Issues with *Radicalisation* cases and the civil law

By Martin Downs

Introduction

1. The Civil Courts have now been involved in cases of radicalisation brought before them by local authorities for very nearly three years (we are approaching the third anniversary of the first case). What was then innovative is now reasonably well-established (see *President's Guidance on Radicalization Cases in the Family Courts* (8 October2015) and the Judgment of Hayden J in *London Borough of Tower Hamlets v B* [2016] EWHC 1707.

2. Concern was stirred originally by the spectre of significant numbers of people travelling to Syria to demonstrate their support for ISIS or the Al Nusra Front. This problem is not novel as 80 years ago Britain and Ireland were similarly fixated with the problem of volunteers departing for Spain to fight on both sides in the Civil War. A portrayal of the indoctrination of school age children to fight in that war even seeped into popular culture courtesy of Muriel Spark's novel, *The Prime of Miss Jean Brodie*. The current situation is complicated by the relative ease of international travel, the tactics and targets used by extremists and the fact that the UK has already experienced domestic terrorism inspired by international examples.

3. The number of UK nationals travelling to Syria may have fallen but reports in 2016 of significant numbers of youths travelling from Kerala to Syria show that the problem has not fallen away and is truly international.

One size fits all approach

4. Reports of cases have revealed that the Courts are prepared to act when young people are at risk of radicalisation and having their will suborned to encourage them to travel to Syria and other countries. In the case of girls there are risks of child sexual exploitation and forced marriage – in the case of boys, the risk is of death in combat. For both sexes there is the danger implicit in any travel to a war zone.

5. Those with whom the Courts are concerned are actually a disparate group including young men – frequently 15 – 17 who are drawn to fight in Syria. Young women 15 – 17 and children where it is the intention of the whole family to relocate.

6. The primary destination of concern is Syria but there is some evidence of people wanting to go to Iraq and Libya and in future there will be concerns about other countries e.g. Yemen & Somalia given the spread of ISIS to North Africa including Tunisia.

7. The energies of the Court have been on young people because the Court has power under the Children Act 1989 or the inherent jurisdiction to make orders concerning them. The Prevent Duty extends to adults as well – albeit Local Authorities have many fewer tools to deal with that problem unless they are vulnerable adults. It is likely that Mr Justice Hayden in *A Local Authority v Y* [2017] EWHC 968 (Fam) (27 April 2017) was signalling the

willingness of the High Court to deal with cases of this sort concerning vulnerable adults under the inherent jurisdiction.

8. However, it is important to understand the exceptional nature of these cases and guard against any potential abuse of the jurisdiction of the Court.

9. At Paragraph 12 of the Guidance, the President said,
"The police and other agencies recognise the point made by Hayden J[1] that "in this particular process it is the interest of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter terrorism policy or operations."

The statutory Duty: Prevent

10. The Counter-Terrorism and Security Act 2015 came into force in July 2015 and section 26 and Schedule 6 of the 2015 Act placed a general duty on specified authorities to have due regard to the need to prevent people from being drawn into terrorism. According to section (2) a specified authority is a person or body that is listed in Schedule 6. This includes local government, police, health services, education, and child care.

11. The Government has defined extremism in the Prevent strategy as: "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 (p 2 *Prevent Guidance).*

12. The Statutory *Prevent Duty Guidance* came into effect on July 1st 2015. Part of the Duty includes monitoring, and risk assessment. How broad the expectations are is apparent from Para 38 of the same
"38. We expect local authorities to use the existing counter-terrorism local profiles (CTLPs), produced for every region by the police, to assess the risk of individuals being drawn into terrorism. This includes not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit".
13. The 2015 Act also placed the current "Channel" arrangements for supporting people vulnerable to being drawn into terrorism onto a statutory footing. Section 36 requires that each Local Authority must ensure that a panel of persons is in place for its area, with the function of assessing the extent to which individuals are vulnerable to being drawn into terrorism." Broader functions of the Panel include the preparation of action plans to reduce the vulnerability of individuals being drawn into terrorism and (with consent) arrangements are made to receive support (including by an approved independent provider who can address the potential radicalisation). The Channel Statutory Duty came into effect on 12 April 2015.

14. The Prevent Guidance includes a duty on LAs to undertake assessments of the risk to children of being drawn into terrorism [Paragraph 67 of the Guidance].

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[1] *The London Borough of Tower Hamlets v M and ors* [2015] EWHC 869 (Fam), para 18(iv).

15. Elements of the Prevent Guidance were subjected to judicial review in *R (Butt) v Home Secretary* [2017] EWHC 1930 (Admin) (where Oliver Sanders QC represented the Secretary of State with Amelia Walker). The claimant challenged the lawfulness of two aspects of the government's counter-extremism strategy: (1) the Prevent Duty Guidance issued to universities and other higher education institutions on external speakers attending on campus events; and (2) the work of the Home Office's Extremism Analysis Unit which conducts research into extremism and extremists, including using open source materials and social media.

16. The claim failed on every ground with the judge, Mr Justice Ouseley, finding: (1) the Prevent Duty Guidance was lawful and did not interfere with the claimant's Art.10 free expression rights and, even if it had done, any interference would have been prescribed by law and necessary and proportionate for the purposes of Art.10(2); and (2) the Extremism Analysis Unit's use of the claimant's personal data was lawful and did not engage his Art.8 privacy rights and, even if it had done, any interference would have been in accordance with the law - via compliance with the Data Protection Act 1998 - and necessary and proportionate for the purposes of Art.8(2).

17. A claim that the Extremism Analysis Unit's research into the claimant involved unauthorised "directed surveillance" for the purposes of the Regulation of Investigatory Powers Act 2000 was also dismissed.

A need for caution

18. Local Authorities operate in a Human Rights framework and will need to evaluate the competing considerations concerning Article 8 rights to private and family life and also Art 9 freedom of thought conscience and religion and Article 10 which provides a qualifies right to freedom of expression. These rights may have to be weighed against the right to life provided by Article 2.

19. Caution was articulated by the Supreme Court *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075 where Lord Wilson of Culworth JSC said (para 28):

> "[Counsel] seeks to develop Hedley J's point. He submits that:
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> > 'many parents are hypochondriacs, many parents are criminals or benefit cheats, many parents discriminate against ethnic or sexual minorities, many parents support vile political parties or belong to unusual or militant religions. All of these follies are visited upon their children, who may well adopt or "model" them in their own lives but those children could not be removed for those reasons.'
> >
> > I agree with [counsel]'s submission".

20. It is important to note that McFarlane LJ in *H (A Child)* [2015] EWCA Civ 1284 (11 December 2015), made the point that (paragraphs 89 and 90) that the quotation from Hedley J

concerned threshold and the most famous passage by Lord Templeman in *Re KD (A Minor: Ward) (Termination of Access)* [1998] 1 AC 806 was likewise concerned with the "trigger" "threshold" conditions within wardship – not the welfare decision.

21. The Prevent strategy also encompasses right wing extremism but in the case of *Re A (A Child)* EWFC 11, the President was keen to stress (at para [71]) that membership of an extremist group such as the EDL is not, without more, any basis for care proceedings.

22. The use of child protection procedures, social workers and children's guardians as well as the family justice system in such cases raises profound questions and involves the finest of judgements. Not least of the problems is the pressure to take care proceedings because of the religious or political views of the parents.

23. It is apparent from this that fine judgement is called for and poses real problems for social workers who might be concerned they are they being recruited for an ideological fight against extremism – the definitions of which are imprecise and which may jeopardise the rest of their child protection work.

24. One widely used text, when trying to arrive at a closer understanding of the issues, is the paper, "Issues Relating to Radicalisation" prepared by Prof Andrew Silke and Dr Katherine Brown of 6th November 2015 which is attached to the Judgment of Hayden J in *London Borough of Tower Hamlets v B* [2016] EWHC 1707.

25. A more critical view is provided by the much respected: Tony Stanley and Surinder Guru in C*hildhood Radicalisation: An Emerging Practice Issue* Practice: (2015) Social Work in Action (Vol 27) which highlighted the potential dangers posed to social workers if they were to find themselves as pawns in an ideologically driven moral panic. They also raise questions about the sort of skills required for such work and the necessity for social workers to have regard to their values and adopt an appropriately sceptical approach to risk analysis in this area.

Threshold

26. It is striking that a series of these cases have failed as the court have found the "threshold criteria" are not made out – i.e. the Courts have refused to find that the children have suffered or were at risk of suffering significant harm. The most controversial of these was the Judgment of the President in *Re X (Children)(No3)* [2015] EWHC 3651 (Fam) at [96] where he said that:

> "the mother's qualities as a parent are not, of themselves, any assurance that she would not have acted in the way alleged by the local authority. I cannot blind myself to the reality that not every parent is necessarily as steeped in the values and belief systems of post-Enlightenment Europe as we might like to imagine. People may be otherwise very good parents (in the sense in which society generally would use that phrase) whilst yet being driven by fanaticism, whether religious or political, to expose their children to what most would think to be plain, obvious and very great significant harm. There are, after all, well-attested cases of

seemingly good parents exposing their children to ISIS-related materials or event taking their children to ISIS-controlled Syria."

27. Almost as contentious was the Judgment of MacDonald J in *A Local Authority v HB (Alleged Risk of Radicalisation and Abduction)* [2017] EWHC 1437 (Fam) (26 May 2017) where in the context of an application to injunct the children from being removed from the jurisdiction of England and Wales for the rest of their minority, he refused to make findings against the mother in the context of a trip to the Syrian border and her being stopped from leaving the country with large sums of money and having sympathies for Islamic State. MacDonald was keen to stress that suspicion was insufficient (he was concerned that it was easier for it to find a foothold in cases such as this.

28. Even in cases where the Court has been prepared to make threshold findings – such *as Re C, D and E (Radicalization: Fact Finding)* [2016] EWHC 3087, ultimately the Court authorized the removal of electronic tags and approved the proceedings concluding with no order by agreement (albeit that the passports had already been revoked by Royal Prerogative). It is striking that even in the most high profile of all the cases, *London Borough of Tower Hamlets v B* [2016] EWHC 1707, Hayden J proposed a care plan that returned B to her family (after a period in which he had sought to "de-radicalise" her.

Confidentiality

29. In other cases the Courts have struggled to decide these applications where potentially relevant evidence was withheld on national security grounds.

30. There has been an issue about the confidentiality of some of the evidence in these cases almost since their inception. In *Re C (A Child) (No 2) (Application for Public Interest Immunity)* [2017] EWHC 692 (where Marina Wheeler QC appeared for the Home Secretary), Pauffley J approved an application for public interest immunity by the Home Secretary in a Radicalisation Case. Specifically, Mrs Justice Pauffley upheld the Home Secretary's assessment that national security considerations precluded disclosure, and also underlined the importance of examining:

i. what other – non-sensitive - evidence might be available in a case such as this which would allow the Court to draw inferences and find the threshold criteria satisfied – the Court agreed that the Home Secretary's decision to exercise the Royal Prerogative so as to refuse to issue the father with a passport (based on the assessment that he is an Islamist extremist who seeks to travel to Syria for jihad) is 'evidence.' The Home Secretary's decision is amenable to judicial review but there has been no challenge;
ii. Alternatives to public law proceedings – especially other safeguarding measures such as the 'Channel Programme', the new Home Office initiative, the 'Desistence and Disengagement Programme' and steps to disrupt travel plans involving flight to a war zone by passport restrictions.

31. The Judgment reiterated the significance of the *President's Guidance – Radicalisation Cases in the Family Courts – dated 8 October 2015*.

32. By contrast in *X, Y and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam) (06 October 2016), David Evans QC and Matthew Hill[2] successfully obtained permission to disclose confidential documents from family law proceedings to the Security Service.

33. Where sensitive material is placed before the court, and requires to be examined and/or tested on behalf of the parties to whom it cannot be disclosed, the Court may invite the Attorney General to appoint a Special Advocate (a security cleared lawyer), to represent their interests (note the formula for the appointment of special Advocates in the civil context: per *section 9(1)/(2)* of the *Justice and Security Act 2013*). Special Advocates are appointed by the Attorney General through the Special Advocates' Support Office ("SASO"), which is part of the Government Legal Department.

34. The issue which arose for determination in *R (Closed Material Procedure Special Advocates Funding)* [2017] EWHC 1793 (Fam) (13 July 2017) was how the costs of an instructed Special Advocate should be funded in family proceedings. Cobb J determined that the agency that holds the sensitive material should pay the relevant fees. The Judgment contained a useful summary of the relevant law,

"([16] It is only reasonably exceptionally that a family court will consider it appropriate to hold closed material hearings and invite the appointment of Special Advocates: see McFarlane J (as he then was) in *Re T (Wardship: Impact of Police Intelligence)* [2009] EWHC 2440 (Fam) (*Re T*). This point was emphasised by Sir Nicholas Wall P, in describing the closed material procedures (similar to those engaged here) as "a matter of last, as opposed to first resort" (see *A Chief Constable v YK, RB, ZS, SI, AK, MH (Sub nom Re A (Forced Marriage: Special Advocates)* [2010] EWHC Fam 2438, [2011] 1 F.L.R. 1493 [92]: (*Re A (Forced Marriage: Special Advocates)*). Separately, and more recently still, Baroness Hale supported this approach, describing as "very powerful" the arguments *against* using a closed material procedure in family cases ("an inroad into the normal principles of a fair trial") in her judgment in *re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60 [2013] 2 AC 66 at [34]. Quite apart from any other consideration, while it is recognised to be a "valuable procedure" in certain limited circumstances, it is also clearly an "imperfect" one (see respectively Lord Bingham at [35], and Lord Hoffman at [54] in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440, [2007] 3 WLR 681)."

[16] Currently, there are no family procedural rules equivalent to *Part 82* of the *Civil Procedure Rules 1998* ('*CPR*') dealing with these situations in family cases; *Part 82* was inserted into the *CPR* in 2013, at the time of the implementation of the *Justice and Security Act 2013* to deal with Closed Material Procedure issues. Nonetheless, procedures have been adapted in the family court to replicate as appropriate the arrangements for a closed material process, to achieve fairness, and ensure the protection of the *Article 6* rights of the parties. The principal advice available to the family court is that referred to in Pauffley J's order (see [9](iii) above), namely the 2015 President's Guidance on the "*Role of the Attorney General in appointing Advocates to the Court or special Advocates in Family Cases*".

[2] Adam Wagner was also instructed by the Metropolitan Police at an earlier stage of the proceedings

Will parents be frozen out?

35. It is important that when considering the protection of children from extremism this does not mean that all other lessons and approaches should be forgotten. *Prevent* [Para 62] itself stresses that it should be read with *Working Together.* The *Channel Duty Guidance* stresses that participation is voluntary and, in the case of children, that means obtaining parental consent [77]. In rare cases where it is sought to persevere despite a lack of parental consent then Local Authorities are directed at their powers – including section 31.

36. There is also a danger that the very strategies used to combat extremism may prove to be counter-productive – especially if used indiscriminately – with parents being further alienated and leading to despair and anger. As Stanley and Gurus argue, families who experience surveillance or pressure in the UK may choose to leave the jurisdiction – placing their children at greater risk

A note about process/procedure

37. Lawyers are aware that one of the features of these cases is that many of them use the inherent jurisdiction to craft bespoke solutions of the children and young people concerned.

38. The relevant framework is provided by:
    (i) Children Act 1989 section 100 (restricting the use of the inherent jurisdiction, requiring a LA to obtain the permission of the Court to make an application and giving priority to applications under statute)
    (ii) Family Procedure Rules Part 12, Chapter 5 (sets out the contemporary meaning of wardship and the law as to the use of the inherent jurisdiction)
    (iii) Family Procedure Rules 2010, Practice Direction 12D (provides clarity as to the meaning of wardship and expands on the injunctory relief available e.g. orders for the return of children to and from another state).

Wardship

39. From October 1991, the Children Act 1989 restricted the scope of Wardship by way of section 100.

40. Apart from the plain wording of the Children Act 1989 section 100, case law has also stressed that wardship is only to be used when the questions with which the Court are determining cannot be resolved under statutory procedures *Re T (A Minor) (Wardship: Representation)* [1994] Fam at 59. This is confirmed by FPR 2010 PD 12D. Nevertheless it also gives a series of examples where it may be apt – including where the case has a substantial foreign element.

41. Wardship has also been approved in cases where there has either been significant disharmony between the parties per the Judgment of Hedley in *T v S (Wardship)* [2012] 1 FLR 230 and as a "unique solution for a unique case" where there was particular dispute about the care of a child in *Re K (Children with disabilities; Wardship)* [2012] 2 FLR 745. This approach was approved – even in circumstances where a child was accommodated under s.

20 CA 1989 by the Court of Appeal in *Re E (Wardship Order: Child in Voluntary Accommodation)* [2013] 2 FLR 63[3].

42. A particular use of the inherent jurisdiction has been in the making of injunctions to prevent undesirable association; and orders to protect abducted children. This developed so as to tackle forced marriage before the passing of the Forced Marriage (Civil Protection) Act 2007.[4]

43. In *Re M (Children)* [2015] EWHC 1433 Munby P, in a case concerned with children who had already left the jurisdiction said that the use of the inherent jurisdiction, "in cases where, the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic…."

44. This Judgment of the President was considered and approved by the Court of Appeal in *In Re C (Children[5])* [2016] EWCA Civ 374 (14 April 2016) per King LJ at para [87]. In addition the Court of Appeal went on to note that *Re M* was endorsed by the Court of Appeal in *In Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886 at para [57] – and it is suggested that this point is not disturbed by the ultimate decision of the Supreme Court when Re B was appealed (*In Re B (A child)* [2016] UKSC 4).

45. In *The London Borough of Tower Hamlets v M and ors* [2015] EWHC 869 (Fam) Hayden J stressed that these cases required rigorous preparation. In *A Local Authority v Y* [2017] EWHC 968 (Fam) (27 April 2017) Hayden J encouraged LA to consider carefully what provision could be made for those leaving wardship in the same way that statute provided for rights for those leaving care (albeit with the cases of radicalisation, many of the young people are not actually accommodated elsewhere.

46. It is important that the President clarified in his Judgment in *In the matter of a Ward of Court* [2017] EWHC 1022 that, "there is not and never has been any principle of rule that judicial consent is required before the Police [or the Intelligence Services] can interview a child [45."

47. It is important to note that not all these issues arise in a straightforward way that engages public law (e.g. a LA bringing proceedings). In Re *ZX, R (on the application of) v The Secretary of State for Justice* [2017] EWCA Civ 155 (17 March 2017) (where David Manknell appeared for the Secretary of State), the Court of Appeal had dismissed a Claimant/Appellant's appeal against the refusal of his Judicial Review of licence conditions set by the Probation Service. The Claimant had been convicted of terrorist offences and the conditions prevented him from having contact with his children during the licence period.

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[3] The authority survived scrutiny in M (Children), Re [2016] EWCA Civ 937 (09 September 2016) – albeit, unlike the situation in these proceedings, the Court did not examine the first instance Judgment of HHJ Bellamy to make full sense of the Judgment of Thorpe LJ

[4] E.g. Re SK (an adult) (Forced marriage: appropriate relief) [2004] EWHC 3202; [2005] 2 FCR 459

[5] The case about the naming of children, Cyanide and Preacher

48. The Court of Appeal rejected an argument that such concerns were properly matters for the local authority and the Family Courts, and reiterated the discretion afforded to the Probation Service, and the limited circumstances in which their decisions can be challenged.

Conclusion

49. Cases before the courts have saved lives but to avoid the possibility of miscarriage of justice and or becoming counter-productive, these cases require discernment/fine judgement – the avoidance of a one size fits all strategy/rigour of approach/proportionality/restraint, an informed approach, the respect of human rights and close scrutiny by courts