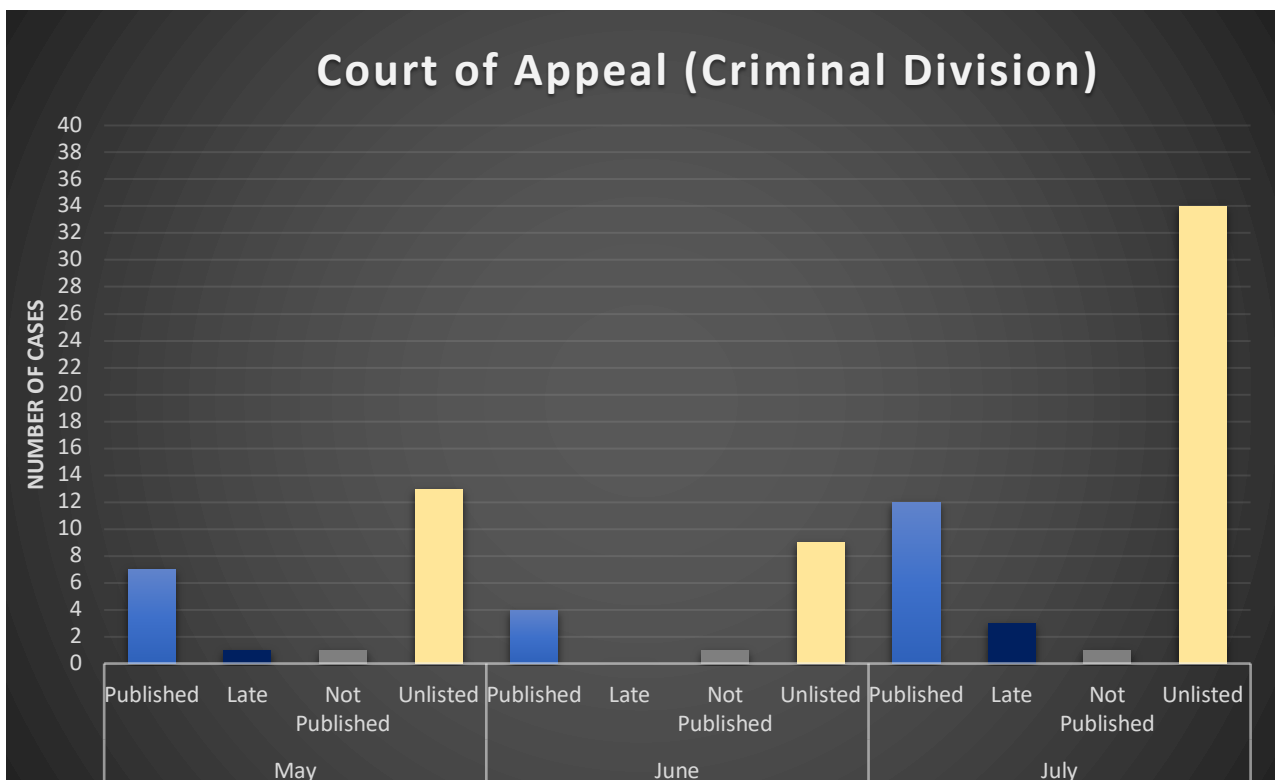
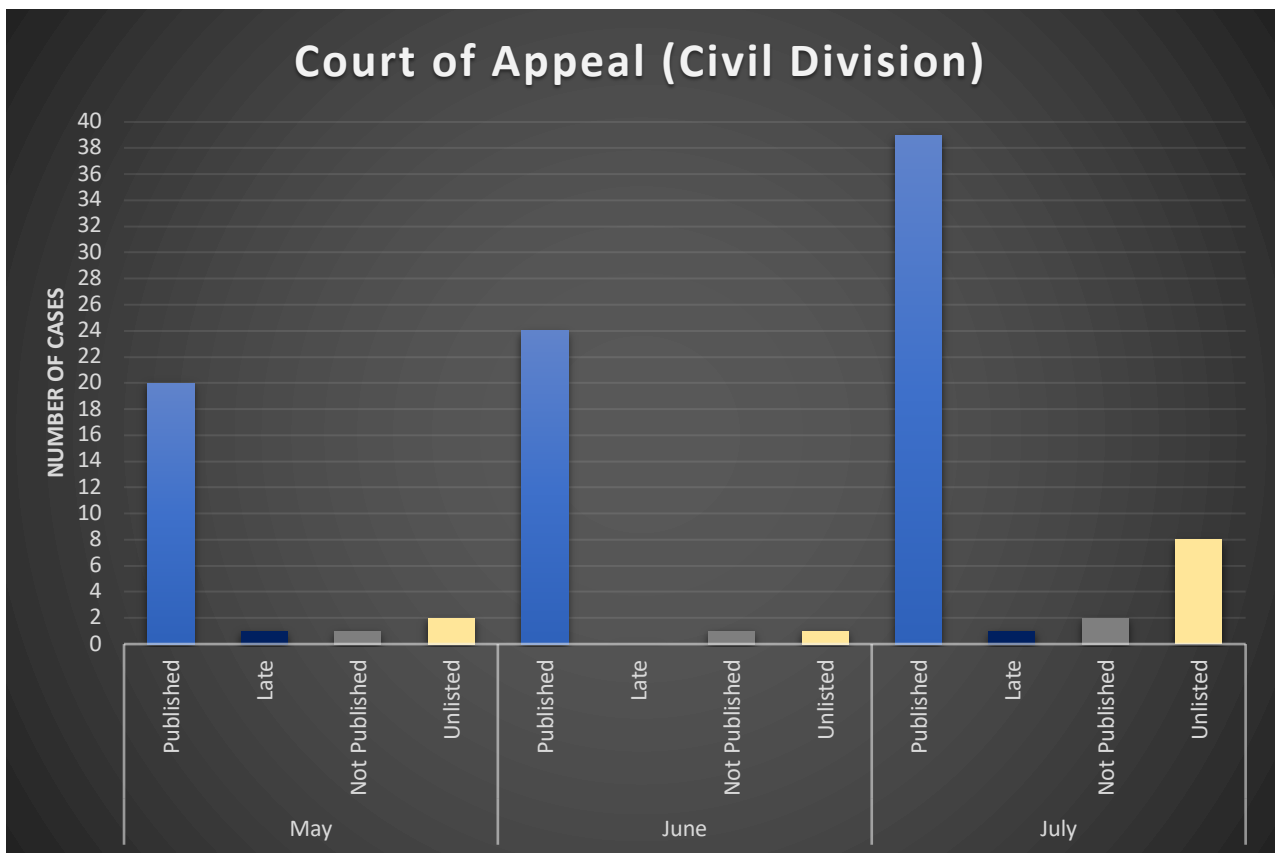
Overall, **54** cases never appeared on the National Archives this month.

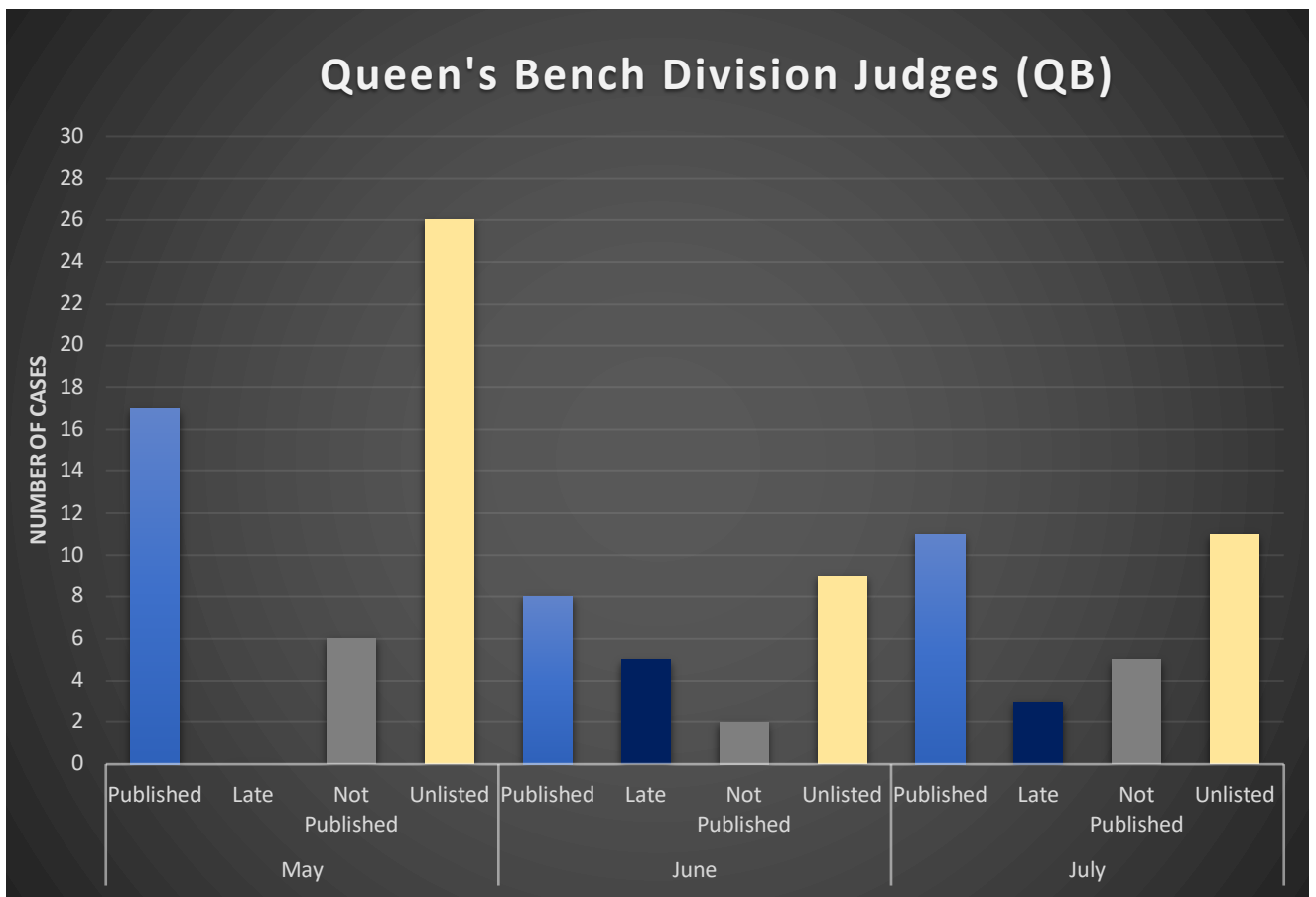
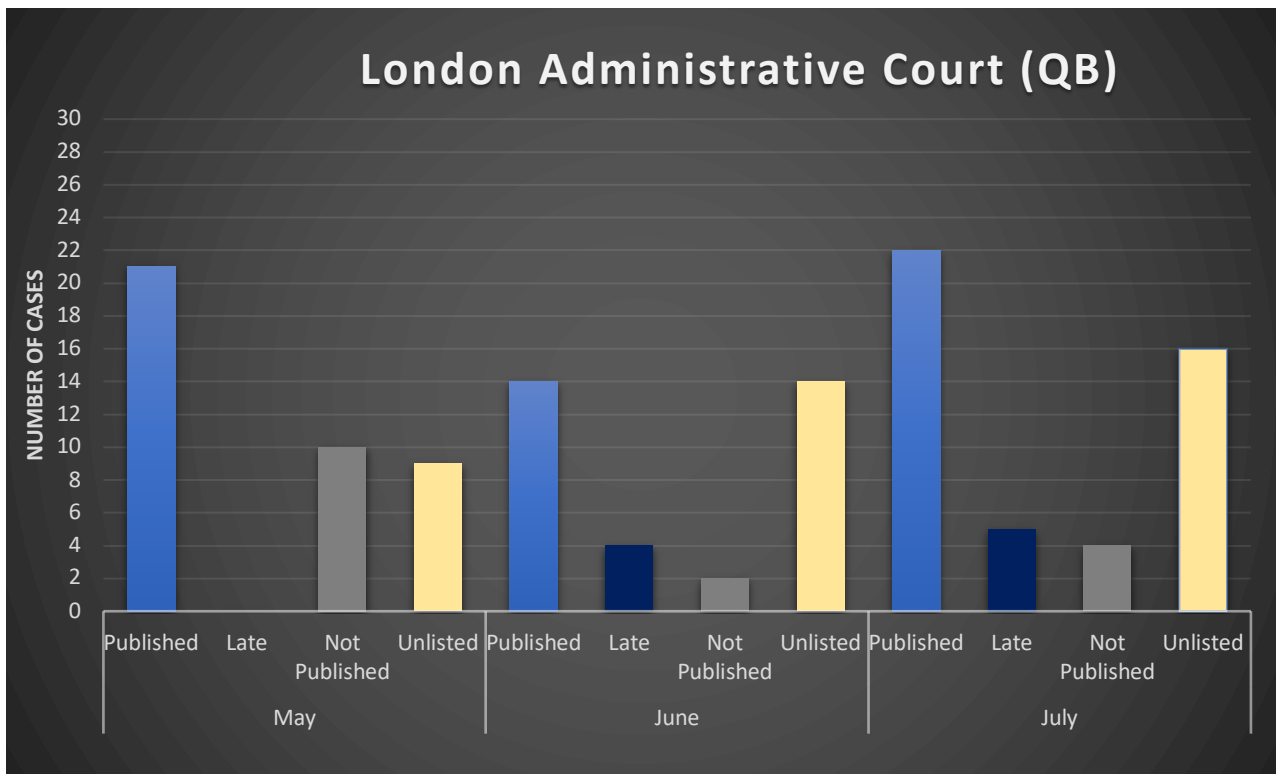
Compared to June, the results across the board were very similar. Once again, the Appeal Courts were again the most efficient at having cases published. Most other courts performed very similarly to the previous month, despite a larger overall number of cases.

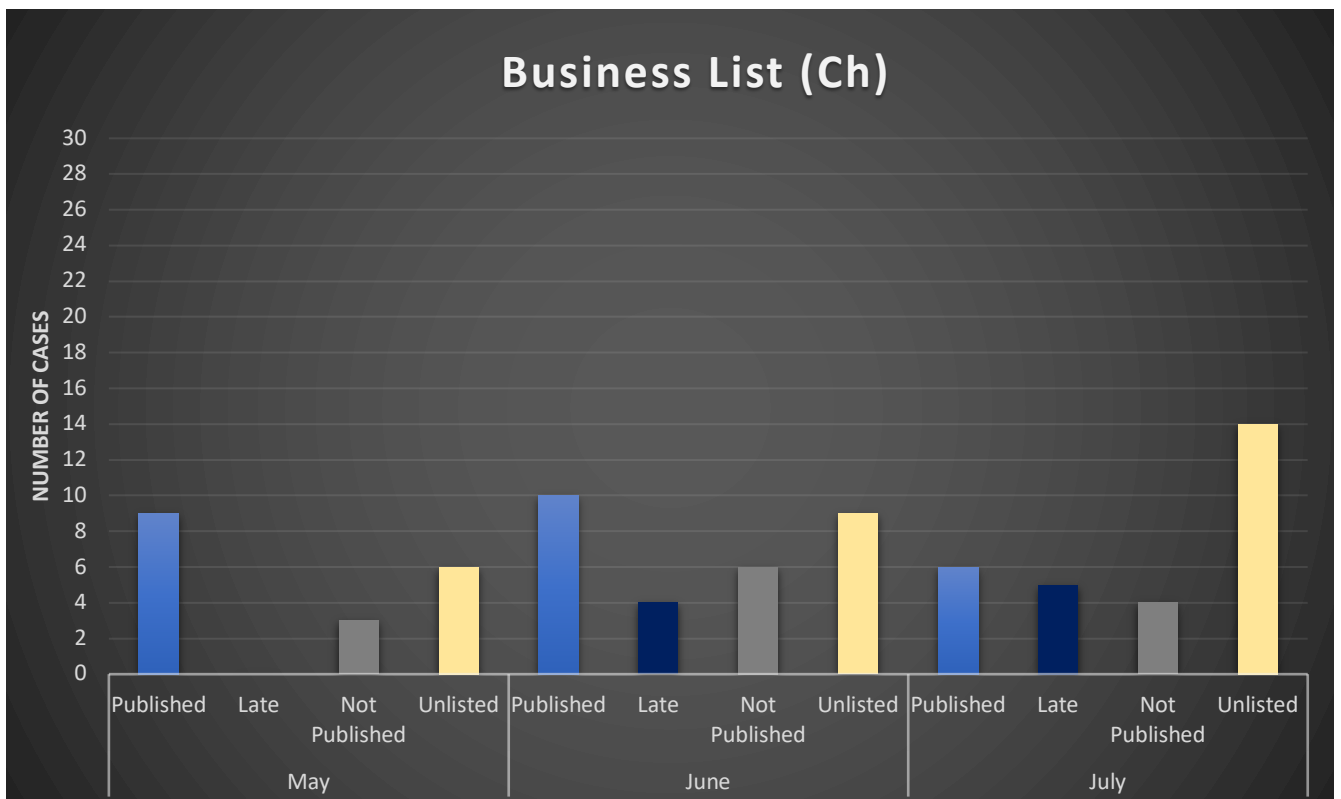
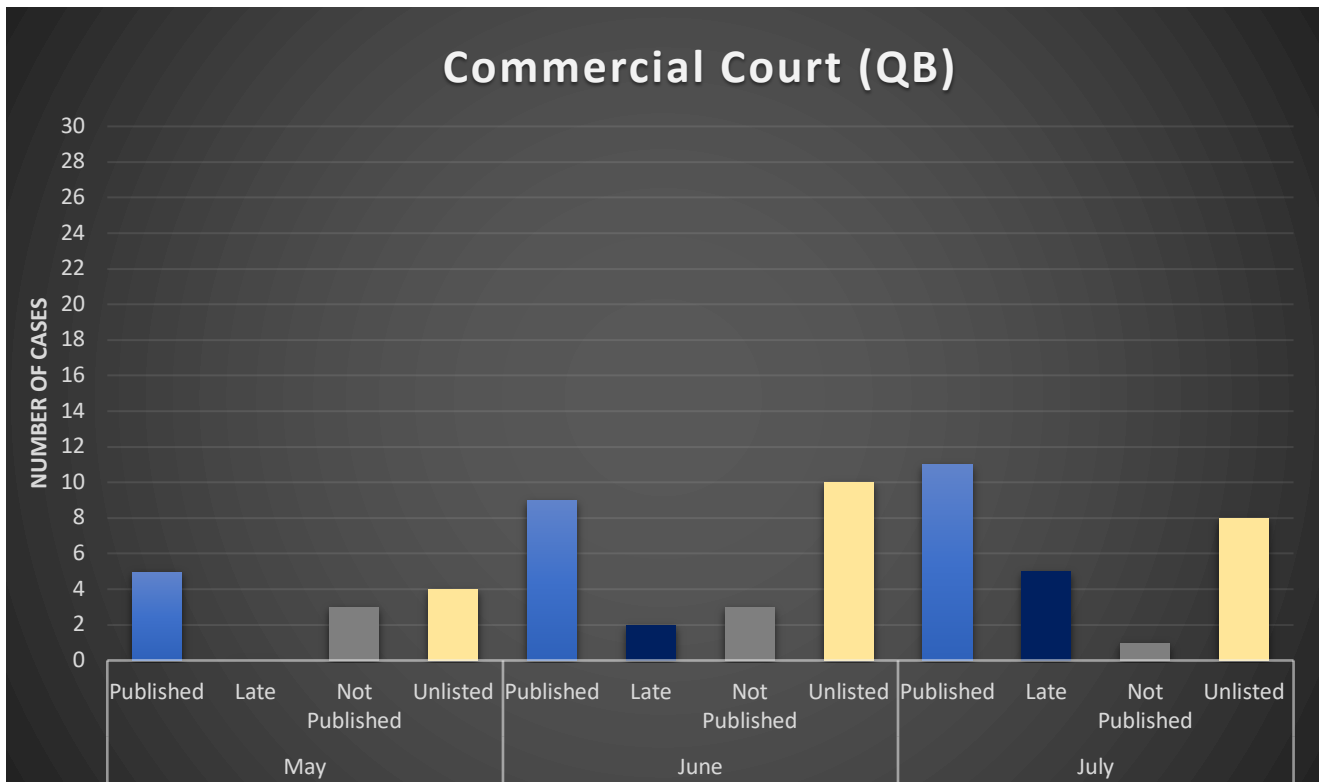
The overall higher same-day publish rate is explained in part by the existence of other courts that didn't appear in June but that had only a handful of cases listed for judgment – all of which being published, such as the Competition List.

APPENDIX 1

Charts showing key court performance across the period.







APPENDIX 2

Publication figures by court header.

May 2022

COURT HEADER	Published	Late	Unpublished	Unlisted
Admiralty Court list	1	0	0	0
Birmingham Administrative Court	1	0	0	0
Bristol and Cardiff Administrative Court	0	0	0	0
Business List	9	0	3	6
Chancery Appeals	1	0	0	5
Circuit Commercial Courts (Outside London)	0	0	0	1
Commercial Court	5	0	3	4
Companies Winding Up	0	0	0	0
Competition List	0	0	0	0
County Court (Outside London/RCJ)	0	0	0	1
County Court at Central London	0	0	10	0
Court of Appeal (Civil Division)	20	1	1	2
Court of Appeal (Criminal Division)	7	1	1	13
Employment Appeal Tribunal	0	0	0	8
Family Division (Or Family Court/Court of Protection)	10	0	6	21
Financial List	2	0	0	0
First-Tier Tribunal General Regulatory Chamber	0	0	0	10
First-Tier Tribunal Tax Chamber	0	0	0	22
Insolvency & Companies Court List	3	0	0	16
Intellectual Property and Enterprise Court	0	0	1	5
Intellectual Property List	2	0	1	3
Leeds Administrative Court	1	0	0	6
London Administrative Court	21	0	10	9
London Circuit Commercial Court	3	0	1	0
Manchester Administrative Court	2	0	0	1
Mayors and City Court	0	0	1	0
Patents Court	3	0	0	1
Pensions List	0	0	0	0
Planning Court	4	0	0	3
Privy Council	0	0	0	11
Property, Trusts and Probate	1	0	5	6
Queen's Bench Division Judges	17	0	6	26
Queen's Bench Masters	5	0	1	2
Senior Courts Costs Office	0	0	0	14
Supreme Court	0	0	0	3
Technology and Construction Court	3	1	1	4
Upper Tribunal (Administrative Appeals Chamber)	0	0	0	10
Upper Tribunal (Immigration & Asylum Chamber)	0	0	0	4
Upper Tribunal (Lands Chamber)	0	0	0	7
Upper Tribunal (Tax and Chancery Chamber) List	0	0	0	4
Total	121	3	51	228

June 2022

COURT HEADER	Pub	Late	Unpub	Unlist
Admiralty Court list	0	0	0	0
Birmingham Administrative Court	0	0	0	0
Bristol and Cardiff Administrative Court	1	0	1	0
Business List	10	4	6	9
Chancery Appeals	1	1	1	4
Circuit Commercial Courts (Outside London)	0	0	0	4
Commercial Court	9	2	3	10
Companies Winding Up	0	0	0	0
Competition List	0	0	0	0
County Court (Outside London/RCJ)	0	0	0	1
County Court at Central London	0	0	8	0
Court of Appeal (Civil Division)	24	0	1	1
Court of Appeal (Criminal Division)	4	0	1	9
Employment Appeal Tribunal	0	0	0	14
Family Division (Or Family Court/Court of Protection)	5	5	10	16
Financial List	0	0	0	2
First-Tier Tribunal General Regulatory Chamber	0	0	0	5
First-Tier Tribunal Tax Chamber	0	0	0	17
Insolvency & Companies Court List	6	0	1	8
Intellectual Property and Enterprise Court	1	0	0	2
Intellectual Property List	2	0	1	1
Leeds Administrative Court	0	0	0	0
London Administrative Court	14	4	2	14
London Circuit Commercial Court	0	1	0	1
Manchester Administrative Court	0	0	0	1
Mayors and City Court	0	0	2	0
Patents Court	1	2	0	2
Pensions List	0	0	0	0
Planning Court	1	1	0	0
Privy Council	0	0	0	4
Property, Trusts and Probate	4	1	2	7
Queen's Bench Division Judges	8	5	2	9
Queen's Bench Masters	4	0	2	1
Senior Courts Costs Office	0	0	0	8
Supreme Court	0	0	0	5
Technology and Construction Court	3	4	1	6
Upper Tribunal (Administrative Appeals Chamber)	0	0	0	6
Upper Tribunal (Immigration & Asylum Chamber)	0	0	0	0
Upper Tribunal (Lands Chamber)	0	0	0	7
Upper Tribunal (Tax and Chancery Chamber) List	0	0	0	0
Total	98	30	44	174

July 2022

COURT HEADER	Pub	Late	Unpub	Unlist
Admiralty Court list	0	0	0	0
Birmingham Administrative Court	0	0	0	1
Bristol and Cardiff Administrative Court	0	0	0	1
Business List	6	5	4	14
Chancery Appeals	3	1	2	5
Circuit Commercial Courts (Outside London)	0	0	0	0
Commercial Court	11	5	1	8
Companies Winding Up	0	0	0	1
Competition List	1	0	0	0
County Court (Outside London/RCJ)	0	0	0	1
County Court at Central London	0	0	7	0
Court of Appeal (Civil Division)	39	1	2	8
Court of Appeal (Criminal Division)	12	3	1	34
Employment Appeal Tribunal	0	0	0	10
Family Division (Or Family Court/Court of Protection)	5	7	11	16
Financial List	1	0	0	1
First-Tier Tribunal General Regulatory Chamber	0	0	0	9
First-Tier Tribunal Tax Chamber	0	0	0	21
Insolvency & Companies Court List	5	1	4	7
Intellectual Property and Enterprise Court	1	1	0	0
Intellectual Property List	0	0	0	5
Leeds Administrative Court	1	1	0	1
London Administrative Court	22	5	4	16
London Circuit Commercial Court	1	2	0	1
Manchester Administrative Court	1	1	2	4
Mayors and City Court	0	0	3	0
Patents Court	1	1	0	7
Pensions List	1	0	0	1
Planning Court	6	1	1	0
Privy Council	0	0	0	4
Property, Trusts and Probate	3	0	3	3
Queen's Bench Division Judges	11	3	5	11
Queen's Bench Masters	1	1	3	1
Senior Courts Costs Office	0	0	0	5
Supreme Court	0	0	0	4
Technology and Construction Court	6	0	1	4
Upper Tribunal (Administrative Appeals Chamber)	0	0	0	12
Upper Tribunal (Immigration & Asylum Chamber)	0	0	0	3
Upper Tribunal (Lands Chamber)	0	0	0	6
Upper Tribunal (Tax and Chancery Chamber) List	0	0	0	9
Total	138	39	54	234