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Countering Terrorism in the Family Courts: A Dangerous Development

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This article critically appraises the implications of the recent emergence of radicalisation cases in the family courts of England and Wales and the involvement of the family justice system in preventing and countering terrorism. It identifies, and takes issue with, a dominant narrative found in case-law, practitioner commentaries, think-tank reports and academic and government literature, which regards the radicalisation cases as a positive legal development. Challenging its characterisation of this line of cases as ordinary family law cases, the article uncovers the significant influence of the logic, priorities and goals of counter-terrorism policy and practice on the family courts. After demonstrating that the radicalisation cases have facilitated the extensive, if surreptitious, involvement of the family courts in the counter-terrorist endeavour, the article claims that the expansion of counter-terrorism into the family justice system is an unnecessary and dangerous legal development with worrying implications for human rights, equality and open justice.

INTRODUCTION

The counter-terrorist state is an ever expanding one.[1] The family justice system has recently joined the legal fight against terrorism,[2] increasing the number of jurisdictions involved in preventing and countering terrorism.[3] Over the course of the last few years, the family courts of England and Wales have decided a growing number of cases, known as the radicalisation cases, which deal with the child-protection issues arising within the context of counter-terrorism.[4]

The involvement of the family justice system in counter-terrorism is a remarkable legal development. For while the family courts have previously considered the impact of fundamentalist religious, and on rare occasions extreme

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1 Jessie Blackbourn and others, *Accountability and Review in the Counter-Terrorist State* (Bristol: Bristol University Press, 2020) 21.
2 Fatima Ahdash, 'The Interaction between Family Law and Counter-Terrorism: A Critical Examination of the Radicalisation Cases in the Family Courts' (2018) 30 CFLQ 389, 389-392.
3 Counter-terrorism has been integrated into criminal justice, administrative law, immigration and citizenship law and education laws and policies.
4 'Radicalisation Cases in the Family Courts' (Guidance issued by Sir James Munby, President of the Family Division, 8 October 2015) (Family Division Guidance) at https://www.judiciary.uk/wp-content/uploads/2015/10/pfd-guidance-radicalisation-cases.pdf [https://perma.cc/3TV4-24QD].

political, beliefs of parents on the welfare of their children,[5] this has never taken place within a national security context. In fact, until recently the family justice system has been notably *absent* from the UK's counter-terrorist landscape, including in Northern Ireland. Although the legal response to terrorist violence during the period of the Troubles was extensive and included a range of statutory and common law powers,[6] family law was never directly deployed. That this is an unprecedented legal development is reflected in the strong media and political backlash against recent threats made by the Chief Constable of Northern Ireland that the children of paramilitaries engaging in terrorist activity there could be taken into state care.[7] The public furore in Northern Ireland at the idea of 'using children as pawns in the fight against terrorism'[8] and the widespread calls for the Chief Constable to withdraw his threats illustrates just how, until very recently, the involvement of the family justice system in counter-terrorism was unthinkable and is, at least outside of England and Wales, politically controversial.[9]

In this article I examine the implications of the recent and unprecedented involvement of the family courts in the counter-terrorist endeavour. Investigating whether, and to what extent, the emergence of the radicalisation cases in the family courts ought to be regarded with concern, I argue that it represents an unnecessary and dangerous legal development.

I start by outlining some of the facts and figures surrounding the radicalisation cases, discussing the methodology used in this article and identifying the gaps in the current and rather limited literature on the topic. Here I identify a dominant narrative which views the emergence of the radicalisation cases in the family courts positively, regarding these cases as appropriate, proportionate and human-rights compliant and insisting that these are simply *ordinary* family law cases as opposed to counter-terrorism by the 'backdoor'. I then go on to deconstruct the claims of this dominant narrative, putting forward three main arguments to demonstrate why the radicalisation cases ought to be regarded with trepidation and concern.

Highlighting the extensive influence of counter-terrorism on the radicalisation cases, I maintain, firstly, that as a result of this influence these cases cannot be regarded as ordinary family law cases. Instead, and by bringing the family justice system within the fold of the counter-terrorist state, the radicalisation cases have enabled the state to 'do' counter-terrorism, covertly and dangerously, through the family courts. Secondly, emphasising the idea that terrorism is, at its core, a crime that can and should be primarily addressed through the criminal justice

5 For example *Re B and G (Minors: Custody)* [1985] FLR 134 and *Re P (Contact: Supervision)* [1996] 2 FLR 314.

6 Colm Campbell and Ita Connolly, 'Making War on Terror? Global Lessons from Northern Ireland' (2006) 69 MLR 935, 945-948.

7 Michael McHugh, 'Children not being used as pawns in fight against terrorism, says police chief' *Belfast Telegraph* 5 September 2019 at https://www.belfasttelegraph.co.uk/news/northern-ireland/children-not-being-used-as-pawns-in-fight-against-terrorism-says-police-chief-38470617.html [https://perma.cc/K922-A3LJ].

8 *ibid*.

9 Simon Byrne, 'Children "not weapons against terrorism"' *BBC News* 5 September 2019 at https://www.bbc.co.uk/news/uk-northern-ireland-49593061[https://perma.cc/NDJ6-T5X9].

system, I contend that the radicalisation cases have facilitated an unnecessary and worrying bypassing of the criminal law. Finally, I highlight the intrusive, and at times draconian, interventions that these cases have led to, as well as their rights-curtailing and discriminatory impact on the families and communities involved.

In critiquing the radicalisation cases and the subsequent involvement of the family courts in counter-terrorism, this article aims to make a new and important scholarly contribution. The article disrupts an overwhelmingly positive dominant narrative which claims that the radicalisation cases are standard child-protection cases. It unsettles the prevailing idea that in deciding these cases the family judiciary have been careful to uphold the conventional principles of family law, thereby protecting the family courts from being co-opted for counter-terrorism ends. Demonstrating how this line of cases is shaped by and implement the aims of counter-terrorism policy and practice, dangerously undermine the preferable criminal justice model of counter-terrorism and negatively impact the welfare and human rights of the children and parents involved, the article suggests that they represent yet another worrying, if clandestine, expansion of the state's already formidable counter-terrorism arsenal. Importantly, moreover, the critique is based on a robust and empirically grounded study of this emerging legal phenomenon. The claims put forward in this article have been developed out of a close and comprehensive analysis of the publicly available radicalisation cases as well as original data generated through the use of empirical research methods.

COUNTER-TERRORISM IN THE FAMILY COURTS: OVERVIEW, METHODOLOGY AND THE DOMINANT NARRATIVE

Before I can begin critiquing the recent emergence of the radicalisation cases in the family courts and unsettling the dominant narrative's claim that they are ordinary family law cases rather than a covert expansion of the counter-terrorist state, it is important to contextualise this study. Therefore, in what follows, I discuss the methodology deployed in this article, locating the radicalisation cases in their broader factual and legal context. I then outline in greater detail the main claims of the dominant narrative that are contested and challenged in this article.

Research methodology: facts and figures

The exact overall number of the radicalisation cases is unknown. Between 2013–22, there were 47 cases published in the British and Irish Legal Information Institute's (BAILII) online database where radicalisation concerns were raised within the context of family court proceedings.[10] Although the 47 published radicalisation cases provided the primary data-set for the analysis in this

10 A full list of the cases can be found in the appendix to the online version of the paper.

article, they are not referred to or cited equally. Rather, 20 such cases have been more heavily relied upon. These 20 cases are focused on because they deal at length and in detail with allegations of parental extremism and childhood radicalisation and as such are illustrative of the family courts' approach in the radicalisation cases.

It is worth noting, however, that not all of the radicalisation cases have been published.[11] A study conducted in 2016 by the Children and Family Court Advisory Service (Cafcass) revealed that between July 2015 and December 2015, there were 54 family court cases where radicalisation featured as a concern.[12] It was clear, therefore, that the published cases represented only 'a fraction of the [radicalisation] cases decided.'[13] To understand the true nature and scale of the family justice system's involvement in counter-terrorism, Freedom of Information (FOI) requests were sent on a regular basis to Cafcass, who have been keeping a database on the radicalisation cases.[14] These FOI requests asked for the overall number of cases in the Cafcass database featuring radicalisation concerns and a breakdown of the case numbers based on the type of family law proceedings used. The responses indicate that between 2016 and 2022, over 450 cases featuring radicalisation concerns have appeared before the family courts of England and Wales. The huge number of radicalisation cases uncovered by the FOI requests highlights the extensive scale of family court involvement in counter-terrorism and the importance of critical academic discussion of the topic.

In an attempt to better understand this novel legal phenomenon, and given the high number of unpublished radicalisation cases, elite interviews were also used.[15] Elite interviews are in-depth interviews conducted with experts who hold 'important or exposed positions'[16] and can provide expertise on a particular topic. The interviewees (five family barristers, one family solicitor and two senior members of staff at Cafcass) were selected based on their extensive experience working on the radicalisation cases.[17] They were asked both specific and open-ended questions regarding their experiences, reflections and views. The insights derived from the interviewees highlighted certain developments, confirmed findings and contextualised interpretations. Because the interviews were used as a secondary research method and the data generated by the interviews is supplementary in nature, direct quotations from the interviews are used infrequently.[18]

11 The lack of publication could be explained by reference to the statutory restrictions on reporting family proceedings that exist to protect children and the privacy of the family. It could also be because the radicalisation cases are sensitive on national security grounds.

12 'Study of data held by Cafcass in cases featuring radicalisation' (Cafcass, 2016) at https://www.basw.co.uk/system/files/resources/basw_90312-9_0.pdf [https://perma.cc/95VS-UFAT].

13 Marina Wheeler, 'Radicalism and the Family Courts' (UK Human Rights Blog, 30 October 2015) at https://ukhumanrightsblog.com/2015/10/30/radicalism-and-the-family-courts-marina-wheeler/ [https://perma.cc/3SLM-P37A].

14 n 12 above.

15 Ethics approval was provided by the London School of Economics for these interviews.

16 Lewis Anthony Dexter, *Elite and Specialised Interviewing* (Colchester, ECPR Press, 2006) 18.

17 A total of 20 solicitors, barristers and child-welfare practitioners were approached for interviews but most declined, citing the controversial and sensitive nature of the topic as the reason.

18 At the request of the interviewees, identities have been anonymised.

The radicalisation cases: factual and legal context

The radicalisation cases are diverse. They include private family law proceedings between separated parents where radicalisation allegations have mainly been raised as part of disputes over residence and contact. They also include public family law proceedings that arise from local authority applications to the family courts for wardship, care and/or supervision orders due to allegations of parental involvement in terrorism and extremism and the risk of childhood radicalisation. Although Cafcass' responses to the FOI requests indicate that 53 per cent of the radicalisation cases that have appeared before the family courts are private family law cases, the majority of the *published* radicalisation cases are public family law cases. As such, they form the main dataset for this article.

It is worth noting that the specific allegations vary between different public law radicalisation cases and the reasons behind local authority applications to the family courts have evolved over time. The radicalisation cases that have received substantial media,[19] and some academic,[20] attention are those that formed part of the state's response to the rise of Islamic State in Iraq and Sham (ISIS) and the Foreign Terrorist Fighter phenomenon.[21] Between 2015-16, local authorities across the country applied for family court orders because of 'suspicions that children, with their parents or on their own, [were] planning or attempting or being groomed with a view to travel to parts of [the Middle East] controlled by' ISIS.[22] But with the fall of ISIS and gradual return of British former ISIS members to the UK, local authorities have applied to the family courts for orders to manage the child-protection risks emerging from the return, or attempted return, of British parents and their children.[23]

More numerous and controversial[24] are the radicalisation cases that have appeared in the family courts as a result of concerns regarding the risk of harm posed to children by extremist ideology. Extremism concerns have been raised in a wide range of radicalisation cases, including cases where extremist or terrorist-related materials have been found following searches of the family home; cases where parents have been released following convictions for terrorism-related offences and/or have been subjected to Terrorism

19 For example 'Radicalisation fears for 32 children protected by court' *BBC News* 5 August 2015 at https://www.bbc.co.uk/news/uk-33791406 [https://perma.cc/ABM6-H4YE] and 'Judges considering fate of children as young as two amid radicalisation fears' *The Guardian* 5 August 2015 at https://www.theguardian.com/uk-news/2015/aug/05/judges-children-family-courts-radicalisation-terrorism-fears [https://perma.cc/AB62-9GAZ].

20 Susan Edwards, 'Protecting schoolgirls from terrorism grooming' (2015) 3 Int Fam Law 236 and Jessie Blackbourn and Clive Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 73 MLR 840.

21 According to the United Nations Security Council, Foreign Terrorist Fighters are 'individuals who travel to a State other than their State of residence or nationality for the purpose of the preparation, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training' UN Doc S/RES/2178 (24 September 2014) at [2].

22 Family Division Guidance n 4 above at [1].

23 Chris Barnes, 'Radicalisation Cases in the Family Courts: Part 4: Three-Year Review' (2018) *Family Law* 197, 200.

24 Brenda Hale, 'Freedom of Religion and Freedom from Religion' (2017) 3 Ecclesl Law J 3, 13. These cases, and the reasons behind their controversy, are discussed in the third section.

Prevention and Investigation Measures (TPIMs)[25] and cases involving non-terrorist parental criminality and/or mental health issues.

The claims of the dominant narrative

The discussion above highlights the multifaceted, extensive and enduring nature of the family justice system's involvement in the national security arena. But other than a few anxious community, civil society and academic voices,[26] there has been a notable indifference regarding the radicalisation cases. This indifference reflects the influence of the dominant narrative that is identified and critiqued in this article. Proponents of this narrative can be divided into three main categories: official, academic and practitioner. In addition to policymakers,[27] official proponents of the dominant narrative also include some of the family judges who have decided the radicalisation cases, most notably MacDonald J,[28] Hayden J[29] and Munby P.[30] Whilst academic literature on the topic has remained limited, some family law[31] and counter-terrorism[32] academics and think-tank researchers[33] have suggested that the involvement of the family courts in counter-terrorism is both a necessary and desirable legal development. More prolific in their commentary on and support for the radicalisation cases are the practitioners, especially barristers and solicitors who practice in the area of family law.[34]

The dominant narrative argues that even though the radicalisation cases are unprecedented and have thrown up new and complicated challenges, they are a necessary legal response to a new reality where children are increasingly being

25 TPIMs are non-criminal measures designed to limit the activities of individuals suspected of involvement in terrorism.

26 Rachel Taylor, 'Religion as harm? Radicalisation, extremism and child protection' (2018) 30 CFLQ 41; Asim Qureshi, 'Separating Families: How PREVENT Seeks the Removal of Children' (London: Cage, 2018); Jessie Blackbourn, 'Closed Material Proceedings in the Radicalisation Cases' (2020) 32 CFLQ 355 and Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, *Human rights impact of counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls and the family* UN Doc A/HRC/46/36 (22 January 2021).

27 HM Government, *CONTEST: Annual Report for 2015* Cm 9310 (2016) 16.

28 For example in *A Local Authority* v *HB* [2017] EWHC 1437 (Fam); [2018] 1 FLR 625.

29 For example in *London Borough of Tower Hamlets* v *M and Others* [2015] EWHC 869 (Fam); [2015] 2 FLR 1431.

30 Family Division Guidance n 4 above.

31 Edwards, n 20 above, 236-237.

32 Blackbourn and Walker, n 20 above, 128-130.

33 Nikita Malik, *Radicalising our Children: An Analysis of Family Court Cases of British Children at Risk of Radicalisation 2013-2018* (London: Henry Jackson Society, February 2019) 3.

34 Martin Downs, 'Police Anti-terrorism "Lead" calls for children to be protected from terrorist parents on a par with paedophilia' (UK Human Rights Blog, 1 March 2018) https://ukhumanrightsblog.com/2018/03/01/police-anti-terrorism-lead-calls-for-children-to-be-protected-from-terrorist-parents-on-a-par-with-paedophilia/ [https://perma.cc/LG6N-WTVY]; Damian Woodward-Carlton, 'Radicalisation and the Family Courts' (2019) *Family Law* 752; Jo Delahunty and Chris Barnes, 'Radicalisation cases in the family courts: Part 1: An introduction' (2016) *Family Law* 183; and Jo Delahunty and Chris Barnes, 'Radicalisation cases in the family courts: Part 2: Practicalities and pitfalls' (2016) *Family Law* 330.

targeted for recruitment by extremist and terrorist organisations.[35] For example, Susan Edwards and Clive Walker argue that in these cases the family courts are filling a gap in the state's counter-terrorism arsenal, particularly when those at risk of involvement in terrorism are children.[36] They maintain that the family justice system has provided the state with the necessary child-centred tools to be able to respond to the child-protection dimensions of counter-terrorism initiatives.

Whilst these commentators praise the family courts for being flexible and adapting to a national security landscape that increasingly impacts and involves parents and children, they also maintain that the radicalisation cases are essentially *ordinary* child-protection cases. Here barristers Martin Downs and Damian Woodward-Carlton contend that in deciding the radicalisation cases the family judiciary has remained committed to the fundamental principles of family law, in particular the threshold criteria, the welfare principle and human rights.[37]

The threshold criteria, found in section 31(2) of the Children Act 1989, stipulate that a court may only grant a local authority's application for care or supervision orders if it is satisfied, on the balance of probabilities, that the child in question is suffering or is likely to suffer significant harm attributable to the care given or likely to be given by their parent. Harm is defined rather widely in the legislation as 'ill-treatment or the impairment of health or development.'[38] Harm also includes emotional and psychological harm that impairs the proper development of children.[39] As I have discussed elsewhere, in the radicalisation cases the family judges view extremism and radicalisation both as risks that can lead to physical harm (by encouraging children to become involved in terrorist violence) *and* as stand-alone emotional and ideological harms that could, in and of themselves, threaten the well-being and development of children.[40]

In their interpretation of the threshold criteria, the upper courts have made it clear that mere suspicions of harm are not enough; anything less than proven facts indicating actual or likely significant harm will fail to satisfy the threshold criteria.[41] Woodward-Carlton and Downs argue that in the radicalisation cases the judges have rigorously applied the threshold criteria, insisting on the need for cogent evidence of actual or likely harm before sanctioning compulsory state intervention in private and family life.[42]

If the court is satisfied that the threshold criteria are met, it acquires jurisdiction to make a care and/or supervision order and can move on to the welfare stage. The welfare principle, set out in section 1(1) of the Children Act 1989, specifies that when a court makes a decision that relates to the upbringing of

35 Martin Downs and Susan Edwards, 'Brides and Martyrs: Protecting Children from Violent Extremism' (2015) *Family Law* 1073, 1075-1076.
36 Edwards, n 20 above, 236 and Clive Walker, 'Foreign Terrorist Fighters and UK Counter-Terrorism Laws' (2018) 2 *Asian Yearbook of Human Rights and Humanitarian Law* 177, 201.
37 Woodward-Carlton, n 34 above, 757 and Downs, n 34 above.
38 Children Act 1989, s 31 (9).
39 *Re B (Care Proceedings: Appeal)* [2013] UKSC 33; [2013] 2 FFR 1075.
40 Ahdash, n 2 above, 398.
41 *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL); [1996] 1 FFR 80 and *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35; [2008] 2 FLR 141.
42 Woodward-Carlton, n 34 above, 753-757 and Downs, n 34 above.

a child, the child's welfare is its paramount consideration.[43] Whether the court should make a care and/or supervision order is a question that relates to the upbringing of a child. At the welfare stage, therefore, the court assesses whether making a care or supervision order is in the child's best interests.[44] Here the family courts have been commended for strongly upholding the welfare principle in the radicalisation cases. For example, the former Chief Executive Officer of Cafcass, Anthony Douglas, claims that the judges deciding the radicalisation cases have prioritised the welfare of children over counter-terrorism and national security considerations.[45]

Finally, the family court must consider whether granting a care and/or supervision order is proportionate or whether a less interventionist measure that could protect the child is possible. The right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR) plays an important role in the deliberations of the family court with regards to this question.[46] Within the context of the radicalisation cases, the family courts have been praised for their defence of the human rights of the parents and children involved.[47] Pointing to the relatively low number of children who have been permanently removed from their home in such cases, Nikita Malik of the conservative think-tank the Henry Jackson Society argues that the family courts have protected the right of children and parents to respect for private and family life.[48] Separately but relatedly, Edwards also commends the family courts for defending the religious rights of the parents and children involved in these cases.[49] In praising the family judiciary for deciding the radicalisation cases whilst upholding the conventional principles of family law, the dominant narrative suggests that the family courts have guarded themselves from being inappropriately used to advance the national-security objectives of the Government. This was most clearly articulated by MacDonald J, who maintained in his concluding remarks in one radicalisation case that while 'Islamist extremism and the radicalisation consequent upon it exist at present as a brutal and pernicious fact in our society,'[50] it is still 'important … that the court holds fast to the cardinal precepts of fairness, impartiality and due process that underpin the rule of law in our liberal democracy.'[51] The idea here seems to be that in the radicalisation cases, the family courts have resisted the erosions to due process, fairness and impartiality to which some developments in counter-terrorism law have notoriously led.[52]

43 Children Act 1989, s 1.
44 *ibid*, ss 1(1), 1 (3), 1(4)(b).
45 Downs, n 34 above.
46 *Re C and B (Children) (Care Order: Future Harm)* [2000] 2 FCR 614; [2001] 1 FLR 611.
47 Downs and Edwards, n 35 above, 1078.
48 Malik, n 33 above, 54.
49 Susan Edwards, 'Negotiating Faith, Culture and Gender in J v B and the Child AB' (2018) *Family Law* 56, 57-58.
50 *A Local Authority* v *HB* n 28 above at [103].
51 *ibid*.
52 Conor Gearty, *Liberty and Security* (London: Polity, 2013) 96-100 and Conor Gearty, 'No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy' in Richard English (ed), *Illusions of Terrorism and Counter-Terrorism* (Oxford: OUP, 2015) 73-74.

'DOING' COUNTER-TERRORISM THROUGH THE FAMILY COURTS

The dominant narrative's insistence that the radicalisation cases are essentially ordinary family law cases as opposed to counter-terrorism by the 'backdoor' does not adequately account for or explain the extensive influence of counter-terrorism policing, intelligence and expertise on the radicalisation cases. In what follows I disrupt the dominant narrative's claim by demonstrating how at every stage, from initial referral to final outcome, such cases are influenced by, reinforce and implement the logic, priorities and aims of counter-terrorism thinking, policy and practice. I then proceed to show how and why the welfare principle, one of the fundamental principles of family law, has not been as powerful in resisting the demands and aims of the counter-terrorist state as the dominant narrative claims.

The role of counter-terrorism policing and intelligence: referring families and providing evidence

Whilst the involvement of the police is not uncommon in public family law cases, what makes the radicalisation cases distinctive – and problematic – is the *unusually* high levels of counter-terrorism police involvement.[53] Whereas generally speaking referrals from the police account for around 30 per cent of all child-protection cases,[54] in *all* of the published radicalisation cases family court proceedings were only initiated by the local authority following communications or referrals from counter-terrorism police. In a couple of radicalisation cases, family court proceedings were issued by the local authority following communications to social services from the Counter-Terrorism Unit of a regional police force or the Counter-Terrorism Command of the London Metropolitan Police Service regarding the suspected involvement of a parent in terrorism-related activity or their association with extremism.[55] Radicalisation cases have also appeared in the family courts as a result of police referrals to local authorities following a stop and search,[56] examination,[57] detention or arrest[58] of a parent under terrorism legislation.

53 Thomas Chisholm and Alice Coulter, *Safeguarding and radicalisation: Research report* (London: Department for Education, August 2017) 26.

54 'Characteristics of children in need: reporting year 2022' (Department of Education, 27 October 2022) at https://explore-education-statistics.service.gov.uk/find-statistics/characteristics-of-children-in-need [https://perma.cc/Y64K-XPBN].

55 *Re S* [2015] EWHC (Fam) and *Re C (A Child)* (*Care Proceedings: Disclosure)* [2016] EWHC 3171 (Fam); [2017] 1 FLR 1655.

56 *Re Y Children (Findings of Fact as to Radicalisation) Part 1* [2016] EWHC 3826 (Fam); [2016] 8 WLUK 250.

57 *A Local Authority* v *HB* n 28 above.

58 *Re C, D, E (Radicalisation: Fact Finding)* [2016] EWHC 3087; [2016] 1WLUK 609; *London Borough of Tower Hamlets* v *B* [2015] EWHC 2491 (Fam); [2016] 2 FLR 877; *A Local Authority* v *T* [2016] EWFC 30; *A Local Authority* v *A Mother and Others (Fact-Finding)* [2018] EWHC 2054 (Fam); [2018] 3 WLUK 81 and *Re I (Child Assessment Order)* [2020] EWCA Civ 281; [2020] 1 FLR 1213.

Clearly, counter-terrorism policing plays a central role in bringing these cases to the attention of the family justice system in the first place. This view of the radicalisation cases as being counter-terrorism *led* is also shared by members of the family judiciary. In *Re C (A Child)*,[59] for example, Pauffley J revealed that 'there would have been no [family law] proceedings had it not been for information communicated to the local authority by the SO15 [the Counter-Terrorism Command]'[60] regarding its suspicions that the father was a Jihadist with extremist views. Although Pauffley J was referring here to one specific case, during interviews a barrister and a solicitor working on radicalisation cases shared that unlike usual child-protection cases, which are led by the children and social services departments within local authorities, most of the radicalisation cases they had worked on were 'very much led by the counter-terrorism police, the Counter-Terrorism Unit and security agencies.'[61]

The leading role played by counter-terrorism policing and intelligence in the radicalisation cases is also reflected in the fact that the bulk of the evidence against parents is often provided and analysed by counter-terrorism police and intelligence officers. The extent of local authority and family court dependence on the evidence and intelligence gathered and shared by counter-terrorism police was most clearly reflected in *A Local Authority* v *M and Others*.[62] In that case, the local authority applied for care orders seeking to remove the four children of a mother who had been convicted of child abduction after she was detained near the Turkish-Syrian border and repatriated to the UK. The local authority's main sources of evidence against the mother consisted of 'police photographic evidence of the three children attending a number of … rallies … in the company of convicted terrorists and hate preachers' and 'police evidence of written material seized from the family home containing evidence of extreme beliefs.'[63] These pieces of evidence were instrumental in convincing Newton J that the mother was an extremist individual who radicalised her children. In reaching this conclusion, Newton J acknowledged that he had been 'enormously assisted by the close cooperation [of the] counter-terrorism police [who made] available a significant quantity of focused, highly relevant material.'[64]

It is not just counter-terrorism police that provide evidence in the radicalisation cases; it is also undercover security agents.[65] The most striking example of this was in *Re Y (Children) (Finding of Fact 2)*,[66] the second judgment in a case involving a father accused of radicalising his children and attempting to take them with him to join ISIS in Syria. Parker J 'heard evidence from Z, an

59 n 55 above.
60 *ibid* at [6].
61 Interview with Barrister A, a senior barrister at St John's Building Barristers' Chambers (Manchester, 30 October 2017). See also interview with Solicitor A, a family solicitor at Fountain Solicitors (Manchester, 9 May 2018).
62 [2016] EWHC 1599 (Fam); [2017] 1 FLR 1389.
63 *ibid* at [18].
64 *ibid* at [28]. See also: *Re K (Children)* [2016] EWHC 1606 (Fam); [2016] 6 WLUK 136 at [5] and [15].
65 *Re C (A Child) (No 2) (Application for Public Interest Immunity)* [2017] EWHC 692 (Fam); [2017] 2 FLR 1342 at [3]-[16]; and *Re C (No 3) (Application for dismissal or withdrawal of proceedings)* [2017] EWFC 37; [2018] WLR 107 at [5]-[6].
66 [2016] EWHC 3825 (Fam); [2016] 12 WLUK 138.

anonymous undercover officer'[67] who had closely followed the activities of the father and his associates. Z's testimony regarding the father's membership of a proscribed group and his attendance with the children at events where views supportive of ISIS were expressed provided the court with some of the most damning evidence against the father, leading Parker J to find that the father had indeed attempted to radicalise his children.[68]

The influence of counter-terrorism policy and practice: securitised approaches to risk assessments

In the radicalisation cases counter-terrorism does not just provide the facts. It also *interprets* and analyses the facts, such that risk is assessed primarily from a securitised perspective. This is perhaps unsurprising given that the overwhelming majority of the children involved in the such cases are not at risk of the child-protection harms that are present in 'usual' public family law cases involving a family background of substance abuse, neglect, chaos and domestic violence.[69]In fact, as a barrister pointed out during an interview, one of the 'defining features of the radicalisation cases is that they mostly involve stable families with no history of local authority involvement.'[70] Rather, the main focus of the child-protection agencies, and the family courts, is on identifying, assessing and responding to the risk of, and from, radicalisation and extremism.[71]

Whilst it is true that the radicalisation of children puts them at risk of some recognisable physical and emotional child-protection harms that might result from potential travel to war-zones abroad and engagement in terrorist activity, the influence of counter-terrorism policy and practice is still overwhelming. For we need to remember that radicalisation and extremism are *security* terms that originate from and are defined in counter-terrorism policy and legislation. It is interesting that when determining the question of whether or not a parent has put their child at risk of radicalisation through exposure to extremism, the judges do not provide their own tailored definitions of these terms. Instead, the majority of the judges directly import and apply the definitions found in counter-terrorism policy literature.

A particularly illustrative example is the case of *Re K (Children)*,[72] where care proceedings were initiated after a raid on the family home raised concerns that the parents held extremist views supportive of ISIS. Examining 'the mother's Twitter account'[73]to verify the accuracy of the allegations regarding the mother's exposure of her children to extremist ideologies and the risk of radicalisation that they faced, Hayden J explained that although extremism and radicalisation are words that:

67 *ibid* at [39].
68 *ibid* at [62]-[79].
69 Ahdash, n 2 above, 391.
70 Interview with Barrister B, a barrister at Doughty Street Chambers (London, 3 October 2017).
71 Ahdash, n 2 above, 405-408.
72 n 64 above.
73 *ibid* at [11].

> are now sadly so much part of contemporary life … that they scarcely need definition … to avoid any ambiguity, I adopt the July 2015 *Revised 'Prevent Duty' Guidance for England and Wales on the duty in the Counter Terrorism and Security Act 2015*. There, radicalisation is defined as referring to the process by which a person comes to support terrorism and extremist ideologies associated terrorist groups … the definition of 'extremism' that I adopt is that set out in the 'Channel Duty Guidance. Protecting vulnerable people from being drawn into terrorism. Statutory guidance for Channel panel members and partners of local panels 2015.' There, extremism is defined thus as a: '… *vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs*'.[74]

Applying these definitions to the mother's social media communications, Hayden J concluded that she held 'a radicalised and extreme perspective on the world'[75] to which her children were vulnerable.

The reliance on national security policies and frameworks that is displayed in this and other similar cases[76] illustrates the securitised approach to risk present in the radicalisation cases. That counter-terrorism policy not only informs but determines the focus of the family courts is also evident from the way in which the *Channel's Vulnerability Assessment Framework*[77] (*VAF*) guides judicial assessments of risk. The *VAF* is a key component of the *Prevent Strategy*, the preventive strand of the Government's official counter-terrorism policy, and its closely affiliated de-radicalisation programme *Channel*. It is primarily used in police-led multiagency teams to assess whether an individual is vulnerable to radicalisation and should be referred to *Channel*.[78] It directs assessors to look for a number of 'engagement factors'[79] which might act as 'psychological hooks'[80] for radicalisation, such as 'being at a transitional time of life', having the 'need for identity, meaning and belonging' or feeling 'grievance and injustice.'[81]

Outside national security circles, such a list of factors would be understood as 'familiar characteristics of what it means to be a child'[82] rather than signs of risk. As Vicki Coppock and Mark McGovern maintain, the *VAF* securitises the otherwise routine and 'innocuous thoughts, feelings and behaviours of children',[83] reconstructing them as 'potentially dangerous'[84] radicalisation indicators. But in the radicalisation cases these engagement factors are directly used by the family judges, without any modification or alteration, to assess risk and determine the

74 *ibid* at [15]-[17] (emphasis in original).
75 *ibid* at [15].
76 See *A Local Authority* v *M and Others* [2017] EWHC 2851 (Fam); [2018] 2 FLR 875 at [22] 4 and *A City Council* v *A Mother and Others* [2019] EWHC 3076 (Fam); [2020] 1 FLR 515 at [28].
77 HM Government, 'Channel: Vulnerability assessment framework' (October 2012) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118187/vul-assessment.pdf [https://perma.cc/LCK2-WRHW].
78 *ibid*, 2.
79 *ibid*.
80 *ibid*.
81 *ibid*.
82 Vicki Coppock and Mark McGovern, '"Dangerous Minds"? Deconstructing Counter-Terrorism Discourse, Radicalisation and the "Psychological Vulnerability" of Muslim Children and Young People in Britain' (2014) 28 *ChildSoc* 242, 250.
83 *ibid*.
84 *ibid*.

suitability of state intervention in private and family life. An example of this can be found in *Re Y (A Minor: Wardship)*,[85] a case involving a 17-year-old teenager whose uncle had been detained in Guantanamo and whose brothers had died while fighting in Syria. Applying the engagement factors listed in the *VAF* to Y's background, for example the 'sense of injustice' Y felt believing that his 'uncle was brutalised at Guantanamo' and the grief caused by 'the death of his brothers',[86] Hayden J found that 'so many of the[se] features … seem apposite to Y's own life.'[87] Since, according to the *VAF*, Y was 'extremely vulnerable … to radicalisation',[88] Hayden J granted the local authority's application for wardship and passport removal, even though there was no indication that Y himself had ever expressed extremist sympathies.

A securitised approach to risk is also reflected in the prominent, and problematic, role that is played by radicalisation experts and the weight accorded to their risk assessments in the radicalisation cases. In *Re Y (Children) (Finding of Fact) Part 1*,[89] Parker J relied upon the analysis of 'RX, a practicing Muslim cleric who provides advice on religious and cultural matters and who has considerable experience of radicalisation'[90] to determine whether the father was an extremist who had attempted to radicalise his children. What is noticeable about this case is Parker J's excessive deference to RX's opinions. RX's interpretations of the meaning of certain gestures and poses within the photographic evidence and his impressions of the religious views of the children were accepted by Parker J without much questioning or contextualisation. For example, RX's view that a 'photograph of the two younger boys [showing them with] a forefinger extended and lifted up'[91] indicated a rejection 'of a secular Rule of Law'[92] and 'is often used by suicide bombers as a prelude to the explosion' of their devices[93] was accepted by Parker J. Although RX acknowledged that the gesture is more commonly used 'at the holiest moment of [Islamic] prayer' to 'signify the oneness and uniqueness of the Almighty',[94] this more benign, and indeed mainstream, interpretation of the gesture was side-lined.[95] Since other possible interpretations were ignored by RX, to whom Parker J defers, their salience was not properly explored in the case.[96]

Of course, it is understandable that in interacting with an unfamiliar area of law and policy, the family courts would rely upon the expertise of those who better understand and are familiar with this area of practice. Given the multiplicity of the issues that affect children and families, family judges often seek expert

85 [2015] EWHC 2099 (Fam), [2016] 2 FLR 229.
86 *ibid* at [8].
87 *ibid*.
88 *ibid* at [10]. See also: *A City Council* v *A Mother and Others* n 76 above at [28].
89 n 56 above.
90 *ibid* at [23].
91 *ibid* at [92].
92 *ibid*.
93 *ibid*.
94 *ibid*.
95 Shafi Musaddique, 'BBC apologises for describing common Islamic gesture as an "ISIS salute"' *The National* 5 August 2019 at https://www.thenationalnews.com/world/europe/bbc-apologises-for-describing-common-islamic-gesture-as-an-isis-salute-1.894917 [https://perma.cc/8YAS-3BBH].
96 See *Re C, D, E (Welfare: Radicalisation)* [2016] EWHC 3088 (Fam); [2016] 10 WLUK 534.

assistance to understand complicated issues and to reach informed decisions.[97] Nevertheless, the excessive nature of the judicial reliance upon radicalisation experts that is evident in the radicalisation cases is especially problematic for a number of reasons.

Firstly, the radicalisation expertise cohort is closely connected to, and is often directly funded by, the government.[98] Radicalisation experts tend to work closely with counter-terrorism policy-makers.[99] Their work is often informed by, and implements, the theoretical underpinnings, orientations and goals of counter-terrorism policy.[100] By deferring to and accepting the assessments and recommendations of radicalisation experts, the judges allow counter-terrorism policy to heavily and directly inform the way in which risk is identified in the radicalisation cases and to even determine some of the outcomes.

Secondly and consequently, radicalisation experts tend to lack objectivity.[101] The research that radicalisation experts ground their risk assessments on is circumscribed by ideological assumptions and hypotheses regarding the causes of terrorism which locate propensity for radicalisation in Islamic theology and psycho-social factors as opposed to structural, historical and socio-political causes including social and foreign policies of the state.[102] It is also influenced by and seeks to respond to the needs and interests of security officials in intervening as early as possible to prevent or reverse the process of radicalisation.[103]

Thirdly, the theories and models of radicalisation which these experts use are not based on scientifically rigorous data.[104] Due to the nature of the subject itself, much of the research that grounds the opinions of radicalisation experts is empirically weak, is based on secondary rather than primary sources and does not use control groups, thereby failing to meet the required social scientific standards.[105] There is even less rigorous research on radicalisation that is directly concerned with children.[106]

Finally, what makes judicial reliance on radicalisation experts even more concerning is that it is especially, perhaps even uniquely, excessive and deferential. Although undue deference to the views of experts had for a long time been identified as a problem within the English family bench,[107] changes to the Family Procedure Rules introduced in 2013[108] have resulted in an overall decline

97 Sarah J. Brown and others, *The use of experts in family law: understanding the processes for commissioning experts and the contribution they make to the family court* (London: Ministry of Justice Analytical Series, 2015) 30.
98 Arun Kundnani, 'Radicalisation: the journey of a concept' (2012) 54 *Race & Class* 3, 3-5 and Peter Neumann and Scott Kleinmann, 'How Rigorous is Radicalization Research?' (2013) 9 Democr Sec 360, 361-363.
99 Derek Silva, 'Radicalisation: The Journey of a Concept Revisited' (2018) 59 *Race & Class* 1, 7.
100 *ibid*.
101 Kundnani, n 98 above, 3-4.
102 *ibid*, 5-8.
103 *ibid*, 5.
104 Neumann and Kleinman, n 98 above, 370-377.
105 *ibid*.
106 Taylor, n 26 above, 56.
107 Elaine Sutherland, 'Undue Deference to Experts Syndrome?' (2006) 16 Ind Int'l & Comp L Rev 381, 381-383.
108 See Children and Families Act 2014, s 13.

in the use of experts.[109] Research shows that the family judiciary is increasingly marginalising, and even dispensing with, expert risk assessments in cases that do not require expert medical opinions.[110] It is fair to say, therefore, that the family judiciary's deferential approach to the views, assessments and conclusions of radicalisation experts goes somewhat against the current general approach to expertise in the family courts.

The discussion above demonstrates the extensive influence that counter-terrorism thinking, policy and practice has on the radicalisation cases. Because the logic, theoretical orientations, concerns and goals of counter-terrorism policy and practice set the terms of reference in the radicalisation cases and shape judicial approaches to risk, it is difficult to avoid the conclusion that the family courts are indeed 'doing' counter-terrorism by the 'backdoor'.

Facilitating the counter-terrorist state: security as welfare

But what about the welfare principle, the cardinal precept of English family law? To reiterate, the welfare principle (commonly known as the paramountcy principle)[111] says that when a court makes a decision that relates to the upbringing of a child, that child's welfare outweighs all other considerations.[112] As we saw earlier in the article, one of the reasons why proponents of the dominant narrative have insisted that the radicalisation cases are *ordinary* child-protection cases relates to what they claim is a clear judicial commitment to upholding the welfare principle. In commending the family judiciary for deciding the radicalisation cases without losing sight of the paramountcy principle, these commentators suggest that the family courts have resisted the demands and influence of counter-terrorism policy and practice.

It is certainly the case that the family judges have been emphatic that the welfare of the children before them is of paramount importance, irrespective of broader national security considerations. The paramountcy principle was clearly asserted in one of the earliest radicalisation cases, *London Borough of Tower Hamlets* v *M and Others*.[113] The case involved applications for wardship in respect of a number of children who were considered by the local authority to be at risk of travelling to join ISIS in Syria and whose parents were unable to adequately protect them. Granting the local authority's application, Hayden J stressed that 'it is the interest of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter terrorism policy or operations.'[114] This strong affirmation of the paramountcy of children's welfare

109 Sarah Brown and others, n 97 above, 2-7.
110 Rosemary Hunter, Mandy Burton and Liz Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (London: Ministry of Justice, 2020) 3-6, 44 and 82 and Adrienne Barnett, *Domestic abuse and private law children cases: A literature review* (London: Ministry of Justice Analytical Series, 2020) 110.
111 Helen Reece, 'The Paramountcy Principle: Consensus or Construct' (1996) 49 CLP 267, 267.
112 *ibid*.
113 n 29 above.
114 *ibid* at [18].

interests was repeated in subsequent radicalisation cases,[115] and was emphasised in the President of the Family Division's guidance on the radicalisation cases.[116] According to the dominant narrative, this shows that in this line of cases it is the welfare of children, rather than the priorities of counter-terrorism policy and practice, that guides the decisions of the family judges.[117]

But the problem with this claim is that it misunderstands the welfare principle and its relationship to wider state policies and concerns. It assumes that there is a clear dichotomy between the welfare interests of children on the one hand and counter-terrorism considerations on the other, such that family judges can prioritise the former over the latter. Such a clear-cut dichotomy cannot, and does not, exist in practice. As Harry Hendrick demonstrates in his exploration of the history of child-welfare laws and policies in the UK, children's welfare is never 'isolated from other … national anxieties and concerns.'[118] It is not, and cannot, be independent of the state's 'social, political, economic and cultural' policy agendas.[119] Furthermore, the welfare principle as enshrined in the Children Act 1989 is 'noted for its indeterminacy.'[120] This indeterminacy has, according to Helen Reece, allowed other state policies and objectives, even when they are 'extraneous to children's welfare [to be] justified in terms of the child's best interests.'[121]

A similar argument could made be of the relationship between the paramountcy principle and counter-terrorism policies and aims in the radicalisation cases. As I argue in more detail in the following section, the government has in recent years identified extremism and radicalisation as child-protection risks and safeguarding issues. It has incorporated countering terrorism, extremism and radicalisation into the usual child-protection and safeguarding duties of nurseries, schools, local authorities and hospitals.[122] Christos Boukalas argues that in doing so, the state has aligned its child welfare policies and institutions 'with [its] security apparatus',[123] blurring the distinction between child-welfare and national security. Therefore, according to the state, to prevent and counter terrorism, extremism and radicalisation *is* to promote children's welfare and vice versa. The logic of security and the logic of welfare overlap: security is welfare, and welfare is security. As such, even if the family judges really do attempt to focus on and prioritise the best interests of the children that come before them,

115 *Leicester City Council* v *T and Others* [2016] EWFC 20; [2017] 1 FLR 1585, at [17]; *Re X (Children); Re Y (Children)* [2015] EWHC 2265 (Fam) (*Re X; Re Y*); [2015] 2 FLR 1487 and *London Borough of Tower Hamlets* v *B* n 58 above at [14].
116 Family Division Guidance n 4 above at [4].
117 Edwards, n 20 above, 56.
118 Harry Hendrick, *Child Welfare: Historical dimensions, contemporary debates* (Bristol: The Policy Press, 2003) 20.
119 *ibid*, 40.
120 Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Oxford: Hart Publishing, 2012) 384.
121 Reece, n 111 above, 296.
122 See *Working Together to Safeguard Children* (London: Department for Children, Schools and Families, 2010) ch 11; *Working Together to Safeguard Children* (London: HM Government, 2015) ch 1 and Counter-Terrorism and Security Act 2015, ss 6 and 26.
123 Christos Boukalas, 'The Prevent Paradox: destroying liberalism in order to protect it' (2019) 72 Crime, Law Soc Cha 467.

the welfare of children cannot really be distinguished from the goals and priorities of counter-terrorism policy and practice. In fact, as the following analysis shows, the welfare of children is often construed in ways that align with and support the national security interests of the state.

This is clearly reflected in *A Local Authority* v *M and Others*,[124] the second judgment in the case discussed earlier involving the mother convicted of child abduction after her alleged attempt to cross the Turkish-Syrian border towards ISIS-held territories with her children.[125] Finding that the father had passively condoned the mother's extremism and failed to adequately protect the children from her radicalising influence, Newton J had decided that it was best for the children to remain in foster care pending a full assessment of the father. In considering how best to proceed following the positive outcome of the father's parenting assessment, Newton J stressed that the family court's 'focus and paramount concern is solely with the welfare of each of the children'[126] and that 'wider issues of public protection are for others.'[127] To that end, Newton J decided that 'the children's best interests would be best served'[128] by returning the children home to the care of their father.[129] Part of the reason why return home was considered to be in the best interests of the children was that it was 'in fact more likely that they will be at risk of further radicalisation if they are not permitted to return home.'[130] The 'considerable distress'[131] that would be felt by the children as they lived apart from their father was likely to increase their 'vulnerability to extremist views.'[132] In contrast, if they return home the children would receive the support of *Prevent* and other de-radicalisation programmes organised by their local authority and mosque.[133] The father would also be given training to 'ensure that the risk of … exposure … to radicalism/extreme political beliefs [is] kept to a minimum.'[134] In this case, therefore, return home was considered to be in the best interests of the children *because* it was the outcome most likely to prevent their radicalisation. Here it appears that the welfare principle enables, rather than resists, the achievement of the state's national security priorities.

The convergence between the welfare principle and counter-terrorism aims is even more clearly present in *Re X, Y and Z (Disclosure to the Security Service)*.[135] The local authority alleged that the father, who was living in Syria, was involved with ISIS and had engaged in terrorism. It also suspected that the mother intended to travel with their child, Z, to join the father in Syria. During the course of the proceedings the mother filed a statement admitting to these allegations. The court found that the mother was aware of the father's involvement with

124 n 76 above.
125 *A Local Authority* v *M and Others* n 62 above.
126 n 76 above at [3].
127 *ibid*.
128 *ibid* at [41].
129 *ibid*.
130 *ibid* at [47].
131 *ibid* at [16].
132 *ibid*.
133 *ibid* at [49].
134 *ibid* at [7].
135 [2016] EWHC 2400 (Fam); [2017] 2 FLR 583.

ISIS and had planned to take the child with her to join the father in Syria. The Metropolitan Police Service subsequently applied to the court for permission to disclose to the Security Services copies of both the mother's incriminating statement and the family court's findings against her. Although MacDonald J did acknowledge the risks that could result from disclosure to the Security Services,[136] he nonetheless decided to approve disclosure because it would be in Z's welfare interests: 'identification and prosecution of criminal conduct by one or both of the parents will assist in formulating more informed safeguarding for Z.'[137] In fact, MacDonald J went as far as to proclaim that disclosure was 'in the welfare interests of children more generally'[138] because 'it is plainly in the welfare interests of children … that suspected terrorist activity is investigated, and where necessary, protective measures taken and criminal sanctions deployed.'[139] According to this radicalisation case, then, assisting the security services in their counter-terrorism operations is not only in the best interests of this child – it also promotes the welfare of *all* children.

A similar approach to the paramountcy principle and its relationship to national security can be detected in *Re C (No 3)*.[140] This was the third and final judgment in the case discussed earlier involving a local authority's application for a supervision order after it received information from the Counter-Terrorism Command that the father held extremist beliefs and had travelled to Syria to fight alongside Islamist terror groups. Concerned that it did not have sufficient evidence to substantiate its allegations against the father, the local authority sought to withdraw its application. In dismissing the application to withdraw, Pauffley J explained that 'there would be an inherent incongruity in one arm of the State maintaining that the father is a terrorist with an Islamist extremist mind-set whilst another appears powerless to take any step so as to protect the welfare interests of the child.'[141] Here it seems that in the eyes of some of the family judiciary, the state's counter-terrorist and child-welfare aims and functions are, and *ought* to be, congruent.

It is clear, then, that in the radicalisation cases the welfare of children is approached from a securitised lens. There is a conceptual and operational overlap between the priorities and aims of the family justice system and the priorities and aims of counter-terrorism and national security. This overlap has allowed the family courts to facilitate, rather than challenge and resist, the reach and influence of the counter-terrorist state.

Having demonstrated that, due to the radicalisation cases, the state is now countering terrorism in and through the family courts, in the remainder of this article I argue against the dominant narrative's claim that the radicalisation cases are proportionate, benign and human rights-compliant. I contend, firstly, that when preventing and tackling terrorism, the state should prioritise criminal justice responses. Secondly, I highlight and explore the intrusive, discriminatory

136 *ibid* at [57].
137 *ibid* at [61].
138 *ibid* at [62].
139 *ibid*.
140 n 65 above.
141 *ibid* at [72].

and rights-curtailing impact of the radicalisation cases on the children and parents involved.

AN UNNECESSARY AND DANGEROUS BYPASSING OF THE CRIMINAL LAW?

Over the last two decades, the UK's legal response to the threat posed by terrorism has taken two main forms.[142] The first is the 'criminal justice model.'[143] It is important to note here the 'plethora of crimes on offer on the anti-terrorism menu'.[144] For in addition to the ordinary crimes of murder, offences against the person and criminal property damage, successive UK governments have introduced an array of specific terrorism offences[145] which have become progressively more preventive with the years, capturing preparatory, inchoate and even 'pre-inchoate'[146] terrorist conduct.

Despite the availability of a wide range of preventive terrorism offences that can facilitate very early intervention, the UK authorities have tended to prefer using the second approach, which involves non-criminal measures designed to prevent potential terrorist conduct.[147] These non-criminal preventive measures are often directed at individuals who are suspected of being involved, or are considered to be at risk of becoming involved, in terrorism but cannot be prosecuted for lack of sufficient evidence or due to the sensitivity of the evidence.[148] Non-criminal preventive measures include Control Orders and their replacement TPIMs that allow the Home Secretary to impose a number of restrictions on terrorism suspects,[149] citizenship deprivation orders and various immigration and travel restrictions.

Non-criminal preventive measures have been strongly criticised for undermining natural justice, human rights and the rule of law.[150] In particular, scholars and civil society organisations have criticised Control Orders and TPIMs,

142 Clive Walker, 'Keeping Control of Terrorists Without Losing Control' (2007) 59 Stanford Law Rev 1395, 1400.

143 Christos Boukalas, 'U.K. Counterterrorism Law, Pre-Emption, And Politics: Toward 'Authoritarian Legality?' (2017) 20 New Crim Law Rev 355, 363.

144 Conor Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 CLP 25, 28.

145 *ibid*.

146 Lucia Zedner and Andrew Ashworth, 'The Rise and Restraint of the Preventive State' (2019) 2 Annu Rev Criminol 429, 429.

147 Helen Fenwick, 'Criminalization and Quasi-Criminalization of Terrorism: Emerging Trends and Tensions with Human Rights Law in the UK' in Darryl K. Brown, Jenia Iontcheva and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford: OUP, 2019) 680.

148 Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?' (2015) 78 MLR 913, 913-915.

149 Control Orders were introduced by the Prevention of Terrorism Act 2005. They were replaced with TPIMs, introduced by the Terrorism Prevention and Investigation Measures Act 2011. See Helen Fenwick, 'Designing ETPIMs around ECHR Review or Normalisation of "Preventive" Non-Trial-Based Executive Measures?' (2013) 76 MLR 867.

150 Helen Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the "War on Terror"?' (2010) 63 CLP 153, 153.

which impose severe restrictions such as electronic tags, curfews and limits on movement and communication based on evidence that is presented to a judge using closed material proceedings from which the suspected terrorists and their counsel are denied access and using a civil standard of proof.[151] They argue that they have created a parallel system of terrorism prevention that undermines transparency, denies suspected terrorists the right to a fair and open trial and imposes highly intrusive measures using a lower, civil standard of proof.

Drawing on and applying this line of critique, in this section I maintain that the radicalisation cases can be described as yet another problematic non-criminal counter-terrorism measure. I argue that from the perspective of justice, transparency and human rights protection, the involvement of the family justice system in counter-terrorism represents an unnecessary, and ultimately dangerous, bypassing of the criminal law.

Claiming that the radicalisation cases appear to have established another parallel, opaque and rights-curtailing system of terrorism prevention is, admittedly, not a straightforward exercise. There are two main possible objections that must be contended with.[152] Firstly, the radicalisation cases are not an alternative to criminal prosecution. Parents facing family court proceedings often also face simultaneous criminal proceedings. A close analysis of both the published radicalisation cases and the data provided by Cafcass through the FOI requests indicates that 51 per cent of parents involved in these cases were also involved in criminal proceedings, although only 34 per cent of the criminal investigations and/or prosecutions actually relate to terrorism offences. The existence of these concurring criminal and family proceedings underscores the fact that when it comes to children and their protection from harm and abuse, criminal and family justice responses are motivated by different objectives and seek to achieve differing outcomes.[153] While criminal law is retrospective, aiming to establish guilt and to punish parents for crimes committed against their children and/or the public, family law has more of a preventative and protective purpose.[154] These divergent aims are reflected in the different standards of proof deployed by criminal and family justice systems. Whereas 'the criminal standard requires proof beyond reasonable doubt',[155] the family courts deploy the civil standard of proof, focusing on the question of whether on the balance of probabilities, the child is suffering, or likely to suffer, significant harm.

Because the focus of family court proceedings 'is on the best interests of the child as opposed to a finding of "guilty" or "not guilty" in respect of parental conduct',[156] it is not uncommon for a parent who has been acquitted of a crime, or indeed a parent who has not even faced criminal proceedings, still to be considered by the family courts to be a danger to their children and to

151 Nanopoulos, n 148 above, 913-916.
152 Many thanks to the anonymous reviewers for raising these two objections.
153 Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford: OUP, 2007) 6.
154 Bernard Dickens, 'Legal Responses to Child Abuse' (1978) 13 Fam Law Q 1, 20-22.
155 Hoyano and Keenan, n 153 above, 64.
156 Lauren Devine, *The Limits of State Power and Private Rights: Exploring Child Protection and Safeguarding Referrals and Assessments* (Abingdon: Routledge, 2017) 1.

face the legal consequences that follow.[157] As such, the question that must be responded to here is whether the radicalisation cases can really be criticised for bypassing the criminal law and undermining the criminal justice approach to counter-terrorism if the goal of the family courts is fundamentally different to that of the criminal courts? Should the family justice system not step in to protect the children of accused and/or suspected terrorists and extremists from the risk of harm and safeguard their welfare irrespective of whether or not their guilt has been established to the criminal standard of proof?

Secondly, it could be argued that a family justice response in terrorism and extremism cases involving and/or impacting children is preferable to a criminal justice one since the welfare of children is not *as* central to the criminal justice system as it is to the family justice system.[158] Criminal law is concerned with protecting the safety of the wider public through the containment and deterrence of offenders[159] rather than with a particular child's best interests.[160] Looking specifically at the counter-terrorism context, it is important to bear in mind that criminal counter-terrorism initiatives tend to be adult-focused and do not really take into consideration the vulnerability of children and their specific welfare interests and needs.[161] The question that needs to be addressed here, then, is given that the family justice system is more child-focused and welfarist in its orientation, is it not better placed to deal with cases concerning the involvement of parents and/or children in terrorism, extremism and radicalisation?

These are important potential objections to the claim made in this section regarding the need to prioritise the criminal justice model of counter-terrorism and the general argument against the involvement of the family justice system in the national security landscape. Nevertheless, and responding to these objections, in what follows I demonstrate how and why the radicalisation cases and the subsequent interaction between family law and counter-terrorism denote an unnecessary and at times even troubling bypassing of criminal law.

Prioritising criminal justice responses to terrorism: the essentially *criminal* nature of terrorism

Acts of terrorism are criminal acts of political violence.[162] Although terrorism scholars and counter-terrorism policy makers strongly disagree on how to define terrorism,[163] there seems to be a consensus that acts of terrorism involve, at their core, the unlawful and criminal use of violence for the achievement of

157 Jenny Gray, 'The Interface Between the Child Welfare and Criminal Justice Systems in England' (2004) 13 Child Abus Rev 312, 315.
158 Hoyano and Keenan, n 153 above, 121-122.
159 Heather Keating, '"When the Kissing has to Stop": Children, Sexual Behaviour, and the Criminal Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford: OUP, 2012) 202.
160 Dickens, n 154 above, 22.
161 Walker, n 36 above, 201.
162 Terrorism Act 2000, s1.
163 Conor Gearty, *Terror* (London: Faber and Faber, 1991) 1-5 and 13 and Richard English, *Terrorism: How to Respond* (Oxford: OUP, 2009) 1-5.

political ends.[164] Because terrorists are, first and foremost, criminals, they should face criminal sanctions following a criminal trial.[165] The state has at its disposal an endless supply of preventive and increasingly widely construed terrorism offences that capture the most precursory of terrorist conduct, including the dissemination of extremist speech that justifies and supports terrorism and has the potential to radicalise vulnerable individuals and children.[166] The existence of these broad offences that can facilitate early intervention shows that criminal law not only should but also *can* 'take the main role'[167] in terrorism prevention. Yet, only two percent of the parents involved in the radicalisation cases were actually convicted of terrorism offences. The majority of the parents have either been acquitted of, or have not even been charged with, any terrorism offences.

The first objection, acknowledged above, which stipulates that since family justice interventions have *protective* and *welfarist* goals the family courts must be able to protect children from radicalisation regardless of what is decided in the criminal courts, assumes that radicalisation is a childhood risks just like any other childhood risk. This assumption rests on, and therefore accepts, the categorisation of terrorism, extremism and radicalisation as child-protection concerns that raise recognisable safeguarding issues, albeit in a new and evolving context. However, this assumption needs to be challenged. It is true that the prospect of children travelling to war-zones, witnessing and even potentially participating in terrorist violence there, raises obvious and highly serious risks of physical and emotional harm that clearly engages the child-protection duties of the state.[168] But only a small proportion of the radicalisation cases actually deal with protecting children from the risk of travelling to foreign war-zones and/or engagement in terrorist violence. The majority of the radicalisation cases are primarily concerned with the radicalising influence of parental extremism and the risk of children's indoctrination into extremist ideologies.[169]

Radicalisation and extremism cannot be described as risks that are comparable to more traditional and familiar child-protection harms and safeguarding risks. This is because, as I briefly mentioned earlier, radicalisation and extremism are highly politicised *security* terms that come from counter-terrorism policy. Up until the recent advent of the radicalisation cases in the family courts, these terms were entirely alien to child-protection law, policy and practice. While radicalisation and extremism are now *officially* considered to be child-protection and safeguarding issues, it is important to be aware of the leading role that counter-terrorism policy and legislation played in their identification as such.[170] Radicalisation and extremism were first identified as child-protection and safeguarding

164 Ben Saul, 'Defining "Terrorism" to Protect Human Rights' in D. Staines (ed), *Interrogating the War on Terror: Interdisciplinary Perspectives* (Newcastle: Cambridge Scholars Press, 2007) 190-195 and Conor Gearty, 'Terrorism and Morality' (2004) 61 *Whitehall Papers* 19, 19-20.

165 Helen Fenwick, 'Responding to the ISIS threat: extending coercive non-trial-based-measures in the Counter-Terrorism and Security Act 2015' (2016) 30 Int Rev Law Comput Technol. 174, 185.

166 Boukalas, n 143 above, 355-357.

167 Fenwick, n 165 above, 185.

168 *Re X (Children); Re Y (Children)* n116 above at [70].

169 Ahdash, n 2 above, 398-399.

170 This point will be elaborated below.

risks in the policy documents and literature of *Prevent* and *Channel*.[171] Although, since then, child-welfare policy has required public bodies to incorporate countering radicalisation and extremism into their usual safeguarding protocols,[172] this only became a statutory requirement after the introduction of the 'Prevent Duty'[173] as part of the Counter-Terrorism and Security Act 2015 – a piece of counter-terrorism legislation.

The point here is that radicalisation and extremism do not themselves pose obvious or clear childhood risks. Rather, counter-terrorism policies and laws have redefined radicalisation and extremism from security concerns into safeguarding issues, thereby *constructing* a new category of child-protection.[174] This redefinition has been heavily contested, and even rejected, by social work academics and practitioners who argue that radicalisation and extremism are securitised concepts that do not present social workers with recognisable child-protection risks.[175] They warn that whilst 'everyone can understand the definition of safeguarding when it comes to child-neglect, physical abuse and sexual abuse',[176] when it comes to radicalisation and extremism there is 'no shared consensus … as to what children would [actually] be safeguarded from.'[177]

This lack of consensus is reflected in the fact that exactly *how* children suffer harm as a result of radicalisation and exposure to extremist views is left unarticulated in the radicalisation cases. Because, more often than not, the suspected harm is an ideological and psychological harm that is, by the judges' own admission, 'insidious'[178] and difficult to assess,[179] the family judges have not really been able to specify the child-protection harms and risks faced by children vulnerable to radicalisation through exposure to extremism with any sufficient clarity.[180] Instead, ambiguous and vague conclusions about ideological and psychological harm are drawn without precision or expert psychological evaluation.[181]

171 See 'The Prevent Strategy: A Guide for Local Partners in England (HM Government, 2008) http://www.tedcantle.co.uk/publications/039%20CLG%20Prevent%20Guide%20guide%20for%20local%20partners%202008.pdf [https://perma.cc/E5JJ-SLUQ] and 'Channel: Supporting individuals vulnerable to recruitment by violent extremists: A Guide for Local Partnerships' (HM Government with Association of Chief Police Officers) at https://www.safeguardingcambspeterborough.org.uk/wp-content/uploads/2014/11/acpo-Prevent-and-Safeguarding-Guidance-Supporting-individuals-vulnerable-to-violent-extremism.pdf [https://perma.cc/VWG4-9GYH].

172 n 122 above.

173 The Counter-Terrorism and Security Act 2015, s 26 requires 'specified authorities' including schools and local authorities to 'have due regard to the need to prevent people from being drawn into terrorism.'

174 Ahdash, n 2 above, 403-405.

175 Tony Stanley and Surinder Guru, 'Childhood Radicalisation Risk: An Emerging Practice Issue' (2015) 27 *Social Work in Action* 353 and David McKendrick and Jo Finch, '"Downpressor man": securitisation, safeguarding and social work' (2017) 5 Crit Radic Soc 287, 293-294.

176 Joint Committee on Human Rights, *Counter-Extremism: Second Report of Session 2016-17* HL Paper 39 / HC 105 (2016) 5.

177 *ibid*.

178 *Brighton and Hove City Council* v *Mother, Y* [2015] EWHC 2099 (Fam), [2016] 2 FLR 229 at [9].

179 *ibid*.

180 Taylor, n 26 above 54.

181 Ahdash, n 2 above, 411.

Prioritising criminal justice responses to terrorism: important procedural safeguards

In challenging the equivalence drawn between radicalisation and extremism and more established child-protection and safeguarding issues, the essentially *criminal* nature of terrorism, and the importance of prioritising a criminal justice response to it, is foregrounded. But insisting that the criminal justice system model of counter-terrorism should be prioritised is also important for the achievement of justice and the protection of rights. Whilst it is true, as per the second objection identified above, that the family justice system can be more welfarist and responsive to the specific needs of children than the criminal justice system, this does not mean that it is preferable because it is somehow less draconian. For as Lauren Devine and Stephen Parker point out, the 'welfare ideology'[182] underpinning family law is often achieved at the expense of justice for parents as well as children.[183]

The criminal justice system affords those accused of wrongdoing with important procedural safeguards: a defendant has the right to defend themselves and to challenge the accusations to a jury, under the gaze of the media and the attention of the public. A high standard of proof is used, requiring the state to substantiate its claims beyond reasonable doubt. By contrast, since parents involved in family court proceedings are not defendants, a lower, less forensic civil standard of proof of on the balance of probabilities is used where the focus of the proceedings 'is not on whether specific acts or omissions have occurred but on a broader "picture"'.[184] As we see in the following section, the decisions made using this low evidential standard can be highly intrusive and even 'draconian',[185] including the removal of a child from the care of their parents and the surveillance of family homes and relationships. Even if the family court decides to dismiss proceedings, the process itself is highly invasive and can cause serious damage to reputations.[186] Yet, since family justice interventions are construed as protective, child-centric measures designed to safeguard the child's welfare, rather than sanction the parent,[187] the vulnerability of parents to miscarriages of justice as a result of family court processes and decisions is rarely acknowledged.[188]

The point here is that the preference for family justice approaches to counter-terrorism underpinning the second objection rests on a mistaken view of family law as an essentially benign area of law. This view overlooks the coercive, draconian and rights-curtailing dimensions to family court decisions. Looking specifically at the radicalisation cases, we see that the family judges have made serious terrorism-related findings against these parents, including that they glorify terrorism, support terrorist organisations, and are violent or non-violent

182 Stephen Parker and Lauren Devine, 'Public Family Law Cases in the Context of Miscarriages of Justice' (2015) *Open Research Online* 1, 6.
183 *ibid*, 1-3.
184 *ibid*, 12.
185 *ibid*,13.
186 *ibid*.
187 *ibid*, 6.
188 *ibid*, 13.

extremists who have radicalised, or who are likely to radicalise, their children.[189] Parents involved in such cases also face serious legal consequences, in the form of considerable state intervention in their private and family life,[190] as well as significant reputational damage.[191] These serious findings and intrusive measures are made, of course, using the lower, civil standard of proof. This is not to say that the family justice system should deploy the criminal standard of proof.[192] Rather, the point here is that the civil standard of proof is lacking in the safeguards afforded by a criminal standard of proof of beyond reasonable doubt that should be applied to parents who face serious allegations such as glorification and support for terrorism and potential involvement in terrorist related activity – allegations that fall squarely, and easily, within the parameters of existing terrorism offences. Given the private nature of family court proceedings, this is done away from the media and the public accountability that comes with open legal proceedings.

Finally, it is worth highlighting that in the radicalisation cases where the most draconian outcomes were ordered (ie removal of a child from the family home) the police were unable, for lack of sufficient evidence, to charge the parents in question with terrorism offences.[193] It is therefore hard to disagree with the claim made by some of the interviewees that local authority and family court involvement in some of these cases was 'a form of backhanded criminalisation'[194] and 'an insidious way of applying pressure on parents'[195] who might be suspected of involvement with terrorist and/or extremist organisations but who, for lack of sufficiently robust evidence, have not been charged or have been acquitted.

Having argued that the emergence of the radicalisation cases in the family courts represents yet another *unnecessary* and *dangerous* undermining of the criminal justice model of counter-terrorism, the focus of the final section of the article is on the negative impact that countering terrorism in and through the family courts has had on the affected families and communities. Closely examining the outcomes of the cases and the approach of the family judiciary to fundamental human rights, I demonstrate that these cases have resulted in intrusive interventions in private and family life and have interfered with the right to religious freedom, non-discrimination and children's rights.

189 Ahdash, n 2 above, 399-408.
190 This point is developed further in the final section of the article.
191 For example the father in *Re X (Children) (No3)* [2015] EWHC 3651 (Fam); [2017] 1 FLR 172 at [74] expressed his concern at the impact of family court proceedings on the children's reputation at school.
192 Although this has been suggested by academics with regards to child-protection cases involving particularly serious allegations. See Parker and Devine, n 182 above, 6.
193 *Leicester City Council* v *T and Others* n 115 above and *A Local Authority* v *A Mother and Others* [2018] EWHC 2056 (Fam); [2018] 6 WLUK 481.
194 Interview with Barrister C, a senior barrister at No 5 Chambers (London, 12 May 2018).
195 Interview with Solicitor A, n 61 above.

DRACONIAN OUTCOMES, POTENTIAL DISCRIMINATION AND ABSENT HUMAN RIGHTS

As we saw earlier, the dominant narrative claims that the family courts have adopted a human rights compliant approach to the radicalisation cases. Pointing to the relatively low number of cases that have led to the permanent removal of children from their homes, Downs argues that the cases are proportionate, fair and human rights compliant.[196] The family courts' respect for human rights is also reflected, Edwards maintains, in the sensitivity displayed to the religious rights of parents.[197]

Admittedly, there is some truth to both of these assertions. Permanent removals are indeed a rarity in the radicalisation cases. Moreover, in cases that resulted in permanent removal of children, removal was only ordered because the court made very serious findings against the parents after they admitted to travelling to and living in ISIS-held territories with their children.[198] The cases also demonstrate the care that the family judges have shown to religious rights. For example, in *Re A and B (Children: Restrictions on Parental Responsibility: Extremism and Radicalisation and Extremism)*[199] the mother applied to restrict the father's contact with their two children based on accusations that the father was an extremist individual who supported the ideology and methods of Islamist terrorist groups. Russell J berated counsel for the mother for putting forward allegations of extremism against the father 'without evidence'[200] which had 'effectively sought to equate Islam with radicalisation.'[201] Russell J emphatically stressed that the family courts would never 'tolerate any suggestion that adherents of the Islamic Faith, or any other faith, are ipso facto, supporters of extremism.'[202]

However, here I want to warn against overemphasising the significance of these modest displays of proportionality and symbolic commitments to human rights. Looking closely and critically at the types of outcomes that have been ordered in the radicalisation cases, in this section I argue that focusing too much on the relatively low number of permanent removals obscures some of the other intrusive forms of intervention that have been facilitated by the family courts. I then go on to highlight the negative impact on human and children's rights that the radicalisation cases have had, and the absence of a robust human rights analysis that can offset some of their draconian and discriminatory consequences.

196 Downs, n 34 above.
197 Edwards, n 49 above, 56–59.
198 *A Local Authority* v *T and Others* n 58 above and *A Local Authority* v *A Mother and Others* n 193 above.
199 [2016] EWFC 40; [2016] 2 FLR 977.
200 *ibid* at [119].
201 *ibid*.
202 *ibid*.

Draconian measures, temporary removals and intervention at home

Although permanent removals are a rarity in these cases, they are not non-existent. Permanent removal was ordered in four of the published radicalisation cases.[203] The power to remove a child from their home is one of the greatest powers the state has and must, therefore, be approached carefully. A close and critical examination of the specific nature of the permanent removals that were ordered shows that, contrary to the claims of the dominant narrative, these outcomes are actually draconian.

A particularly illustrative example here is *A Local Authority* v *A Mother and Others*,[204] a case concerning J, a two-year-old girl who had been born in an ISIS controlled city in Syria. The parents had met and married in the UK before leaving to join ISIS first in Iraq and then in Syria. After a while the parents decided to leave Syria with their daughter, but they were detained by the Turkish authorities at the border. While the father faced criminal proceedings in Turkey, the mother was repatriated to the UK. Knowles J found that the mother held extremist beliefs supportive of ISIS and that she had harmed her daughter by living with her in ISIS-held territories. Knowles J also found that there was still a risk that the mother would try to move J out of the jurisdiction to the Middle East and that she could indoctrinate her with extremist ideology. As such, Knowles J decided that J's welfare required her permanent removal from the care of her mother and 'her placement with the paternal grandmother'.[205]

Permanent removal would have, on its own, been a drastic enough outcome in this case. But the severity of the outcome was exacerbated by three further issues. First, Knowles J ordered a reduction in the contact time between the mother and J despite the mother's strongly expressed 'desire to see [J] as often as' possible.[206] Although Knowles J conceded that reducing contact time would weaken the 'strong bond between mother and daughter',[207] Knowles J decided that this reduction in contact was necessary because 'contact at a greater frequency runs the risk of unsettling'[208] J who 'must undergo a difficult process of putting down new roots in her grandmother's home.'[209]

Second, since J was to be raised by her non-Muslim paternal grandmother, she was no longer going to 'be brought up as a Muslim.'[210] Whilst Knowles J recognised that this amounted to a limitation on J's 'right to manifest her religious beliefs',[211] he found that this will be 'mitigated by the paternal grandmother's willingness to educate and inform J about her religious and cultural heritage so that in due course she can make her own choices.'[212] However, the

203 See *Re Y (Children) (Finding of Fact 2)* n 66 above; *A Local Authority* v *T and Others* n 58 above; *Leicester City Council* v *T and Others* n 115 above and *A Local Authority* v *A Mother and Others* n 193 above.
204 n 193 above.
205 *ibid* at [7].
206 *ibid* at [63].
207 *ibid* at [44].
208 *ibid*.
209 *ibid*.
210 *ibid* at [49].
211 *ibid*.
212 *ibid*.

fact that the paternal grandmother is a Christian and had raised her son, the girl's father, as a Christian was not given sufficient attention.[213] J will not be entering a religiously neutral environment. Rather, she will be entering and will be raised in a Christian environment. As Suhraiya Jivraj and Didi Herman note, while 'an implicit Christian normativity'[214] within the English family courts tends to render Christianity 'invisible',[215] when a non-Christian child is removed from their religious home and community and permanently placed with a Christian family, they are – or at least risk appearing as if they are – 'placed on the road to conversion.'[216] The potentially serious implications of this were not even considered, let alone addressed, by Knowles J in the case.

Thirdly, it is not really clear that permanent removal was necessary or desirable from the perspective of J's welfare. To deal with the risk of travel to ISIS-held territories, the mother informed the court that 'she will agree to any supervision requirements'[217] and even proposed 'injunctive relief so as, for example, to prevent her from travelling abroad.'[218] It is not clear why these less interventionist measures were rejected by Knowles J, especially since in other similar cases electronic tagging was seen as a sufficient measure for protecting children at imminent risk of travel to ISIS-held territories.[219] Nor was the emotional harm that could be caused to J as a direct result of removal from the care of their parents given sufficient consideration. As critical family law scholars have argued, permanent removals are not always ordered by the family courts because they are in the best interests of children. Rather, as this case illustrates, removals can have a *punitive* quality to them.[220]

Even if *permanent* removals are a rare outcome in the radicalisation cases, *temporary* removals under police protection, emergency protection orders (EPOs) and interim care orders are certainly not. Although removal here is temporary, it is still concerning since it results in a separation between parent and child for relatively long periods of time.[221] In particular, it is worth noting that an interim care order usually lasts for the duration of proceedings, from several months up to more than a year.[222] In some of these cases, children have been removed under interim care orders and placed in foster care for long periods of time lasting for months[223] in some cases and more than two years in others.[224] Moreover, the threshold criteria used by the family courts to sanction these temporary removals is significantly lower than the threshold criteria for final orders. In the case of police protection and EPOs, the court does not even require evidence

213 *A Local Authority* v *A Mother and Others* n 58 above at [16].
214 Suhraiya Jivraj and Didi Herman, '"It is difficult for a white judge to understand": orientalism, racialisation and Christianity in English child welfare cases' (2009) 21 CFLQ 283, 297.
215 *ibid*, 292.
216 *ibid*.
217 n 58 above at [43].
218 *ibid*.
219 For example *Re X; Re Y* n 115 above and *Re C, D, E (Radicalisation: Fact Finding)* n 58 above.
220 Lynne Wrennall, 'Surveillance and Child Protection: De-Mystifying the Trojan Horse' (2010) 7 *Surveillance and Society* 304, 306.
221 Children Act 1989, ss 45 and 46.
222 Andrew Bainham, 'Interim Care Orders: Is the Bar Set Too Low?' (2011) *Family Law* 374, 377.
223 *Lancashire County Council* v *M and Others* [2016] EWFC 9; [2016] 2 WLUK 148 and *Re X; Re Y* n 115 above.
224 *A Local Authority* v *M and Others* n 76 above.

of actual or likely harm but simply a reasonable cause to believe that harm may occur in the future.[225] As Andrew Bainham has pointed out, for the anxious parents whose children have been removed and who are threatened with the permanent removal of their children if they do not cooperate and comply, the idea that these are simply *temporary* removals is not very reassuring.[226] Therefore, focusing on the low number of permanent removals obscures the extent of state intervention that the radicalisation cases have otherwise facilitated in the private and family lives of the children and parents involved.

Looking beyond the issue of permanent removal also shows that whilst the dominant narrative's claim that in the radicalisation cases the family judges have shown a preference for making orders that allow children to remain at home under the care of their parents is accurate, the return of children to their homes often depended on parental compliance with intrusive measures that facilitate the close scrutiny and regulation of family life. This is reflected in *A City Council* v *A Mother and Others*,[227] a case involving an application for care orders in relation to three children who were feared to be at risk of suffering significant harm as a result of potential exposure to their parents' fanatical religious beliefs and support for terrorist organisations. Just because Knowles J granted care orders that facilitated the return of the children home does not make the outcome of this radicalisation case any less concerning. Care orders give the local authority parental responsibility over the children and allow it to remove the children from their home without any further applications to the court should it consider it necessary. And whilst theoretically under a care order parental responsibility is shared between the parents and the local authority, in reality the local authority controls what happens to the children in its care; parents cannot exercise their parental responsibility in ways that are incompatible with the local authority's care plans.

This particular radicalisation case shows that these care plans can be intrusive, highly prescriptive and even coercive. Before the children could be returned home, the parents were required to commit to and sign 'a written agreement with the Local Authority'[228] which stipulated that 'the family will engage with *Prevent* [and] that the family's electronic devices will be subject to inspection on request and may also have monitoring software installed.'[229] The agreement also required the parents to 'ensure that the older members of the family do not expose any of the younger children' to views 'endorsing or supporting violent jihad.'[230] These stipulations essentially transformed the parents into counter-extremism agents in their own home, requiring them to actively prevent the exposure of their children to extremist thought and to monitor the flow of religious and political ideas within their family. The fact that the family court comes dangerously close to facilitating thought policing was made alarmingly

225 Judith Masson, 'Human Rights in Child Protection: Emergency Action and Its Impact' in Peter Lodrup and Eva Modvar (eds), *Family Life and Human Rights* (Oslo: Gyldendal Norsk Forlag AS, 2004) 475.
226 Bainham, n 222 above, 377.
227 n 76 above.
228 *ibid* at [36].
229 *ibid*.
230 *ibid*.

clear in Knowles J's remark regarding the 'magnitude of the task which lies ahead for the local authority and its partner agencies in seeking to recalibrate the beliefs of these parents towards a more inclusive and tolerant acceptance of those living in this country who do not observe the Muslim faith.'[231] In this radicalisation case, then, recalibrating the beliefs of the parents was required before the children could be returned home to their parents.

Clearly, then, the focus on the low number of permanent removals that have resulted from the radicalisation cases is misleading. Although permanent removal is certainly the most severe form of state intervention in family life, this should not obscure the fact that there are other intrusive and insidious forms of state intervention that have been facilitated by such cases. Highlighting and critically analysing these other forms of intervention shows why the recent involvement of the family courts in counter-terrorism is, in fact, a worrying legal development.

The impact on human rights: discriminatory double-standards and children's rights

The discussion above demonstrates how the radicalisation cases and the resulting involvement of the family justice system in counter-terrorism have given the counter-terrorist state unprecedented access to the private realm of the home and family. In families where there are accusations of terrorism, children can be removed from their homes, parental responsibility can be restricted and the nature of the parent-child relationship and the minutiae of everyday family life closely monitored and regulated. The intrusive, prescriptive and at times draconian orders that have been sanctioned, and the parenting and child assessments and the regular visits by social workers and radicalisation experts that both precede and follow these court orders, interfere significantly with the right to respect for private and family life.

What makes these interferences even more troubling is the discriminatory dimension to them. For it is worth highlighting here the fact that the involvement of the family courts in counter-terrorism has not made *all* families and family relationships susceptible to intervention and surveillance in the name of national security. The families that have been involved in and impacted by the radicalisation cases are Muslim families. To date, there have been no published family court cases involving allegations of far-right extremism and radicalisation. This has remained the case despite the increase in far-right terrorism and the fact that the majority of children and young people who are referred to *Prevent* and *Channel* are at risk of far-right radicalisation.[232] This focus on Muslims hints at a possible and concerning double-standard within the family justice system's approach to allegations of extremism and radicalisation.

231 *ibid* at [38].

232 Haroon Siddique, 'More Prevent referrals linked to far-right extremism than Islamist' *The Guardian* 18 November 2021 at https://www.theguardian.com/uk-news/2021/nov/18/more-prevent-referrals-linked-to-far-right-extremism-than-islamist [https://perma.cc/2J4V-4YWX].

This potential discriminatory double-standard is also reflected in the treatment of allegations of far-right extremism by the family courts in two recent cases. In *Re A* (*Application for Care and Placement Orders: Local Authority Failings)*,[233] the local authority claimed that the father had been an active member of the far-right group the English Defence League (EDL), organising violent protests and espousing racist views.[234] However, and dismissing the applications for a care order, Munby P insisted that '[m]embership of an extremist group such as the EDL was not, without more, any basis for care proceedings.'[235] Likewise, allegations of far-right extremism were largely ignored in *Re V (Children)*.[236] While the focus of the case was on the alleged sexual abuse committed by the father against the children,[237] part of the case against the father included allegations that 'he was a supporter of Hitler'[238] and had made comments in front of his children 'suggesting exposure to what might be characterised as extreme right-wing prejudices.'[239] But even though the father 'conceded that the reference to his fascination with Hitler had substance to it',[240] and accepted that the comments he made regarding what 'the Nazis did to [the] Jewish population … [were] frightening',[241] the allegation was not explored by Wood J further. Nor was the potential impact of the father's neo-Nazi views on the children subjected to any investigation.

This attitude to allegations of far-right extremism differs significantly to the approach of the family courts in the cases where allegations of Islamist extremism and radicalisation are taken much more seriously. In *Re A and B (Children)*,[242] a case that is factually quite similar to *Re V*,[243] the local authority applied to the court for care orders primarily because of the father's long criminal history which, the local authority argued, caused the children instability and emotional harm.[244] However, part of the local authority's case against the father included concerns regarding extremist materials found in the home.[245] The psychologist instructed to conduct the father's parenting assessment was 'invited to consider whether the father held extreme views'[246] and 'whether the father's views, whatever they be, were impacting upon his parenting of his children.'[247] There is, therefore, a discrepancy in the way in which the family courts respond to and treat allegations of Islamist extremism and far-right extremism, indicating the existence of racial and religious bias and perhaps even Islamophobic discrimination.

233 [2015] EWFC 11; [2016] 1 FLR 1.
234 *ibid* at [64]-[69].
235 *ibid*.
236 [2015] EWHC B28 (Fam).
237 *ibid* at [4].
238 *ibid*.
239 *ibid* at [49].
240 *ibid*.
241 *ibid* at [102].
242 [2016] EWFC B43.
243 n 236 above.
244 n 242 above at [24].
245 *ibid* at [25].
246 *ibid* at [44].
247 *ibid*.

The radicalisation cases also interfere with and impact the rights of children. For example, consideration of the right of children to a voice within legal proceedings affecting them is notably absent in this line of cases. Even though judges are required, under both section 1(3) of the Children Act 1989 and Article 12 of the United Nations Convention on the Rights of the Child, to ascertain and give weight to the views and wishes of children when making decisions regarding their upbringing, the children in the radicalisation cases are conspicuously silent. Their views appear to be relevant only in so far as they help the court determine whether or not they have been radicalised or exposed to extremism.[248]

The radicalisation cases also interfere with the religious rights of children, their political agency and freedom of expression. The clearest example of this can be found in *A Local Authority* v *X, Y and Z*,[249] where care proceedings were issued in relation to three children whose father was the subject of a TPIM. The local authority in that case had alleged that the father was a religious fundamentalist and a member of a proscribed group and that the mother had taken her children to gatherings where extremist views were expressed. During the course of the proceedings, the mother complained that the social worker 'asked the children on a number of occasions about their views in relation to ISIS and wearing the hijab.'[250] Although MacDonald J noted that the social worker's notes clearly indicated that she had indeed questioned one of the girls 'about wearing the hijab and what her parents would do if she did not wear it'[251] and had quizzed the other children 'about ISIS and matters of religion',[252] the issue was not investigated further. The biased and potentially discriminatory nature of these questions, which appear to problematise mainstream Islamic religious practices such as hijab-wearing, and the potentially chilling effect that they have on the children's political exploration and expression were not even acknowledged, much less explored, in the case.

A missing human rights analysis

The worrying impact of the intrusive outcomes, the potential discrimination and the restrictions on children's rights present in the radicalisation cases is exacerbated by the fact that an appropriately thorough consideration of the human rights of the parents and children involved is almost non-existent.

To an extent, the lack of a robust human rights analysis in these cases is rather unsurprising. Generally speaking, the family courts of England and Wales have shown a resistance to ECHR-based rights reasoning.[253] Despite the advent

248 *A Local Authority* v *M and Others* n 62 above and *A Local Authority* v *X, Y and Z* [2017] EWHC 3741 (Fam); [2018] 2 FLR 1121.
249 *ibid*.
250 *ibid* at [41].
251 *ibid*.
252 *ibid*.
253 David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52 ICLQ 549, 572. See Shazia Choudhury and Jonathan Herring, *European Human Rights and Family Law* (Oxford: Hart Publishing, 2010).

of the Human Rights Act 1998 and the subsequent 'growth of what is now commonly referred to as a "human rights culture" in the UK',[254] there is still resistance and 'opposition to the use of rights-based reasoning in the family law context.'[255] Instead, the English family courts maintain that there is no real difference between the welfare principle and checklist (found in sections 1(1) and 1(3) of the Children Act 1989) and ECHR rights. Therefore, the family courts tend to find that human rights issues and assessments are already addressed within, and provided for by, the welfare principle.

This resistance of the family courts to human rights analysis is expressed in two main ways in the radicalisation cases. The first involves a cursory, formulaic and superficial human rights analysis where human rights issues and potential concerns are quickly dismissed.[256] Here, the comments made by Cobb J towards the end of *Re C, D, E (Radicalisation: Fact Finding)*,[257] discussed above, are representative of this limited human rights analysis. After approving the local authority's application for interim care orders and authorising the electronic tagging of the parents, Cobb J confined the human rights analysis in this case to a brief and very generic paragraph: 'I have consciously reflected on the rights of these parents, under Article 9 of the ECHR to freedom of thought and religion, including the right to manifest their religion or belief … they have similar potent rights under Article 10 of the ECHR to freedom of expression and the right or freedom to hold opinions and to receive and impart information and ideas without interference.'[258] A similarly limited human rights analysis is present in *Re M (Wardship: Jurisdiction and Powers)*.[259] After making wardship orders, Munby P provided assurances that the orders made represent 'a proportionate interference with the rights of the mother, the father and the children under Articles 6 and 8' of the ECHR.[260]

The second, more common, approach to human rights analysis involves a total lack of engagement with human rights at all.[261] This tendency of the family courts to be 'silent'[262] on human rights is reflected in the majority of radicalisation cases where any mention of human rights is entirely missing.[263]

Therefore, and contrary to the claim put forward in the dominant narrative, it appears that considerations of human rights are largely absent within the radicalisation cases. Whilst it is true that in cases that have resulted in preventing children from travelling to ISIS-held territories the family courts have taken into account and protected the rights of children to life and their right to freedom from torture and inhuman and degrading treatment, their other rights to respect for private and family life, freedom of religion, equality and

254 Sonia Harris-Short, 'Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution' (2005) 3 CFLQ 329, 330.
255 *ibid*, 329.
256 Bonner, Fenwick and Harris-Short, n 253 above, 578.
257 n 58 above.
258 *ibid* at [32].
259 [2015] EWHC 1433 (Fam); [2016] 1 FLR 1055.
260 *ibid* at [9].
261 Bonner, Fenwick and Harris-Short, n 253 above, 576.
262 *ibid*.
263 In 26 of the overall 48 published radicalisation cases, mention of human rights is entirely missing.

non-discrimination and the rights of their parents have not been sufficiently considered.

CONCLUSION

This article has shown that as a result of the emergence and growth of the radicalisation cases, family court proceedings have now become a routine part of counter-terrorism investigations where children and/or parents are involved. Whereas previously family law was largely uninvolved in counter-terrorism, in recent years it has been streamlined into, and has become a routine part of, counter-terrorism practice.

In this article I warned against the dangers of the family courts' involvement in counter-terrorism – dangers which have been obscured as a result of the prevalence of a largely positive and complacent narrative regarding the radicalisation cases. I questioned the dominant narrative's characterisation of these cases as ordinary child-protection cases where the conventional principles of family law, rather than the goals and priorities of national security, prevail, demonstrating the considerable influence that the practices, aims and objectives of counter-terrorism has on judicial assessments of risk and decisions on welfare. I highlighted the family judges' heavy reliance on evidence provided by counter-terrorism police and security agents and the different and extensive ways in which they draw on counter-terrorism policies, frameworks and experts to determine whether a child is at risk of harm and to decide the course of action that can safeguard their welfare. As such, I argued, the state is essentially 'doing' counter-terrorism in and through the family courts.

This expansion of the counter-terrorist state into the family justice system is worrying, I claimed, for two reasons. Firstly, it represents an unnecessary and rather dangerous undermining of the more suitable and preferable criminal justice model of counter-terrorism. Secondly, it seriously interferes with the private and family lives of the children and parents involved and their religious rights, discriminates against Muslim families and undermines child rights.

The critique contained within, and the warnings sounded by, this article are important and perhaps even urgent. By expanding the number of jurisdictions available to the counter-terrorist state and the type of sanctions that it can impose on those convicted or suspected of terrorism, the radicalisation cases have increased its reach and power to an alarming level. Family court orders are, as this article has shown, highly intrusive and draconian in their impact. By bringing family law into its fold, the counter-terrorist state can, and does, now closely regulate the parent-child relationship in the name of preventing and countering terrorism, removing the children of suspected terrorists and/or extremists from their care, limiting their parental responsibility and monitoring their home lives. This construction and establishment of the family home as the new frontier in the state's ever-expanding fight against terrorism poses serious threats, and causes considerable harm, to the lives and rights of children, parents and communities involved.

The emergence of the radicalisation cases in the family courts of England and Wales is a significant legal and development with far-reaching implications not just for the individuals and families immediately impacted but also more generally for the relationship between the individual, the family and the state. In highlighting and discussing some of these implications, the hope is that the current political and academic indifference to such cases and the ensuing involvement of the family courts in counter-terrorism can no longer continue.

SUPPORTING INFORMATION

A full list of the cases analysed can be found online in the Supporting Information section at the end of the article.