Tracking in the Interests of Counter-Terrorism

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Framing the scene

Counter-terrorism in the UK is not a fully coherent, consolidated policy, but is rather a complex web of powers, duties, offences, and strategies that are somehow intricately linked and meticulously planned, and arranged across four interrelated, but fluid, policy strands: prevent, pursue, protect, and prepare (HM Government, 2018a). Tracking in the interests of counter-terrorism operates within this field, so rather than talking of a tracking 'system' in the interests of counter-terrorism, a more suitable description might be an 'assemblage', which is an ontological perspective in which the relationships of heterogeneous component parts are unstable and fragmented but which can nevertheless exert overall functional power (Deleuze and Guattari, 1980; DeLanda 2006; Phillips, 2006; Allen, 2011).

The notion of counter-terrorism as an assemblage has been applied to various specific elements, such as counter-terrorism financing (de Goede, 2012; 2018), electronic surveillance (Macdonald, 2015), and review (Blackbourn, de Londras and Morgan, 2020). The fluid notion of an assemblage brings advantages and disadvantages. On the one hand, descriptively it is a good way of representing a plurality of sources and techniques (not just formal laws and regulations but also codes and even architecture) which can involve frictions between competing hierarchies as well as common purposes (Lessig, 2006; Acuto and Curtis, 2013). On the other hand, complexity and overlap will make the attainment of desired attributes such as accountability more elusive, as checks and balances might be circumvented by multiple approaches and secrecy will impair measures of effectiveness and efficiency (Amoore and de Goede, 2005; Blackbourn, de Londras and Morgan, 2020). Nevertheless, the concept of an 'assemblage' does overall provide a heuristic framework for tracking in the interests of counter-terrorism that can better reflect three fluid vectors: time; technique; and target.

This chapter assesses counter-terrorism tracking across these three vectors. In doing so, the assemblage is revealed as broad in scope and highly adaptive; it is no longer confined to criminals or suspects but extends to whole populations, sub-populations and individuals, and to 'all risks'. The aim of the chapter is to show how fluid and interactive the process of counter-terrorism tracking can be, even though vital interests are at stake, not just communal interests in harmony and security but also individual human rights to privacy, family life and liberty. Thus one specific, recent instance of tracking in the interests of counter-terrorism will be analysed to highlight the fluidity in the assemblage: the timing, techniques and targets prompted by would-be and returning foreign terrorist fighters (Walker, 2018).

Time

Time is one of the fluid vectors within tracking. This factor can assume at least two aspects: 'time span' and 'timing'.

The perception of some risk of terrorism requiring some response has been fairly constant over a lengthy time span in the UK. While 'terrorism' was not historically a term in common currency, other umbrella concepts such as being 'adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere' in the *Treason Act 1351*,

or ‘national security’ in the *Security Service Act 1989* and the *Intelligence Services Act 1994*, or more simply ‘violence for political ends’, which is a basic definition of terrorism (Saul, 2006; Walker, 2007), or even ‘subversion’ (Spjut, 1979), reveal that the state has been energised to install laws and structures in response to these types of threat for many centuries. In this way, perceptions of risk based on political and religious extremism encouraged the establishment of a network of spies and surveillance as long ago as the reign of Elizabeth I (Alford, 2012; Fraser, 1996). Furthermore, the antecedents of the Irish Republican Army (IRA) and counter-terrorism responses and laws in Ireland can be traced back to the *Whiteboy Acts* starting in 1761 (Beames, 1983; Howlin 2021).

The conclusion is that a sustained time span of terrorism is associated with an increase in counter-terrorism, including tracking activity and legislation which becomes a fixture rather than a precise correlative. Yet, one might also suppose that effort over time is calculated according to the objective level of threat posed by terrorism, as reflected in the five gradations used by the Security Service (MI5, 2019a):

- LOW means an attack is highly unlikely
- MODERATE means an attack is possible, but not likely
- SUBSTANTIAL means an attack is likely
- SEVERE means an attack is highly likely
- CRITICAL means an attack is highly likely in the near future

MI5 (2022a) claims that its threat level is calculated according to the available intelligence plus terrorist capability, intentions and timescale. However, the position is in fact more complex, and account must be taken of the public’s tolerance to threat level, exogenous political calculations such as the wish to be seen as ‘strong’ on terrorism, or chance events such as miscarriages of justice, press campaigns, or emotional triggers such as the death of children. It follows that while the threat level has fluctuated between substantial and severe since 2006 (when it was first made public), the laws allowing tracking and the amounts of tracking have generally accrued throughout the same period. That is, there has been an inexorable increase in tracking despite no corresponding one way increase in the terrorist threat level. The only notable reduction in powers was between 2010 and 2012 when stop and search powers were reduced, even though the threat level only decreased from severe to substantial in July 2011. Since then, the threat level has fluctuated between severe and critical from August 2014 to July 2019, and between the lower levels of substantial and severe from July 2019 to February 2022 (MI5, 2022a).

‘Timing’, in the sense of the precise moment of state intervention for tracking, is also important. This aspect of the vector of time is reflected in debates within various stages of tracking. The first stage is an individual’s designation as a suspect or ‘Subject of Interest’ (SOI) worthy of official tracking in some format. That format can range from intelligence reporting to physical tracking. However, no published rules explain how precisely designation or grading takes place. More formal tracking actions undertaken against an SOI, especially those which impinge significantly on privacy, are more formally regulated. But even here, there can be slippage between those who are an SOI, formal suspects of crime, and criminally accused. That slippage occurs because of legal changes in counter-terrorism which allow for flexibility.

Part of that flexibility is that powers of arrest are granted which allow intelligence tracking to be concluded, and formal policing detention and investigation to begin. Thus, the power of

arrest without warrant in section 41 of the *Terrorism Act 2000* allows for arrest on reasonable suspicion of being a terrorist. The purposes of arrest involve forensic testing and interrogation of suspects, as aided by extended detention and by avoidance of having to supply detailed reasons at the point of arrest (*Forbes v HM Advocate*, 1990; *Brady v Chief Constable for the RUC*, 1991; *Oscar v Chief Constable of the RUC*, 1992). This power is founded on the idea that the threat of terrorism demands anticipatory police intervention because to await the anticipated crime to be perpetrated is too risky. Allied to this early intervention is the amendment of criminal law by way of new provisions focusing on so-called 'terrorist precursor crimes' (Walker, Llobet Anglí, and Cancio Meliá 2022). The most important example in the UK is the offence of preparation of terrorism under section 5 of the *Terrorism Act 2006*. Prosecution for this offence can read like a catalogue of tracking activities; the accused met this person, communicated on the internet with those persons, downloaded identified extremist literature, and bought tickets to go to that place. They were tracked throughout. But what they did not do, unlike the so-called 'ordinary decent criminals' (Baker, 1984, para 136), was to commit an actual shooting, bombing or stabbing. No matter, since Parliament, the courts and the Sentencing Council have ensured that the penalty can involve savage tariffs, including a sentence of up to life imprisonment with a minimum term of up to 40 years (*R v Kahar*, 2016; Sentencing Council, 2022).

Techniques

Techniques of tracking in counter-terrorism have evolved in number and complexity. Human sources of intelligence-gathering – whether by agents, informants or others – have long represented key assets in counter-terrorism tracking. Their worth is especially emphasised in Ireland, where tales of informants, agents and even supergrasses are centuries old (Moran, 2008; 2017), but whose utilisation and frequent disrepute have been revived and reviled in modern times (Greer, 1995; Ingram and Harkin, 2004; Dudai, 2012; Martin, 2013; *Re Scappaticci*, 2003; *R v Stewart and Stewart*, 2010; *In re Loughlin*, 2017; *R v Gary Haggarty*, 2018; *Re Mulhern*, 2018). The manifold inquiries into collusion between the security forces and informants, allegedly turning a blind eye to criminal acts, including killings, are often unresolved and painful (Stevens, 2003; 2005; Bruce, 2000; Police Ombudsman for Northern Ireland, 2007; Cory, 2003a; 2003b; 2003c; 2003d; 2003e; 2003f; Barron, 2003; *In re X and the Rosemary Nelson Inquiry*, 2008; *Re Hamill*, 2008; *R v Barrett*, 2004; de Silva, 2012). A survey by HM Inspectorate of Constabulary conducted in 2008 found that arrangements for Covert Human Intelligence Sources (CHIS) in Northern Ireland were 'robust, effective, and comply with all the necessary legislation' (HM Inspectorate of Constabulary, 2008). But this was far from the last word in Northern Ireland. While tighter controls under the *Regulation of Investigatory Powers Act 2000* should avert some of the past excesses, the absence of independent oversight of CHIS activity offers little confidence that this outcome is assured (Hyland and Walker, 2014). The fact that contemporary informants against *jihadis* may be run by overseas agencies, such as the Central Intelligence Agency (CIA), is a new twist which increases scepticism that UK agencies and courts will receive a full and fair representation of the evidence. Further disquiet is engendered by the possibility of immunity for criminal conduct under the Covert Human Intelligence Sources (Criminal Conduct) Act 2021.

Nowadays Human Intelligence (HUMINT) has been joined by many other variants of tracking terrorists (Johnson, 2009; Wirtz, 2010), most of which deploy technology which allows a much larger scale of coverage but far less discernment in tracking. Indeed, under

many of these techniques, the whole population is treated as a risk. Most important of those said to be available (Omand, Bartlett and Miller, 2012) are: OSINT: Open Source Intelligence, gathered through reading news sources or talking to people; SIGINT: Signals Intelligence, gathered from interception of signals; and COMINT: Communications Intelligence, which involves the reading of communications traffic patterns and is actually the main source for a great deal of tracking.

The Security Service still puts CHIS at the top of its list of techniques (MI5, 2019b), whereas the US Office of the Director of National Intelligence (2019) gives SIGINT top billing. This conscious or unconscious downgrading of HUMINT as a tracking technique was one of the core issues concerning faulty intelligence underlying the Iraq war (Butler, 2003-04; HM Government, 2005; Chilcot, 2016-17). A sense of this expansion of tracking in counter-terrorism can also be gauged from its cost. Staffing levels at the security agencies have risen substantially since 9/11. In 2020, staffing levels stood at MI5 at 5200, at MI6 at 4107 and at GCHQ at 7107, with the overall cost at £3.4bn (Intelligence and Security Committee, 2021: Annex C). These numbers are around triple what they were on 9/11 (Intelligence and Security Committee, 2002: para 39; Walker and Staniforth, 2013).

Targets

The third vector concerns the targets of tracking in the interests of counter-terrorism. A number of different attributes can be discerned based on three dichotomies: external/internal; individual/communal; and punitive/predictive.

External/Internal

The target of tracking in counter-terrorism has always veered between aliens and neighbours. This binary was even true in the age of Elizabeth I, reflected in her statement that 'I would not open windows into men's souls' (Neal, 1934). This 'art of separation' (Walzer, 1984) allowed a space for Catholic dissent which, if recognised openly, would have had to be treated as treasonous. Instead, the focus could be turned to 'Popish plots', inspired not only by the Pope, but also by French and Spanish monarchs. This demonising of aliens was politically less divisive and corrosive of communal harmony than to accuse one's neighbours of treason or terrorism. But facts had to be faced from time to time, notably with the Gunpowder Plot in 1605, led by a group of provincial English Catholics. One reaction was anti-terrorism legislation in the shape of the *Popish Recusants Act 1605* (Haynes, 1994; Marotti, 1999). The Act forbade Roman Catholics from practising the professions of law and medicine and from acting as a guardian or trustee; and it allowed magistrates to search their houses for weapons. The Act also provided a new oath of allegiance. Any recusant was to be fined £60 or to forfeit two-thirds of his land if he did not receive the sacrament of the Lord's Supper at least once a year in his Church of England parish church. The Act also made it high treason to obey the authority of Rome rather than the Crown.

A corresponding contemporary dichotomy has emerged between a focus on aliens and an emphasis on 'neighbour terrorism' during the years following 9/11 (Walker, 2005; 2008; 2009). Traditional military strategy conceived of the typical 'enemy' as someone other than our 'neighbour' – an alien whose unfamiliarity in thought and intention increased the potential risk to our well-being. As encapsulated in Sun Tzu's famous words (1963: 18): 'If you know the enemy and know yourself, you need not fear the result of a hundred battles. If

you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle'. Yet, in the contemporary phase of terrorism, our neighbours – fellow citizens or at least long-term foreign residents – have become the most risky actors. The trouble is that the threats posed by our neighbours are more insidious; how do we tell friend from foe, and how do we respond without harming community solidarity or without blatant discrimination?

The shift towards neighbour terrorism entails significant alterations in law enforcement. There is likely to be an enhanced emphasis on anticipatory risk as well as on the more traditional forms of pursuit after the event through prosecution (HM Government, 2006; Dershowitz, 2006). Intelligence rather than evidence will loom large as a trigger for responses, and the responses will also encompass an expanded array, including not only policing operations but also executive actions. One aspect will be the inception of 'all-risks' policing powers, by which the police will treat anyone and everyone as a risk, based on the recognition that risks may come from any source, and are not exclusively raised by non-citizens or other obvious 'outsiders' traditionally considered most in need of scrutiny.

Applying these reflections to contemporary terrorism, the convenient figure of Osama bin Laden could be presented as an archetypal foe; definitely not a neighbour who shares our ideologies and cultures, but a primitive, uncivilised cave dweller. As US President Bush put it in late 2001, bin Laden was 'a guy who, three months ago, was in control of a country. Now he's maybe in control of a cave' (Bush, 2001; see also: Gunaratna, 2002). But bin Laden as a convenient scapegoat has ceased to be the centre-stage villain, even before his death in 2011 (Goldenberg, 2006). Since the London bombings in July 2005, which were carried out by four men from Yorkshire, the most threatening figures are our neighbours (Intelligence and Security Committee, 2006; House of Commons, 2006). No longer can it be claimed that the enemy in war is 'in a particularly intense way, existentially something different and alien' and 'the negation of our existence, the destruction of our way of life' (Schmitt, 1976). Rather, we are less and less sure about how to typecast our enemies (Pape, 2005; Pedahzur, 2004; Gupta and Mundra, 2005; Silke, 2006) and to avoid the paranoia that our neighbour may turn out to be a terrorist or is being unjustly labelled as a terrorist because of racial or ethnic origins.

The consequences of the breakdown in this external/internal divide can be seen in tracking policies, where all-risks conceptions of the enemy encompass: huge use of stop and search powers amounting to hundreds of thousands of stops per year under section 44 of the *Terrorism Act 2000* until its replacement in 2012; pervasive port and airport controls under schedule 7 of the *Terrorism Act 2000*, which are augmented by passenger name recognition data collection, as required by the European Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; and the expansion of communications data surveillance to cover everyone under the *Investigatory Powers Act 2016*. More pointed changes which highlight the switch from external to internal can be found, notably the attempt under Part IV of the *Anti-terrorism, Crime and Security Act 2001* to apply detention without trial solely to deportable aliens and not suspected neighbour terrorists, a distinction later judged to be unsustainable in *A v Secretary of State for the Home Department* (2004). The consequent withdrawal of detention without trial and its replacement by control orders and then Terrorism Prevention and Investigation Measures (TPIMs) notably applied to everyone regardless of citizenship status (Walker, 2007; Walker and Horne, 2012).

Individual/Communal

The dichotomy between individual and communal raises the question of whether the targets of counter-terrorism tracking are persons selected as individuals or whether the tracking of target communities is more likely. The point raised here is that tracking in counter-terrorism goes well beyond the individual; in between the individual and the 'all risks' approach to tracking the whole population, as outlined above, is a communal approach. The authorities would claim the approach is based on scientific profiling, but critics would say that it simply reflects prejudice.

A sweeping 'suspect community' thesis (Pantazis and Pemberton, 2009; Greer, 2010; Pantazis and Pemberton, 2011; Hickman, Thomas, Nickels and Silvestri, 2012; Kundnani, 2014; Breen-Smyth, 2014; Greer, 2014) has been depicted as 'confused, and muddled' (Greer, 2015), however some localities do appear to have been selected for special attention, including population tracking, and those localities do correspond with concentrations of a particular religion or ethnicity. The same technique has long been used in non-counter-terrorism settings, notably the Swamp 81 operation that was said to trigger the Brixton Riots in 1981 (Scarman, 1981). One example of communal tracking in counter-terrorism was Project Champion in 2007. West Midlands Police embarked on a flawed operation to implement community surveillance in two (predominantly Muslim) districts of Birmingham where terrorist suspects were believed to reside (Thornton, 2010; Walker and McKay, 2015). The police's venture was halted by a storm of local protests before it could be fully realised.

Punitive/Predictive

The final axis in the targets of counter-terrorism tracking is punitive/predictive. Some people are selected on scales of risk or dangerousness as a predictive exercise. Other individuals become tracked because of formally and legally designated proven activities. The formally and legally designated proven terrorism activities leading to tracking are more straightforward and will be considered first. Most obvious is a person convicted of a terrorism crime. That status can lead to post-release tracking through both criminal and civil means.

There are two methods by which the tracking of convicted persons explicitly continues beyond any period of imprisonment (Appleton and Walker, 2015). The first is during a period of licence when arrangements under Multi-Agency Public Protection Arrangements (MAPPA) apply to released terrorist offenders, similar to other dangerous convicts. MAPPA are set out under sections 325–327 of the *Criminal Justice Act 2003*, which requires the 'Responsible Authority', consisting of the police, the probation service, and prison service, to work together to make arrangements for assessing and managing risks. Terrorist offenders may become eligible for MAPPA arrangements in various ways. For example, released terrorists convicted of a specified 'violent offence' under section 224 of the *Criminal Justice Act 2003* will be automatically subject to the MAPPA as a Category two offender, with active multi-agency involvement (NOMS, 2012; 2014). For other terrorist offenders, the nature of their offence and the risk they pose to the public must be considered in order to assess whether they exceptionally qualify as a Category three offender. Finally, consideration must be given to the impact on the victim of, and the motivation for, the crime, which may result in involvement in MAPPA as a Category three offender (NOMS, 2012; 2014). Although the number of terrorism offenders released on licence in England and Wales is relatively small, MAPPA have been said to be 'largely successful' in preventing serious reoffending amongst

released terrorist offenders (Wilkinson, 2014: 264; Disley et al, 2013), though there are some notable exceptions. They include Usman Khan, who killed two individuals in a terrorist attack at Fishmonger's Hall in London in November 2019, whilst on licence (HM Coroner, 2021). Rehabilitative or reintegrative programmes, however, have been difficult to devise for terrorists, the most recent being called the Desistance and Disengagement Programme, which was launched in October 2016:

> It focusses on those who have served prison sentences for terrorist or terrorist related offences and are due to be released on probation licence; those on Terrorism Prevention Investigation Measures (TPIMs): and those who have returned from conflict zones in Syria or Iraq and are subject to Temporary Exclusion Orders (TEOs) (Wallace, 2018; HM Government, 2018a: para 129).

Given the tragedy of the Usman Khan case and also the unease surrounding the release of Anjem Choudary, (*Choudary and Rahman v R*, 2016, 2017 – described further below), there has occurred the intensification of penal impositions through: sentencing modifications (increases in maximum penalties, the setting of minimum penalties and prolonged detention, especially as implemented by the Counter Terrorism and Sentencing Act 2021); special prison regimes; and stricter post-release monitoring (Walker and Cowley 2021; Lee and Walker 2022).

The second method by which to track convicted terrorists is a special scheme called 'notification' that applies to released terrorism offenders under the *Counter-Terrorism Act 2008* (Police Service of Northern Ireland, 2009; Prison Service, 2011). Notification is modelled on sex offender registration under Part II of the *Sexual Offences Act 2003* (Walker, 2011). Notification applies to a person aged over 16 and sentenced to imprisonment for one year or more (sections 44, 45, and 46) for a terrorism legislation offence (as listed in section 41) or for an offence with a terrorism connection (as described in section 42). In Northern Ireland, only offences under section 41 are relevant. Initial notification under section 47 demands the transmission of details about identity, residence, and travel to the police, to be delivered in person within three days of release from detention (section 50). Two subsequent duties ensue: notification of changes of residence for seven days or more (section 48) and periodic annual re-notification (section 49). In relation to foreign travel, compulsory notification arises under section 52, and foreign travel restriction orders may be imposed by section 58 and schedule 5. The duration of notification is regulated by section 53. For persons over 18 at the time of conviction and sentenced to life imprisonment or imprisonment for ten years or more, the period is thirty years. A period of fifteen years applies to those sentenced to imprisonment for five to ten years. Otherwise, the period is ten years (including for offenders aged 16 and 17). These lengthy periods arise because the government doubted the sustainability of renewals of orders: 'The fact that a person has not reoffended is not sufficient to establish the absence of such a risk' (West, 2008). The automatic imposition of notification and its length were challenged unsuccessfully in *R (Irfan) v Secretary of State for the Home Department* (2012a; 2012b), and the scheme was deemed to be proportionate for the protection of national security and public safety (Cf *R (F) v Secretary of State for the Home Department,* 2010; *Bouchacourt v France*, 2009).

Tracking by way of civil laws also produces legally designated tracked subjects, but involves more controversial processes. Contention arises because some impacts of the civil law tracking methods are akin to crime conviction and may severely restrict family life, expression and association, movement and financial life. The tracking here includes the

measures under the *Terrorism Prevention and Investigation Measures Act 2011* (including tagging and relocation), financial sanctions (which demand tracking by all financial institutions under the *Terrorist Asset Freezing Act 2010*), and Temporary Exclusion Orders (under the *Counter-Terrorism and Security Act 2015*) and other movement restrictions such as passport and travel document deprivation, immigration exclusion, and even citizenship deprivation. These are inflicted without a fully open trial and without proof beyond reasonable doubt. Nevertheless, these civil orders are deployed more often than criminal conviction (HM Government, 2018b). As at 31 December 2020, 185 persons were in custody in Great Britain for terrorism-related offences (HM Government, 2022). As for UK financial sanctions, there were 20 in total (14 individuals and six groups) plus several hundred more have been sanctioned by the EU and UN, though most have no assets in the UK (EU, 2018). Passports were withdrawn from 84 individuals between 2013 and 2017, 53 travel documents removed from 2015 to 2017 (HM Government, 2018b), there were 60 exclusions and seven TEOs issued between 1 January 2019 and 31 December 2020, and 37 citizenship deprivations in the same period (HM Government, 2022). The latter is a significant reduction from the 188 citizenship deprivations made in 2016 to 2017 at the height of travel to fight in Syria and Iraq (HM Government, 2018b).

Beyond the 'legally designated SOIs', whether criminal or civil, several other categories of SOI can be discerned, all within the predictive category. Recent estimates suggest that there are currently 3,000 active SOIs and 20,000 closed SOIs (Anderson, 2017): 1.24, 1.26). SOIs come to attention through tracking, for example because of their associations with other SOIs, through their movements (captured by PNR records or CCTV), and through communications profiles such as web activity and expressions of opinion on social media. Some SOIs are 'persons of authority' (Sorial, 2014) who can influence others. The prime example here is Anjem Choudary, as a so-called 'preacher of hate' (Yengistu, 2018: A10). But authority can arise from private life as well as public life; within the family rather than the mosque or social group. Therefore, attention will now be turned to family life as one of the newer sites for tracking.

Tracking Families in the Interests of Counter-Terrorism

The family, and in particular the family court, has become a new site of counter-terrorism tracking in recent years, especially since the declaration of a caliphate by Islamic State in mid-2014 (Munby, 2015; Ward and Jones, 2020, chapter 25). The use of tracking against families in the interests of counter-terrorism emerged amidst concerns about would-be and returning 'foreign terrorist fighters', a phenomenon that whilst not 'new' in terms of historical precedent, certainly captured the public and government's attention with case histories such as that of Shamima Begum (Walker, 2021; APPG 2022).

Time

The rise of Islamic State coincided with a period of relative quiescence for terrorism in the UK. As noted above, the terrorist threat level had been reduced from severe to substantial in 2011, and a process of security liberalisation had begun. Thus, the *time-span* in which most families have been tracked in the interests of counter-terrorism in the UK has been relatively short – just seven years. This period is at odds with the lengthier time-span of terrorism and counter-terrorism highlighted earlier in this chapter. Despite this short time-span, the techniques and targets of counter-terrorist tracking of families have changed over this period,

with different techniques used during the early years of the foreign terrorist fighters phenomenon compared to more recent interventions as outlined below. This change arises because the type of threat that families posed also changed, from one which was initially about preventing the travel of children to Syria and Iraq, to more contemporary threats which concern the potential radicalisation of a child or engagement in terrorist activity at home.

In terms of *timing*, intervention in the form of counter-terrorist tracking in the family courts occurs at a variety of stages, for example, following a child's referral to the government's deradicalisation programme, Channel (a forerunner to the Desistance and Disengagement Programme mentioned earlier and designed for persons at large). The referral applies by consent to those at risk rather than as a legal sanction, but may occur whilst formal terrorist or other criminal investigations are ongoing, following the conviction of a parent for terrorism related offences, or where a parent is subject to some form of executive counter-terrorism measure.

Techniques

The family courts have adopted and adapted a variety of tracking techniques for use against families, depending on who constitutes the target of the tracking (the parent or the child), and on the particular risk that they are perceived to pose (travel abroad to join Islamic State, or radicalisation or engagement in terrorist activities at home). The development of these techniques has also encouraged procedural difficulties such as the handling of closed hearings (Blackbourn, 2020) and the disclosure of sensitive documents (*Re L*, 2022).

The first reported cases in the Family Division related to a risk that parents were attempting to remove their children to Islamic State territory in Syria and Iraq (*London Borough of Tower Hamlets v M & Others*, 2015; *Re M (Children)*, 2014; *Re X (Children); Re Y (Children)*, 2015). The Family Division dealt with these cases using its inherent jurisdiction to make the children wards of the court. Wardship has also been used in cases where the children themselves have sought to travel to join Islamic State (*Brighton & Hove City Council v A Mother*, 2015a). Wardship provides the Family Division with a tracking function in the sense that 'no important step can be taken in the child's life without the court's consent' (Ministry of Justice, 2018, 1.3). In subsequent cases, the court has ordered the removal of passports of individuals suspected of attempting to travel to Syria or Iraq to join Islamic State (*Brighton & Hove City Council v A Mother*, 2015b). Passport removal ensures that an individual's attempted movements across international borders can be tracked.

The most innovative tracking technique developed by the family courts in the interest of counter-terrorism has been the use of GPS tagging, a technique which is not without precedent but not commonplace. The first use of tagging of parents was in *Re C (Abduction: Interim Directions: Accommodation by Local Authority)*, 2004. The use of electronic tagging, as proposed by the mother, was described as 'an innovation' by Mr Justice Singer. The judge issued the order under section 5 of the *Child Abduction and Custody Act 1985*, which states:

> Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

The judge continued: 'Although in future cases there may be funding issues to be resolved, in principle arrangements for electronic tagging can be made if the court so orders, which I assume it would ordinarily only do with the consent of the individual concerned … I emphasise that such requirements are unlikely to be appropriate save in a very few cases' (*Re C (Abduction: Interim Directions: Accommodation by Local Authority)*, 2004, [46]). Guidance issued by the President of the Family Court subsequently confirmed in *Re A (Family Proceedings: Electronic Tagging)*, 2009, that tagging is available. The type of electronic tags used in these early (non-terrorism) cases involved radio-frequency monitoring.

The first case to consider the use of electronic tagging as a means of mitigating the risk of harm caused by radicalisation was *Re X (Children); Re Y (Children)*, 2015. In that case, Sir James Munby, President of the Family Division noted that:

> there is no suggestion, apart from the alleged journeys to Syria, that there is, either in the X case or in the Y case, any basis for complaint about any aspect of the parent's basic care for their children. It is accepted that they are, in other respects, good parents who are bringing up their children lovingly and well ([28]).

In considering what action to take, the judge stated that 'it occurred to me to think about the possibility of electronic tagging' (*Re X (Children); Re Y (Children)*, 2015, [16]). The case turned on the question of whether the risk of flight by the parents could be mitigated by the protective measures put in place to prevent them from taking the children to Syria. The Judge held that the 'comprehensive and far-reaching package of measures … *does* provide the necessary very high degree of assurance that the court needs' (*Re X (Children); Re Y (Children)*, 2015, [8]). The Court thus made orders against the parents, including that they should be subject to GPS tagging. However, the Ministry of Justice objected. It did not consider that ordering the use of GPS monitoring was within the scope of the powers available to the Family Court for two reasons. First, it served a different purpose to radio-frequency monitoring, which had previously been used in family cases to ensure that curfews were maintained. Secondly, in prior cases, tagging had not been imposed against the will of the parties; thus, the use of electronic monitoring had been with their consent (*Re X (Children); Re Y (Children)*, 2015, [93]). The Ministry of Justice's intervention delayed the placement of the children in the family home. However, it ultimately stated that it was prepared to facilitate GPS tagging in this particular case, including payment of the costs of tagging. However, it was 'not intended to suggest that the power to order it to do so exists' (*Re X (Children), Re Y (Children) (No 2)*, 2015, [4]), nor did the decision 'mark a departure from its fundamental position that the court has no power to order [the Ministry of Justice] or [the National Offender Management Service] … to bear the costs of providing GPS tagging' (*Re X (Children), Re Y (Children) (No 2)*, 2015, [4]). The Ministry of Justice was concerned about the potential 'resource implications' of using GPS tagging in family cases. That concern was raised again in *Re C, D and E (Radicalisation: Fact Finding)*, 2016:

> The MoJ acquiesced to an order for electronic tagging (by way of GPS device), on the basis that (as in *Re X & Y No.2*) each case was being considered on its own facts and no precedent would be set by their stance in this litigation. They have indicated that they will fund in the first instance, without prejudice to arguments which they wish to pursue at a hearing (to be arranged) that it would be right for other parties to make contributions (*Re C, D and E (Radicalisation: Fact Finding)*, 2016, [127]).

The use of GPS tagging has only been ordered in cases where the harm that the court sought to mitigate against was that occasioned by the likelihood of travel to Syria or Iraq instigated by parents. In *London Borough of Tower Hamlets v B*, 2015, the judge refused to order the electronic tagging of the child, despite a request from her specifically to be tagged to enable her to stay in the family home. This was because, as Mr Justice Hayden explained:

> The risk here though is not primarily or indeed exclusively one of flight; it is of psychological and emotional harm from which tagging cannot protect her. Only a safe and neutral environment free from these powerful influences can, for the time being, secure her welfare interests (*London Borough of Tower Hamlets v B*, 2015, [32]).

The judge thus allowed the Local Authority's application to remove B from her family and place her outside her home. The characterisation of the case as one being not primarily or exclusively of flight appears, at least on first sight, at odds with the facts of the case. B was stopped attempting to travel to Syria when the brother in whom she confided her intentions informed their mother of her travel plans, who then reported her missing to the police. However, all was not as it seemed. Mr Justice Hayden stated that:

> Matters, however, took a dramatic turn when, between 26th and 28th June of this year a protracted search of the family home resulted in a plethora of electronic devices being taken away for analysis by the Counter Terrorism Command. B was arrested on suspicion of terrorist offences. She was interviewed and this promising young woman now finds herself on police bail whilst further investigations continue (*London Borough of Tower Hamlets v B*, 2015, [11]).

B's parents and siblings were subsequently also arrested on suspicion of terrorism offences. Thus, the harm that B had suffered was not the attempted travel to Syria, which, unlike the X and Y cases, she undertook on her own, but the 'serious emotional harm' that she was at risk of from being in her parent's care. This harm could not be mitigated by the electronic tagging of either the child or the parents.

Targets

Families have become a new target of counter-terrorist tracking. This development has affected both children and parents, where suspicions arise: that children are planning or attempting to travel to join Islamic State; that parents are planning or attempting to take their children there for the same purposes; and that children are at risk of being radicalised, either within the family home or by external influences, or that they are at risk of being involved in terrorist activities in the UK (Munby, 2015). The techniques of tracking the two potential targets (parents and children) have differed depending on the potential harm that is posed – travel abroad, or radicalisation or engagement in terrorist activities at home. Typically, parents have been subject to passport removals or GPS tagging to mitigate against the risk of them removing their children from the jurisdiction to travel to territory controlled by Islamic State. In contrast, as well as having their passports removed, children have been made wards of the court or subject to care proceedings under the *Children Act 1989*. In all cases, the imposition of compulsory assessments (as in *Re I (Children)*, 2020) or restrictive measures has been to facilitate the tracking of persons giving rise to risk in the interests of counter-terrorism.

Conclusions

Tracking in the interests of counter-terrorism occurs at multiple points in time in relation to a terrorist attack, uses multiple techniques, and addresses a multiplicity of targets. This tracking assemblage has many benefits, in particular the fluidity and flexibility analysed above. For example, the multiple points of attack in counter-terrorism tracking can increase the chances of operational success by addressing disparate pieces of a security jigsaw with different techniques which may overcome obstacles in unexpected ways (Haggerty and Ericson, 2000), or even produce valuable intelligence from a combination of open source data each component of which was not considered sensitive (Solove, 2007). However, the approach also raises some concerns, particularly about over-reach, accountability and effectiveness.

One of the issues arising is that lower resistance on the part of government tends to apply to requests for extra funding by counter-terrorism tracking agencies, sometimes at the expense of other social goods and of a temptation to apply the same security techniques to non-security contexts. Furthermore, due process for the individual might also be degraded, not least because the tracking and any of its impacts might be kept secret (Dummer, 2006; Citron, 2008). Issues of fairness arise from secrecy and intrusion, with potential damage to due process, privacy, family life, movement, and expressive rights. A key issue here is the absence of guidance as to the opening of a file on a new SOI and equally the closing of the file, with the result that any sense of ethical tracking is seriously undermined (Herman, 2004; Omand, 2011; Omand and Phythian, 2018). Most insidious of all is that the uncertain boundaries and impacts of the assemblage create chilling effects on behaviour, especially for those who might reasonably assume themselves to be prime candidates for attention (Richards, 2013).

There has been a mass proliferation in tracking that the UK Parliament has struggled to monitor and contain over time. For example, in the field of police tracking by surveillance techniques, the *Interception of Communications Act 1985* covered only, in the space of 12 sections, intercepting communications sent by post or by a public telecommunications system. Much more sophisticated was the *Regulation of Investigatory Powers Act 2000*. It revealed in 83 sections a much more complex world of tracking, covering interception, collection of communications data, directed surveillance, intrusive surveillance, encryption intrusion and even, for the first time, the traditional technique of Covert Human Intelligence Sources. However, in 2013, Edward Snowden revealed the dire inadequacy of such legal machinery when he leaked thousands of highly classified US National Security Agency (NSA) files (Greenwald, 2014; Harcourt, 2015). So, now the *Investigatory Powers Act 2016* has expanded to 272 sections and includes new categories of equipment interference, personal data warrants, and a lengthy catalogue of bulk data hoovering techniques. However, another scandal will inevitably arise which will demonstrate that recent legislative reforms in the UK and elsewhere have been 'limited and underwhelming' and have served to recognise and endorse tracking rather than to curtail it (Wetzling and Vieth, 2018; Leman-Langlois, 2018; Hirst 2019).

In addition to the inadequacy of the legal regime to track terrorism, there are concerns about the effectiveness of the tracking machinery itself. Complaints of failure arise when attacks are not intercepted or disrupted. There are concerns that subjects of interest are either 'slipping through the net' and committing atrocities or, conversely, wasting public resources through

needless selection. Critical reports by David Anderson (2017) and the Intelligence and Security Committee (2018) relating to the major attacks in 2017 have begun to shed light on the system of SOIs, but there is still limited material in the public domain as to how it operates in practice. Since there is never any notification to the subject of designation, enforcement of restraints such as the *Data Protection Act 2018* may not be sufficiently stringent. A review by the Biometrics Commissioner of the corresponding biometrics data collection has revealed major breaches of internal and external protections in national security cases (Commissioner for the Retention and Use of Biometric Material, 2018). Though the standards applied are criticised as weak (Office of the Inspector General, 2005), some standards governing targeting apply to the US Federal Bureau of Investigation (FBI) as issued by the US Attorney General (1989, III.B.1; 2008) which might be suitable for policy transfer purposes (FBI, 2016). Certainly, as recognised by reports from Anderson and Intelligence and Security Committee, the trackers should not be trusted to set the tracking rules if fairness and even effectiveness are to be achieved.

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