Closed Material Procedures in the Radicalisation Cases

Dr Jessie Blackbourn*

Abstract

Closed material procedures were originally introduced in the UK to enable courts to hear national security sensitive information in immigration cases in the absence of the non-government party and their lawyer. They were subsequently extended to the counter-terrorism context and, ultimately, to all civil proceedings under the Justice and Security Act 2013. However, they were not made available for use in the Family Court, and until recently, have only been used in very limited and exceptional circumstances. The case of *Re X, Y and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam) has potentially opened the Family Court up to using closed material procedures in cases concerning the radicalisation of children. This article briefly explores the importance of that case. It then outlines the history and development of closed material procedures in the UK to set the case in its broader legal context before considering the potential impact of the case on the administration of justice in the family jurisdiction and the rule of law.

Keywords: radicalisation, closed material procedures, special advocates, disclosure

Introduction

Since 2014, the Family Court has heard a number of cases relating to concerns about the involvement of children in extremism, radicalisation and terrorism. These cases have come to be known collectively as the 'radicalisation cases'.[1] They represent what Fatima Ahdash has called a 'novel interaction between otherwise very separate areas of state activity, family law and counter-terrorism'.[2] The cases engage a wide range of public and private family law issues,[3] and have raised a number of concerns. These include the use of the non-statutory (and ill-defined) terms 'extremism' and 'radicalisation',[4] the 'novel use of the inherent jurisdiction to make children wards of court to prevent them fleeing to ISIL [Islamic State of Iraq and the Levant] controlled territory or being taken their by their parents',[5] consideration of extremism 'as a freestanding harm',[6] and the use of

* Assistant Professor in Public Law and Human Rights, Durham Law School, Durham University, UK. Email: jessie.blackbourn@durham.ac.uk. I would like to thank Dr Nicola McGarrity and Dr Lawrence McNamara for comments on an earlier draft of this article, along with the participants at the UNSW Staff Seminar, UCL Public Law Group, and Durham Law School Staff Seminar for helpful feedback.

[1] Sir James Munby, Radicalisation Cases in the Family Courts: Guidance issued by Sir James Munby President of the Family Division (8 October 2015).

[2] F Ahdash, 'The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts' (2018) 30(4) *Child and Family Law Quarterly* 389, 390.

[3] Ibid, 392-394.

[4] Ibid, 402; R Taylor, 'Religion as harm? Radicalisation, extremism and child protection' (2018) 30(1) *Child and Family Law Quarterly* 41, 43-44.

[5] Taylor, note 4 above, 47.

[6] Ahdash, note 2 above, 405-408; F Ahdash, 'Childhood Radicalisation and Parental Extremism: How Should Family Law Respond? Insights from A Local Authority v X, Y and Z' (2019) *LSE Law, Society and Economy Working Papers 8/2019* 1, 5-13; Taylor, note 4 above, 47-51; 54; E Walsh, 'Is preventing violent extremism a facet of child protection?' (October 2015) *Family Law* 1167, 1167-1168.

electronic tagging.[7] In addition to these distinct *family law* issues, the radicalisation cases also raise broader *public law* concerns but in the family law context, notably the potential use of closed material procedures. *Re X, Y and Z (Disclosure to the Security Service)*[8] is one such radicalisation case. In it, the Family Court grappled with the question of whether to permit the Metropolitan Police Service (MPS) to disclose to the Security Service (MI5) two documents: a statement made by the mother during an earlier fact finding hearing, and the substantive judgment of the Court from that hearing.[9] These two documents had already been disclosed to the MPS and the Crown Prosecution Service (CPS) by the Local Authority involved in the case with the permission of the Court. However, a number of conditions had been imposed upon the original disclosure to the MPS and CPS, including that the information should not be 'disclosed or discussed with any other person outside the MPS or CPS without further permission of this court', and that the 'MPS and CPS must only use the information for the purposes of any criminal investigation and any charging decision'.[10] The key question before the Court in *Re X, Y and Z*, was whether any conditions should be attached to a permission to grant onwards disclosure of the information by the MPS to MI5.[11]

This question raised a number of issues regarding the administration of justice in the family justice system and its relationship with the criminal justice system. For example, MacDonald J was concerned that permitting onwards disclosure in this case might have a potential chilling effect on individuals' participation in family proceedings in the future. He noted that permitting disclosure to the Security Service without any conditions attached would 'risk reducing the likelihood that other parents in a similar position to the mother will be willing to speak frankly to the court about what they have done, with the consequence of making these already difficult cases harder still.'[12] The resolution of public law family cases in general, and cases relating to radicalisation specifically, often rely on information provided by the parties involved, particularly the parents.[13] The absence of full and frank participation by parties might therefore impact the administration of justice in the Family Court. However, MacDonald J was also concerned about the best interests of the child. He highlighted that these could be served by onwards disclosure to the Security Service because it could provide for a successful conclusion to the criminal investigation conducted by the MPS. This would be in the best interests of the child for one of two opposing reasons. Either 'the identification and prosecution of criminal conduct by one or both the parents' would benefit the child, or the exoneration of one or both parents following a criminal investigation would benefit the child.[14]

A key concern for the judge was that, in addition to the substantive judgment of the Court, permission for onwards disclosure was also sought over the mother's statement. This was obtained under section 98 of the Children Act 1989, which compels an individual's testimony in family proceedings even where such statements might lead to self-incrimination. Under section 98(1), individuals are not excused 'from giving evidence on

[7] J Blackbourn and C Walker, 'Tracking in interests of counter-terrorism' in A Hucklesby (ed) *Tracking People* (Routledge, forthcoming); J Delahunty and C Barnes, 'Radicalisation cases in the family courts: Part 2: Practicalities and pitfalls' (March 2016) *Family Law* 330, 334-336.
[8] [2016] EWHC 2400 (Fam).
[9] [2016] EWHC 2400 (Fam), [3].
[10] [2016] EWHC 2400 (Fam), [2].
[11] [2016] EWHC 2400 (Fam), [8].
[12] [2016] EWHC 2400 (Fam), [68].
[13] [2016] EWHC 2400 (Fam), [67]-[69].
[14] [2016] EWHC 2400 (Fam), [61].

any matter' or 'answering any question put … in the course of … giving evidence, on the ground that doing so might incriminate' them, or their spouse or civil partner of an offence.[15] Whilst statements made under section 98(1) are not admissible against the individual (or their spouse or civil partner) in criminal proceedings,[16] this protection is not absolute,[17] and confidentiality is not guaranteed.[18] In this particular case, it was noted that the mother's admissions in the Family Court could be used by the MPS as the basis for further questioning in police interview, the admissibility of which would be at the discretion of the trial judge in any criminal proceedings that were initiated.[19]

After weighing up the competing interests in the case, MacDonald J determined that permission should be given to the MPS to disclose the information onwards to the Security Service, *but* that a condition should also be imposed on the disclosure requiring MI5 to 'apply for permission should it wish to further disclose that information outside the confines of the Service'.[20] In doing so, he recognised the possibility that 'given the nature of the Security Service and its manner of operation', MI5 might wish to 'adopt a closed procedure' in any application before the Court to seek permission to disclose the relevant information.[21]

In acknowledging this, MacDonald J referred to the 2015 Guidance by the President of the Family Division on *Radicalisation Cases in the Family Courts*.[22] That guidance was issued in October 2015, following an increase in the number of cases being initiated by local authorities where there were concerns 'that children, with their parents or on their own, are planning or attempting or being groomed with a view to travel to parts of Syria controlled by the so-called Islamic State; that children have been or are at risk of being radicalised; or that children have been or at are at risk of being involved in terrorist activities either in this country or abroad.'[23] In the guidance, Sir James Munby P noted that in these types of radicalisation cases, judges should be alert to the fact that some of the evidence before the Court might require special consideration, particularly any 'highly sensitive' material 'gathered by the police and other agencies' the disclosure of which 'may damage the public interest or even put lives at risk'.[24] One of the relevant considerations identified by the President of the Family Court was whether there was 'a *need* for a closed hearing or use of a special advocate'.[25]

In *Re X, Y and Z*, MacDonald J recognised the likelihood of needing to use 'some species of closed procedure involving the deployment of special advocates'[26] when determining any future application by MI5 for permission to further disclose the mother's statement outside of the Service. However, he did not consider that there was any 'need to set up any new or elaborate procedure to account for the particular difficulties raised by any permission application.'[27] This appears at odds with his next assessment that there was

[15] Children Act 1989, s 98(1), also cited in [2016] EWHC 2400 (Fam), [22].
[16] Children Act 1989, s 98(2)
[17] [2016] EWHC 2400 (Fam), [75].
[18] [2016] EWHC 2400 (Fam), [23].
[19] [2016] EWHC 2400 (Fam), [75].
[20] [2016] EWHC 2400 (Fam), [89].
[21] [2016] EWHC 2400 (Fam), [89].
[22] Munby, note 1 above; [2016] EWHC 2400 (Fam), [89].
[23] Munby, note 1 above, 1.
[24] Ibid, 2.
[25] Ibid, 3 (emphasis in original).
[26] [2016] EWHC 2400 (Fam), [91].
[27] [2016] EWHC 2400 (Fam), [91].

no basis, either in statute or in the Family Procedure Rules, for holding a closed material procedure or using special advocates in the Family Court.[28] This is concerning, not least as a rule of law issue. Closed material procedures are highly controversial; they enable the non-government party and their legal representative to be excluded from the hearing, or any part of the hearing, to enable security sensitive material to be considered by the Court. The excluded party and their representative do not see the material, though they may be represented in the closed hearing by a special advocate who can challenge the material on their behalf. The closed material procedure is similar to, but differs from, a claim for public interest immunity in one key respect; in a public interest immunity claim, disclosure of documents may be withheld if the public interest in withholding the evidence outweighs the public interest in the administration of justice. However, that evidence cannot then be relied on by the party that seeks to prevent the material from being disclosed. In contrast, all the material presented to the court in a closed material procedure can be relied upon by the government.

Closed material procedures have been shown to pose serious challenges to the right to a fair trial in Article 6 of the European Convention on Human Rights.[29] In *Al Rawi and Others v The Security Service and Others*,[30] the Supreme Court was asked to decide whether, absent a statutory regime, it had 'the power to order a "closed material procedure" … for the whole or part of the trial of a civil claim for damages and, if so, in what circumstances it is appropriate to exercise the power.'[31] The Supreme Court highlighted several flaws[32] in the closed material procedure and noted that it marked a departure from the principles of open justice and natural justice,[33] concluding that: 'the issues of principle raised by the closed material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so. No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made … to regulate the procedure.'[34] The Supreme Court thus held that a closed material procedure could not be adopted by a court in the absence of a specific statutory regime for such enacted by parliament.[35] This raises serious concerns about MacDonald J's assessment that closed material procedures could be adopted in the Family Court absent a statutory regime or rules of procedure. The bright line drawn in *Al Rawi* was somewhat diluted in the subsequent case of *Re A (A Child)*[36] by Lady Hale, who while acknowledging that *Al*

[28] [2016] EWHC 2400 (Fam), [92]; [95].
[29] A Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *The Modern Law Review* 836.
[30] [2011] UKSC 34.
[31] [2011] UKSC 34, [1].
[32] These included that the 'closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it … in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.' [2011] UKSC 34, [35]-[36].
[33] [2011] UKSC 34, [14].
[34] [2011] UKSC 34, [69].
[35] In a subsequent judgment, and contradicting its decision in *Al Rawi*, the Supreme Court held that it could adopt a closed material procedure on an appeal where the judgment is wholly or partly closed, as otherwise the Court could not do justice, or would run a serious risk of not doing justice if it could not consider the closed material. *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38.
[36] [2012] UKSC 60.

Rawi had determined that the Court held no power to adopt a closed material procedure in ordinary civil proceedings, suggested that 'a greater latitude may be allowed in children cases where the child's welfare is the Court's paramount concern.'[37] However, by barring the disclosure of secret material, closed material procedures actually serve the interests of government counter-terrorism, not the individual subject to them. This may not be compatible with the principle that Hayden J asserted in *London Borough of Tower Hamlets v M and Others*,[38] that the best interests of the child 'cannot be eclipsed by wider considerations of counter-terrorism policy or operations.'[39] Ahdash notes that the use of closed material procedures in the radicalisations cases 'suggests that family law is at risk of … turning into a parallel counter-terrorism justice system where civil liberties and human rights protections can be eroded in the name of national security,'[40]

This article assesses these concerns by looking to identify whether there is a basis for a closed material procedure to be held in the Family Court. It does so by first examining how closed material procedures developed in the UK, focusing on their creation in the immigration context. It then looks to the statutory closed material procedures that have been established, both the bespoke procedures in the counter-terrorism context, as well as the generic regime in the Justice and Security Act 2013. Having identified that there is no recourse to a closed material procedure in the Family Court through these routes, the article then examines how closed material procedures and special advocates developed in the family justice system prior to the recent radicalisation cases. It then assesses the impact of the judgment in *Re X, Y and Z*, both on administration of justice in the family justice system specifically, and on the rule of law more generally.

The early development of closed material procedures and special advocates

Closed material procedures and special advocates were established as the response to the decision of the European Court of Human Rights in *Chahal v United Kingdom*.[41] In late August 1990, the UK government issued a notice to deport Mr Chahal, an Indian national with permanent leave to remain in the UK, to India on the grounds that his 'continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism'.[42] Mr Chahal was detained in immigration detention pending his deportation, during which time he attempted to seek asylum on the grounds that he had a well-founded fear of persecution if returned to India.[43] His asylum application was denied, and he challenged his deportation and detention before the ECtHR on three main grounds. First, that he would be exposed to 'a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the Convention' if returned to India. Second, that the length of his immigration detention and the ineffectiveness of the judicial control of that detention was in breach of his article 5 right to liberty and security. Third, that he lacked

[37] [2012] UKSC 60, [34].
[38] [2015] EWHC 869 (Fam).
[39] [2015] EWHC 869 (Fam), [18]. Ahdash cautions that 'the infamous indeterminacy and malleability of the "best interests of the child" principle has meant that the logic of security and the logic of child welfare have overlapped in recent years: to prevent and counter terrorism is to protect children from harm and to promote their best interests.' Ahdash, note 6 above, 17.
[40] Ahdash, note 2 above, 413.
[41] (1997) 23 EHRR 413.
[42] (1997) 23 EHRR 413, [25].
[43] (1997) 23 EHRR 413, [26].

an effective domestic remedy in contravention of Article 13 of the ECHR because of the 'national security elements in his case'.[44]

It was the ECtHR's decision in relation to the second and third aspects of the challenge in *Chahal v UK* that led to the creation of special advocates and closed material procedures. The procedures adopted under the Immigration Act 1971 were not deemed to constitute a 'court' within the meaning of article 5(4) of the Convention or an effective domestic remedy as required by article 13. Under that Immigration Act 1971, there was no right of appeal against a Minister's decision to make a deportation order 'where the ground of the decision to deport was that the deportation would be conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature'.[45] The ECtHR described the procedure that was adopted for individuals subject to deportation on the grounds of national security:

> The person concerned is given an opportunity to make written and/or oral representations to an advisory panel, to call witnesses on his behalf, and to be assisted by a friend, but he is not permitted to have legal representation before the panel. The Home Secretary decides how much information about the case against him may be communicated to the person concerned. The panel's advice to the Home Secretary is not disclosed, and the latter is not obliged to follow it.[46]

Whilst the ECtHR held that the existing panel procedure in the UK constituted a breach of articles 5(4) and 13, it did acknowledge that 'the use of confidential material may be unavoidable where national security is at stake'.[47] In doing so, it referred to the Canadian immigration system, which had been drawn to its attention by a number of non-governmental organisations during proceedings:[48]

> Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[49]

---

[44] (1997) 23 EHRR 413, [68].
[45] (1997) 23 EHRR 413, [58]. See also: Immigration Act 1971, s 15(3) (repealed).
[46] (1997) 23 EHRR 413, [60]. See also the description of the procedure in House of Commons, *Statement of Changes in Immigration Rules* (HC 251, 1989-90), [157]: 'But such cases are subject to a non-statutory advisory procedure and the person proposed to be deported on that ground will be informed, so far as possible, of the nature of the allegations against him and will be given the opportunity to appear before the advisers, and to make representations to them, before they tender advice to the Secretary of State.'
[47] (1997) 23 EHRR 413, [131].
[48] (1997) 23 EHRR 413, [6]; [144]. Amnesty International, Justice, Liberty, the Centre for Advice on Individual Rights in Europe, and the Joint Council for the Welfare of Immigrants were granted leave to submit observations to the Court.
[49] (1997) 23 EHRR 413, [144].

Following the Court's decision in *Chahal v United Kingdom*, the UK government created new legislation that it thought would satisfy the Court's requirements for dealing with confidential information in national security-related immigration cases. The Special Immigration Appeals Commission Act 1997 established the Special Immigration Appeals Commission (SIAC) to exercise jurisdiction over appeal proceedings in immigration decisions.[50] Under the Act, the Lord Chancellor could, by statutory instrument,[51] make special rules of the court in relation to proceedings, including to:

> (a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
> (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
> (c) make provision about the functions in proceedings before the Commission of persons appointed under section 6 below, and
> (d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.[52]

Rules were first made in 1998.[53] They provided for a 'closed material procedure'; proceedings could be held in private and the appellant and their legal representative could be excluded from a proceeding 'in order to secure that information is not disclosed contrary to the public interest'.[54] The Rules also provided for a 'special advocate to represent the interests of the appellant in the proceedings'[55] by:

> (a) making submissions to the Commission in any proceedings from which the appellant and his representative are excluded;
> (b) cross-examining witnesses at any such proceedings; and
> (c) making written submissions to the Commission.[56]

In 2001, the Anti-Terrorism, Crime and Security Act 2001 expanded the jurisdiction of SIAC to include appeals by individuals certified as 'suspected international terrorists' under section 21 of the Act.[57] Certification as a suspected international terrorist enabled the Secretary of State either to deport,[58] or where deportation was not possible,[59] to indefinitely detain[60] that individual under the Act. The extension of the special rules of

---

[50] These include immigration decisions (s 2(2)); naturalisation and citizenship decisions, including citizenship deprivation decisions (ss 2B and 2D), exclusion decisions (s 2C) and deportation decisions (2E).
[51] Special Immigration Appeals Commission Act 1997, s 8(3).
[52] Special Immigration Appeals Commission Act 1997, s 5(3).
[53] The Special Immigration Appeals Commission (Procedure) Rules 1998 SI 1998/1881.
[54] The Special Immigration Appeals Commission (Procedure) Rules 1998 SI 1998/1881, 19(1).
[55] The Special Immigration Appeals Commission (Procedure) Rules 1998 SI 1998/1881, 7(1).
[56] The Special Immigration Appeals Commission (Procedure) Rules 1998 SI 1998/1881, 7(4).
[57] Anti-terrorism, Crime and Security Act 2001, s 25(1).
[58] Anti-terrorism, Crime and Security Act 2001, s 22.
[59] Because of a 'point of law' relating to an international agreement or a 'practical consideration'. Examples of the latter provided by the explanatory notes to the Act included where there might be 'the unavailability of routes to the country of intended removal (there may, for example, be no commercial flights to that country) or a lack of appropriate travel documentation.' [79]. The former is a result of the decision of the European Court of Human Rights in *Chahal v United Kingdom* (1997) 23 EHRR 413. The Court held that Mr Chahal could not be deported to India because there was a real risk that he would be subject to treatment contrary to article 3 of the European Convention on Human Rights which prohibits torture and inhuman or degrading treatment or punishment. *Chahal v United Kingdom* (1997) 23 EHRR 413, [107].
[60] Anti-terrorism, Crime and Security Act 2001, s 23.

court in SIAC to proceedings involving suspected international terrorists signalled the beginning of a shift in the use of closed material procedures and special advocates beyond the national security-related immigration context to the counter-terrorism sphere. Since 2001, a number of bespoke closed material procedures have been created by statute to deal with national security information in counter-terrorism proceedings.[61] Like SIAC, they are all established by statute and have created new rules of procedure.[62]

Statutory regimes for closed material procedures in counter-terrorism proceedings

New statutory regimes with rules of procedure have been established for proceedings relating to control orders under the now repealed Prevention of Terrorism Act 2005,[63] terrorism financial restriction provisions under the Counter-Terrorism Act 2008,[64] and Terrorism Prevention and Investigation Measures (TPIMs) under the Terrorism Prevention and Investigation Measures Act 2011.[65] In each case, the legislation provided for special rules of court to be made by statutory instrument in relation to the relevant proceedings under the Acts.[66] Once made, these rules were translated into the UK Civil Procedure Rules.[67] The Civil Procedure Rules that apply in relation to TPIMs are broadly indicative of all three sets of special rules of court.

First they provide for hearings to be held in private if 'the court considers it necessary for any relevant party and any relevant party's legal representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest'.[68] Secondly they provide for the appointment of special advocates.[69] Third, they outline the functions of the special advocate, as being to 'represent the interests of a relevant party by':

> (a) making submissions to the court at any hearing or part of a hearing from which the relevant party and the relevant party's legal representative are excluded;
> (b) adducing evidence and cross-examining witnesses at any such hearing or part of a hearing; and
> (c) making written submissions to the court.[70]

Finally, they designate when and how the special advocate can communicate with the relevant party or their legal representative, namely: 'at any time before the Secretary of State serves closed material on the special advocate.' After the closed material has been

---

[61] See also: E Nanopoulos, 'European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?' (2015) 28(6) *Modern Law Review* 913, 918-921.
[62] See: A McCullough and S Rahman, 'Disclosure in Closed Material Proceedings: What has to be Revealed?' (2019) *Judicial Review* 24(3), 223.
[63] Prevention of Terrorism Act 2005, sched (repealed).
[64] Counter-Terrorism Act 2008, chap 2.
[65] Terrorism Prevention and Investigation Measures Act 2011, sched 4.
[66] Prevention of Terrorism Act 2005, sched, 3(5); Counter-Terrorism Act 2008, s 72(4); Terrorism Prevention and Investigation Measures Act 2011, sched 4, 7(5).
[67] Ministry of Justice, *Civil Procedure Rules*, Rule 76 (control orders); Rule 79 (financial restrictions); Rule 80 (TPIMs).
[68] Ministry of Justice, *Civil Procedure Rules*, Rule 80.18. See also: Rule 76.22 (control orders) and Rule 79.17 (financial restrictions).
[69] Ministry of Justice, *Civil Procedure Rules*, Rule 80.19. See also: Rule 76.23 (control orders) and Rule 79.18 (financial restrictions).
[70] Ministry of Justice, *Civil Procedure Rules*, Rule 80.20. See also: Rule 76.24 (control orders) and Rule 79.19 (financial restrictions).

served, the special advocate is prohibited from communicating with 'any person about any matter connected with the proceedings' without the permission of the Court.[71]

In addition to its extension to new types of counter-terrorism proceedings, the nature of the closed material procedure as originally adopted in SIAC has evolved since 1997. This has predominantly been in response to high profile human rights judgments, notably the 2009 decision of the ECtHR in *A v United Kingdom*.[72] In January 2005, eleven individuals who had been certified as 'suspected international terrorists' and detained under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 lodged an application in the ECtHR alleging that 'they had been unlawfully detained, in breach of Articles 3, 5 § 1 and 14 of the Convention and that they had not had adequate remedies at their disposal, in breach of Articles 5 § 4 and 13 of the Convention.'[73] In relation to the closed material procedure, the applicants argued that:

> While in certain circumstances it might be permissible for a court to sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond.[74]

The ECtHR agreed, though it recognised that there may be restrictions on the right to a fully adversarial procedure where strictly necessary in light of a strong countervailing public interest such as national security. It noted that: 'There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.'[75] The Court held that the procedural requirements of the right to a fair trial in article 5(4) would not be upheld in cases where 'the open evidence was insubstantial' and the evidence on which SIAC relied 'was largely to be found in the closed material', such that the applicants were not 'in a position effectively to challenge the allegations against them.'[76] Furthermore, while special advocates could act as a counterbalance against the difficulties caused by the lack of disclosure, they 'could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'[77]

It was not long before the House of Lords had the opportunity to consider the decision of the ECtHR in domestic jurisprudence. Shortly after the decision in *A v United Kingdom*,

---

[71] Ministry of Justice, *Civil Procedure Rules*, Rule 80.21. See also: Rule 76.25 (control orders) and Rule 79.20 (financial restrictions).

[72] *A v United Kingdom* (2009) 49 EHRR 29, [1]. Eva Nanopoulos argues that European human rights law has actually played a significant role in the normalisation of closed material procedures, 'such that it can no longer be characterised as an exceptional process but rather as the predominant mechanism for dealing with allegedly sensitive security information.' Nanopoulos, note 61 above, 913. The development of closed material procedures outlined in this article, along with their extension to radicalisation cases in the Family Court as anticipated by *Re X, Y and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam) supports this thesis.

[73] *A v United Kingdom* (2009) 49 EHRR 29, [3].

[74] *A v United Kingdom* (2009) 49 EHRR 29, [195].

[75] *A v United Kingdom* (2009) 49 EHRR 29, [205].

[76] *A v United Kingdom* (2009) 49 EHRR 29, [224].

[77] *A v United Kingdom* (2009) 49 EHRR 29, [220].

the House of Lords clarified[78] the requirements of a fair trial in relation to closed material procedures in *Secretary of State for the Home Department v AF & Others*.[79] Referring to the Grand Chamber decision in *A v United Kingdom*, Lord Phillips identified what is more commonly known as the 'gisting'[80] requirement in closed material procedures; that 'non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him.'[81] However, this gisting requirement is not a universal feature of cases held as closed material procedures; it only applies where the measures under appeal impinge directly on personal freedoms and liberties.[82] Article 6 of the ECHR therefore allows for different standards to be applied to disclosure in closed material procedures depending on the nature of the case, but only in relation to closed material procedures established under these specific statutory regimes. There was no general power for a court to hold a closed material procedure outside of the immigration and counter-terrorism contexts in which closed material procedures had been adopted by statute and rules of procedure until Parliament enacted the Justice and Security Act 2013 in response to the Supreme Court's 2011 decision in *Al Rawi*. The Justice and Security Act 2013 provided for closed material procedures in non-criminal proceedings.[83]

Closed material procedures under the Justice and Security Act 2013

The Justice and Security Act 2013 provides for closed material procedures in relevant civil proceedings in terms not dissimilar to those in the Special Immigration Appeals Commission Act 1997 and the three statutory counter-terrorism specific closed material procedure regimes. The Court 'may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.'[84] A declaration can be made on the application of the Secretary of State or any party to the proceedings, or the Court can, 'of its own motion' make such a declaration.[85] There are two conditions which must be met for the Court to adopt a closed material procedure. First, the Court may only adopt a closed material procedure where one of the parties to the proceedings would be required to disclose sensitive material[86] to another person, and secondly, the Court must be satisfied that 'it is in the interests of the fair and effective administration of justice in the proceedings' to adopt a closed material procedure.[87] A special advocate may be appointed to represent the interests of any party (or any party's legal representative) excluded from a proceeding held under the closed material procedure.[88] If a declaration is made by the Court, then special rules of court apply. These must secure:

[78] Previous case law on closed material procedures, particularly the House of Lords Judgment in *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, had been anything but clear, and this was acknowledged in Lord Phillips' judgment in *Secretary of State for the Home Department v AF & Others* [2009] UKHL 28, [8]-[21].
[79] [2009] UKHL 28.
[80] See: D Kelman, 'Closed Trials and Secret Allegations: An Analysis of the "Gisting" Requirement' (2016) 80(4) *The Journal of Criminal Law* 264.
[81] [2009] UKHL 28, [65].
[82] *Gulamhussein and Tariq v the United Kingdom* Application Nos. 46538/11 and 3960/12 (26 April 2018).
[83] Justice and Security Act 2013, Part 2.
[84] Justice and Security Act 2013, s 6(1).
[85] Justice and Security Act 2013, s 6(2).
[86] Sensitive material is defined as 'material the disclosure of which would be damaging to the interests of national security.' Justice and Security Act 2013, s 6(11).
[87] Justice and Security Act 2013, s 6(4).
[88] Justice and Security Act 2013, s 9.

(a) that a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to—

(i) the court,

(ii) any person appointed as a special advocate, and

(iii) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State,

(b) that such an application is always considered in the absence of every other party to the proceedings (and every other party's legal representative),

(c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security,

(d) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party's legal representative),

(e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.[89]

A person making rules of court 'must have regard to the need to secure that disclosures of information are not made where they would be damaging to the interests of national security.'[90] Rules may make provision about a range of matters,[91] including:

(d) enabling the proceedings to take place without full particulars of the reasons for decisions in the proceedings being given to a party to the proceedings (or to any legal representative of that party),

(e) enabling the court concerned to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party),

(f) about the functions of a person appointed as a special advocate,

(g) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence.

As with the bespoke counter-terrorism specific closed material procedures, these rules of court have been translated into the Civil Procedure Rules. However, unlike those other rules, the first rule relating to closed material procedures under the Justice and Security Act 2013 states that the overriding objective of the Civil Procedure Rules, that is to enable 'the court to deal with cases justly and at proportionate cost',[92] must be read and given effect to in a way that is compatible with the Court's duty under the closed material procedure rules to 'ensure that information is not disclosed in a way which would be damaging to the interests of national security.'[93] The rules then provide for hearings to be held in private if 'the court considers it necessary for any party and that party's legal representative to be excluded from any hearing or part of a hearing in order to secure that information is not disclosed where disclosure would be damaging to the interests of national security'.[94] They also provide for the appointment of special advocates where

[89] Justice and Security Act 2013, s 8(1).
[90] Justice and Security Act 2013, s 11(1).
[91] For the full list see: Justice and Security Act 2013, s 11(2).
[92] Ministry of Justice, *Civil Procedure Rules*, Rule 1.1(1).
[93] Ministry of Justice, *Civil Procedure Rules*, Rule 82.2.
[94] Ministry of Justice, *Civil Procedure Rules*, Rule 82.6(1).

any party or their legal representative is excluded from a hearing,[95] and outline the functions of the special advocate as being to 'represent the interests of a specially represented party by':

> (a) making submissions to the court at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded;
> (b) adducing evidence and cross-examining witnesses at any such hearing or part of a hearing;
> (c) making applications to the court or seeking directions from the court where necessary; and
> (d) making written submissions to the court.[96]

Finally, the rules designate that the special advocate appointed may communicate with the specially represented party or their legal representative before the sensitive material is served on them, but may not communicate after that point without the permission of the court.[97]

The Justice and Security Act 2013 provides for closed material procedures in 'relevant civil proceedings', meaning any non-criminal proceedings before the High Court, Court of Appeal, Court of Session or Supreme Court. It does not, therefore, apply to family proceedings in the Family Court. Nor do the statutory provisions for closed material procedures in relation to SIAC, control orders, financial restrictions hearings or TPIMs. Furthermore, the Civil Procedure Rules do not apply to family proceedings,[98] and there is no provision for closed material procedures in the Family Procedure Rules.[99] There is thus neither a basis in statute or in the various rules for holding a closed material procedure or using special advocates in family proceedings. Yet they have occurred, and there is even guidance on the use of special advocates in family cases.[100] The next section of this article outlines when, how, and why closed material procedures and special advocates have been used in the Family Court, before considering the impact of *Re X, Y and Z* on this area of law.

Closed material procedures and special advocates in family proceedings

Whilst the Family Court has held proceedings *in camera* and *ex parte* since it was first established, the use of closed material procedures and special advocates is much more recent. The first known case to use special advocates in the Family Court involved wardship proceedings relating to the prior abduction of a child by his father and then his subsequent return to the UK.[101] The fact finding hearing was disrupted by a claim by the MPS that they had 'credible intelligence' that one party to the wardship proceedings (the father) had taken out a contract to have the other party (the mother) killed when she attended the court.[102] The MPS resisted disclosure of the material which supported their

[95] Ministry of Justice, *Civil Procedure Rules*, Rule 82.9.
[96] Ministry of Justice, *Civil Procedure Rules*, Rule 82.10.
[97] Ministry of Justice, *Civil Procedure Rules*, Rule 82.11.
[98] Ministry of Justice, *Civil Procedure Rules*, Rule 2.1(2).
[99] Ministry of Justice, *Family Procedure Rules*.
[100] Sir James Munby, The Role of the Attorney General in Appointing Advocates to the Court of Special Advocates in Family Cases (26 March 2016).
[101] *Re T (Wardship: Review of Police Protection Decision (No 1))* [2010] 1 FLR 1017; *Re T (Wardship: Review of Police Protection Decision (No 2))* [2010] 1 FLR 1026. Reported in: *Re T (Wardship): Impact of Police Intelligence* [2009] EWHC 2440 (Fam).
[102] *Re T (Wardship): Impact of Police Intelligence* [2009] EWHC 2440 (Fam), [2].

claim to the parties to the proceedings, though they 'were prepared to disclose all the information available to them to the court'.[103] Special advocates were appointed 'to assist in managing the disclosure process',[104] namely by challenging the MPS's claims of public interest immunity to try to ensure as much material as possible could in fact be disclosed to the parties and, where it was found that material could not be disclosed, by conducting 'a process of cross-examination and submission designed to test the material and enable the court to see any weaknesses there may be in its evidential value.'[105] In effect, the use of special advocates in this case enabled the court to hear the part of the proceedings relating to the police material that could not be disclosed to the parties in closed session, meaning that only the judge, the police, and the special advocates could see and challenge the material; the parties to the proceedings and their legal representatives were excluded from the court. McFarlane J described the procedure used: 'the police officers were cross-examined by the special advocates upon the material that remained confidential and had not been disclosed to the open parties. This cross-examination was obviously undertaken by the special advocates without being able to discuss the substance of, and obtain instructions upon, the undisclosed material with either their lay clients or the open legal teams.'[106] This was not, therefore, a typical claim for public interest immunity, or a case of special advocates simply being used to test whether material the subject of a public interest immunity claim could in fact be disclosed,[107] it was a closed material procedure. Whilst the judge did not identify the legal basis on which he had adopted it, as the proceedings related to a case of wardship, and not to measures under the Children Act 1989, it is likely that the court simply used its inherent jurisdiction to do so.

The court's inherent jurisdiction, alongside its 'conventional powers' was identified as the potential basis for appointing special advocates in *Chief Constable and another v YK and others*.[108] This case was brought under the Forced Marriage (Civil Protection) Act 2007, which does not provide a statutory regime for closed material procedures or special advocates. The question before Sir Nicholas Wall P was 'whether or not it is appropriate to invite the Attorney-General to appoint special advocates to enable affected parties to deal with information which (inter alios) the police not wish to be disclosed.'[109] The President considered whether a closed material procedure in this case would protect against the disclosure of information which could lead 'to violence and, possibly, death.'[110] Sir Nicolas Wall P concluded that there was no need for a closed material procedure or special advocates for three main reasons: first was that a protection order made under the Act could be made *ex parte*, so there already an available procedure for examining material in the absence of one or more of the parties. Secondly, since the primary purpose of the order was the protection of the individual, the use of a public interest immunity claim was justified. Third, on the facts in this particular case, a special advocate would not add anything to the resolution of a public interest immunity claim or

[103] [2009] EWHC 2440 (Fam), [18].
[104] [2009] EWHC 2440 (Fam), [18].
[105] [2009] EWHC 2440 (Fam), [30].
[106] [2009] EWHC 2440 (Fam), [43].
[107] See *DB v ZA & Ors* [2010] EWHC 2175 (Fam), [24] per Justice Wood: 'In the end, given the extensive disclosure ultimately agreed (I not having to make substantive rulings once the special advocate was in post in "closed" mode) there was also, in effect, no "closed" material and the issues of disclosure have been considered on conventional PII principles. Thus where material was redacted in the public interest I have not considered it.' See also: *BCC v FZ & ors* [2012] EWHC 1154 (Fam), [35].
[108] [2010] EWHC 2438 (Fam), [12].
[109] [2010] EWHC 2438 (Fam), [5].
[110] [2010] EWHC 2438 (Fam), [7].

a disclosure application that could not done by the judge.[111] The President was clear to note that recourse to use of special advocates in the Family Court should be the last, not the first, resort,[112] though also highlighted that 'there will undoubtedly be circumstances in family proceedings in which they are appropriate or in which … representation by an advocate will be required.'[113]

In *BCC v FZ & ors*,[114] even though the judge acknowledged that there was no need for a special advocate to assist with the process for disclosing material subject to a public interest immunity claim, she also held that as it was necessary for the parents to be 'deprived of access to all of the material upon which the Local authority base their case', a special advocate should be appointed to ensure the proper protection of the parents' rights under the ECHR.[115] A closed material procedure was thus considered necessary for the care proceedings in this particular case, which were initiated by the Local Authority under the Children Act 1989. This is despite the fact that there is no statutory basis to hold a closed material procedure or appoint special advocates under that Act.

Closed material procedures and special advocates have thus been considered or used in the Family Court in wardship cases brought under its inherent jurisdiction, in care proceedings under the Children Act 1989, and in proceedings for protection orders under the Forced Marriage (Civil Protection) Act 2007. These proceedings are civil, not criminal, and the legal basis for the use of closed material procedures and special advocates appears to rely on the court's inherent jurisdiction 'to control its own procedure so as to prevent its being used to achieve injustice'.[116] This is despite the fact that the Family Procedure Rules contain no rules of court in relation to closed material procedures in the Family Court, and the Civil Procedure Rules do not apply in that jurisdiction. While the use of closed material procedures and special courts is not unprecedented in the Family Court, it is still rare. It occurs predominantly alongside a claim for public interest immunity and special advocates may be used at one of two stages, either in testing whether the material subject to a public interest immunity claim can be disclosed to the open court, and if it cannot, to test that material in a closed material procedure. In all cases, the best interests of the child have been paramount in the decisions over disclosure and the processes for dealing with material that might attract a public interest immunity claim. The case of *Re X, Y and Z* extends the use of closed material procedures and special advocates beyond that currently provided for in the existing case law in the Family Court. It has the potential to seriously impact not only the administration of justice in the family jurisdiction, but also the rule of law more broadly.

Impact of Re X, Y and Z

There are two core concerns raised by the decision in *Re X, Y and Z* that impact specifically on the family jurisdiction. First, that it purports to enable a closed material procedure and special advocates to be used in hearings that do not directly relate to the proceedings

[111] [2010] EWHC 2438 (Fam), [90]-[92]. A similar conclusion was reached by the judge in *BCC v FZ & ors* [2012] EWHC 1154 (Fam), [42]: 'I am satisfied that none of the confidential material in question should be disclosed even in summary form. It follows therefore that the court does not require the assistance of a special advocate to represent the interests of the parents in conducting a filtering or filleting exercise of that confidential information.'
[112] [2010] EWHC 2438 (Fam), [92].
[113] [2010] EWHC 2438 (Fam), [112].
[114] [2012] EWHC 1154 (Fam).
[115] [2012] EWHC 1154 (Fam), [49].
[116] Per Lord Diplock in *Bremer Vulkan v. South India Shipping* [1981] 1 AC 909 at 977.

initiated in relation to the child. For example, in this case, the closed material procedure (if adopted) will be used to determine whether MI5 may disclose the relevant material – the judgment of the fact finding hearing and the mother's statement – beyond the confines of the service to other agencies, including agencies outside the jurisdiction of the UK. The hearing in which a closed material procedure might be used is substantially far removed from the hearing in which the best interests of the child were first considered. The initial rationale for allowing the material to be disclosed to the MPS and the CPS was to facilitate prosecution.[117] This was said to be in the best interests of the child because the mother would either be convicted (and the child removed from harm) or exonerated (in which case the child would not be in harm).[118] The material was then provided to MI5 for the same purpose of facilitating prosecution.[119] This may have been because the initial MPS investigation had failed to identify any prosecutable criminal activity on the part of the child's mother, or because the investigation was simply ongoing and required further evidence before a charging decision could be made. The need to further disclose the material outside the confines of the security service suggests that they also were unable to support a prosecution of the child's mother at that time. Whilst it is possible that the intelligence and security agencies of countries outside the UK might have intelligence about criminal activity engaged in by the mother, it is highly questionable that it would satisfy the evidential requirements to be used in a UK prosecution.[120] It is much more likely that the material provided in the mother's statement would be used to investigate individuals not closely related to the child in question. This problematises the very purpose on which the original disclosure was made – that it was in the best interests of the child to do so. Furthermore, whilst a criminal prosecution of a parent at some future date might be in the best interest of the child for the reasons given by MacDonald J, in this particular case, the Family Court was initially concerned with an application by the Local Authority for a care order in respect of the child; it did not need to await the outcome of a future prosecution to determine where the best interests of the child lay in relation to the care order at that time.[121] The blurring of the boundaries between the criminal law and family law in this way could lead to a weakening of the paramountcy principle.

The second core concern raised is that the 'radicalisation cases' in which closed material procedures and special advocates might be used relate to a new type of harm that, as Hayden J noted, 'is a different facet of vulnerability for children than that which the courts have had to deal with in the past.'[122] Judges in the Family Court are therefore being asked to determine whether children suspected of having being radicalised have experienced a form of 'significant harm' within the meaning of section 31 of the Children Act 1989.[123] There is, however, currently no legal definition of the term radicalisation.[124] The *Revised Prevent Duty Guidance for England and Wales* defines radicalisation as 'the process by which a person comes to support terrorism and extremist ideologies associated with

[117] [2016] EWHC 2400 (Fam), [57].
[118] [2016] EWHC 2400 (Fam), [61].
[119] [2016] EWHC 2400 (Fam), [61].
[120] See: K Roach, 'The eroding distinction between intelligence and evidence in terrorism investigations' in N McGarrity, A Lynch and G Williams (eds), *Counter-Terrorism and Beyond* (Routledge 2010). Cf L West, 'The problem of "relevance": intelligence to evidence lessons from UK terrorism prosecutions' (2018) 41(4) *Manitoba Law Journal* 57.
[121] In fact, criminal law concepts are not applicable in fact finding hearings in the Family Court: *R (Children)* [2018] EWCA Civ 198, [82].
[122] *London Borough of Tower Hamlets v M and Others* [2015] EWHC 869 (Fam), [57].
[123] See: Ahdash, note 2 above, 402-408; Ahdash, note 6 above, 5-13; Taylor. Note 4 above, 55-58.
[124] Taylor, note 4 above, 43-45.

terrorist groups.'[125] In *Re M (Children)*, which was one of the earliest radicalisation cases, Holman J first considered the term 'radicalisation'. He stated:

> "Radicalising" is a vague and non-specific word which different people may use to mean different things … If and insofar as what is meant in this case by "radicalising" means no more than that a set of Muslim beliefs and practices is being strongly instilled in these children that cannot be regarded as in any way objectionable or inappropriate. On the other hand, if by "radicalising" is meant … "negatively influencing [a child] with radical fundamentalist thought, which is associated with terrorism" then clearly that is a very different matter altogether.[126]

Furthermore, what constitutes evidence of radicalisation is hard to identify. In the case of *Re Y (Children)*, the guardian of Y accepted that she had not seen any specific evidence that the four children had been radicalised, but nevertheless told the court that she 'notes the risk of radicalisation, even in the case of very young children, as indicated by *The Prevent duty – Departmental advice for schools and childcare providers* issued by the Department for Education on 1 July 2015.'[127] The guardian's evaluation was that 'there is sufficient evidence to consider that there is a risk of radicalisation of the children which cannot be ignored.'[128] At the time of the case, two of the children were just two and four years old. The judge disagreed with the Guardian's assessment, noting that because of their ages, the risk of radicalisation was non-existent.[129] Whilst this appears to be a sensible assessment on the facts, it disregards parliament's view that infants and young children are at risk of radicalisation; 'nursery schools' are included in the list of specified authorities subject to the statutory Prevent duty to have due regard to the need to prevent individuals from being drawn into terrorism.[130] Therefore, not only are judges being asked to determine whether radicalisation constitutes a form of significant harm within the meaning of the Children Act 1989, they also have to base their assessments on limited evidence, which derives from the fact that a unanimous definition of the term does not exist, and there is little consensus on how radicalisation occurs.[131] Taylor argues that 'the tension between the vague and contested concepts of radicalisation and extremism and the underlying principles of child protection means that these terms should be avoided by the courts in family cases, with the focus instead being on identifying the harm suffered by the children precisely and substantiating those claims with clear evidence in the conventional way.'[132] This is particularly important in cases where it is the parents' extremist religious beliefs that raise cause for concern, in the absence of any evidence (or even sign) that the child has in fact been radicalised.[133]

---

[125] HM Government, Revised Prevent Duty Guidance for England and Wales (2015), 21
[126] *Re M (Children)* [2014] EWHC 667 (Fam), [23].
[127] *Re X (Children)*, *Re Y (Children)* [2015] EWHC 2265 (Fam), [32].
[128] *Re X (Children)*, *Re Y (Children)* [2015] EWHC 2265 (Fam), [32].
[129] *Re X (Children)*, *Re Y (Children)* [2015] EWHC 2265 (Fam), [34].
[130] Counter-Terrorism and Security Act 2015, sched 6.
[131] See: A Schmid, 'Radicalisation, De-Radicalisation and Counter-Radicalisation: A Conceptual Discussion and Literature Review'. (The Hague: ICCT, March 2013). For discussion of this issue in the radicalisation cases, see: Taylor, note 4 above, 43-45; 53-54.
[132] Taylor, note 4 above, 59.
[133] Ahdash, note 6 above, 13-15. Taylor also notes the case of *Re K (Children)* [2016] EWHC 1606, in which there was concern that the parents of the child held radical beliefs, even though there was no evidence that the children did so. Taylor, note 4 above, 48.

However, in addition to the concerns that the use of closed material procedures raises in the family jurisdiction, the decision is *Re X, Y and Z* also poses two serious concerns for the rule of law more broadly. Most notably, it is not clear on what legal basis a judge might have the power to order a closed material procedure in the Family Court. As noted above, none of the statutes that currently provide for closed material procedure regimes apply to proceedings in the Family Court. It might be possible for the Family Division of the High Court to hold a closed material procedure under the Justice and Security Act 2013, however, the civil procedure rules that set out the closed material procedure do not apply to the Family Court, and there are no special rules of procedure in the Family Procedure Rules that govern closed material procedures. It is a core tenet of the rule of law that the law should be 'accessible and so far as possible intelligible, clear and predictable'.[134] The absence of a statutory basis for closed material procedures in the Family Court is a clear intrusion into this principle and is further compounded by the lack of legal certainty over the term 'radicalisation'.[135] It would not, however, be difficult to remedy. The Family Court could be added to the list of courts that may adopt closed material procedures in the Justice and Security Act 2013.[136] This would then require either the Family Procedure Rules to be updated to include special rules of court for closed material procedures, or the Civil Procedure Rules for closed material procedures to be extended to the Family Court. This would then mean that the Family Court in its entirety would be open to closed material procedures in all proceedings, where national security information is at issue. This would vastly expand the closed material procedure regime into an area of law for which it was not originally designed. However, it would also mean that the use of closed material procedures in the Family Court would be subject to various safeguards, as well as oversight mechanisms. For example, the Secretary of State is required to lay a report on the operation of the Act before Parliament on an annual basis,[137] and the Act provided for an independent reviewer to be appointed to conduct a review of the closed material procedure regime five years after it entered into operation.[138] Unfortunately, this latter oversight mechanism has not proved to be much of a safeguard; that review was due in 2018, but the government has yet to appoint a reviewer of the legislation.[139]

The right to a fair trial is the second fundamental aspect of the rule of law that is brought into question by the use of closed material procedures in the Family Court. Whilst closed material procedures have been found to be compliant with Article 6 in the ECtHR,[140] the minimum standard of disclosure, or 'gist', required to be given to the excluded party and their legal representative depends on the nature of the right under appeal. Where closed material procedures have been used for cases of detention, administrative orders (such as control orders and TPIMs), and asset-freezing, both the ECtHR and the UK courts have recognised that these directly impinge on personal freedoms and liberties.[141] A minimum standard of disclosure is required in those cases as a safeguard to protect against inroads into the right to a fair trial. Cases that do not involve what the courts regard to be direct impingements on personal freedoms and liberties, such as employment disputes, have

[134] T Bingham, *The Rule of Law* (Penguin, 2011), 37.
[135] Taylor, note 4 above, 42.
[136] Justice and Security Act 2013, s 6(11).
[137] Justice and Security Act 2013, s 12.
[138] Justice and Security Act 2013, s 13.
[139] See: Chris Philp's answer to 'Justice and Security Act 2013: Written – Question 9613' (29 January 2020).
[140] *A v United Kingdom* (2009) 49 EHRR 29.
[141] *A v United Kingdom* (2009) 49 EHRR 29; *Secretary of State for the Home Department v AF* (No. 3) [2010] 2 AC 269.

not been considered to import this safeguard; there is no requirement for the minimum standard of disclosure for compliance with Article 6 of the ECHR.[142] Where Family Court cases will sit on this spectrum is unknown. But if the minimum standard of disclosure is not considered necessary, that is, if the Courts consider that Article 6 will not be breached even in the absence of the 'gist' of the case being provided to individuals and their legal representative who have been excluded from proceedings, then the Family Court will be able to make significant decisions about children without a fully adversarial process; the evidence on which the decisions are based will not have been heard and challenged by the individuals involved or their legal representatives, only by a special advocate. Special advocates have themselves highlighted that the 'use of SAs [special advocates] may attenuate the procedural unfairness entailed by CMPs [closed material procedures] to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair. That is so even in those contexts where Article 6 of the ECHR requires open disclosure of some (but not all) of the closed case and/or evidence.'[143] It is therefore inappropriate to extend the general regime for closed material procedures and special advocates in the Justice and Security Act 2013 to the Family Court, where significant and potentially long lasting decisions about the lives of children are made.

Conclusion

In *Re X, Y and Z*, MacDonald J reached the conclusion that the Family Court might need to adopt 'some species of closed procedure involving the deployment of special advocates' to hear any future application by MI5 to disclose material onwards to agencies outside of the Security Service. In doing so, MacDonald J potentially opened the Family Court up to the future use of closed material procedures, even though there was no statutory basis or procedural rules to do so. The implications of this case are significant. Whilst it is not yet known whether a closed material procedure has been adopted in these circumstances (there is no reported case of such), there are three main reasons for concern. First, even though special advocates have been used in limited circumstances in the Family Court in the past, this is not a widespread procedure and is restricted to exceptional circumstances. Special advocates have typically been used in *ex parte* proceedings to assess documents in public interest immunity claims; any substantive hearing still involves all parties. It may be closed to the public, but it is not closed to the individual concerned or their legal representative. If a closed material procedure were to be adopted in the Family Court, then the individual concerned and their legal representative would be excluded from all or part of a hearing in which secret material would be presented by the government to the court, with only a special advocate able to challenge the evidence, and not able to communicate fully with the individual or their legal representative. Given the substantial and potentially long-lasting impact on children's lives of Family Court decisions, this represents a significant inroad into the rule of law and the principles of open and natural justice, as well as potentially an infringement on the right to a fair trial. Secondly, the closed material procedure considered in this particular case was for a hearing that was significantly far removed from any decision that was to be made about the child involved. If adopted, the closed material procedure would be used to determine whether MI5 could disclose the material to another security and intelligence agency. The

[142] *Tariq v Home Office* [2011] UKSC 35; *Gulamhussein and Tariq v the United Kingdom* Application Nos. 46538/11 and 3960/12 (26 April 2018).

[143] A McCullough et al, 'Justice and Security Green Paper: Response from to Consultation from Special Advocates' (16 December 2011), [4] <https://ukhumanrightsblog.com/wp-content/uploads/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf> accessed 7 May 2020.

purpose on which the original disclosure was allowed (in the first instance to the MPS and CPS, then subsequently to MI5) was to facilitate the prosecution of the mother. As MacDonald J noted, it would be in the best interests of the child for a prosecution either to proceed, or for the mother to be exonerated. It is difficult to see how the best interests of the child might be a factor in a decision to grant onwards disclosure to the Security Service in a closed material procedure. This undermines the paramountcy principle, the 'cornerstone' of family law.[144] Thirdly, whilst 'radicalisation cases' might prove to be a meritorious area in which to extend the use of closed material procedures to the Family Court, there are two core concerns that cannot be forgotten: the first is that these 'radicalisation cases' rely on a concept – radicalisation – that is not well understood in the academic literature, and has only in the past six years been considered by the Family Court. It is a new and evolving aspect of Family Law, and it is concerning that significant decisions about a child's life could be taken in such circumstances. Secondly, the history of closed material procedures reveals a 'creep' or 'normalisation' in their use.[145] Originally introduced to deal with national security information in immigration cases,[146] closed material procedures have also been used in various counter-terrorism regimes,[147] and are now available in all civil cases.[148] If closed material procedures were to be adopted in 'radicalisation cases', it is unlikely that, based on past experience, they would be siloed to that particular aspect of family law; there is a strong case to suggest that they would be made available more broadly in the family jurisdiction, for example in cases in which parents' radical, extreme, or fundamentalist (non-Muslim) religious beliefs might be considered to constitute a freestanding harm to the child even in the absence of any link to radicalisation. It could also include any cases involving sensitive material the disclosure of which would be damaging to the interests of national security, such as any public law case initiated by local authorities where an individual involved (including potentially the child) is under investigation by counter-terrorism police or is a 'subject of interest' to MI5.[149] Given the concerns already raised, this would represent a significant expansion of the regime and a worrying inroad into the rule of law.

[144] P Bromley and N Lowe, *Bromley's Family Law* (Butterworths, 1992) cited in H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 269.
[145] See: D Locke, 'A New Chapter in the Normalisation of Closed Material Procedures' (2020) 83(1) *The Modern Law Review* 202. See also: Nanopoulos, note 61.
[146] Special Immigration Appeals Commission Act 1997.
[147] Prevention of Terrorism Act 2005; Counter-Terrorism Act 2008; Terrorism Prevention and Investigation Measures Act 2011.
[148] Justice and Security Act 2013.
[149] D Anderson, *Attacks in London and Manchester March – June 2017* (December 2017), 8.