

# Mothers in prison: the rights of the child

Rona Epstein looks at whether the courts take into account the rights of children when imprisoning mothers

*Of the 11,044 women who entered prison in the UK in 2009, about half were on remand, spending an average of four to six weeks in prison. Following trial, 61 per cent of women sentenced to custody received sentences of six months or less (Prison Reform Trust, 2010). In the same year, 3,000 women were sentenced to custody for three months or less, of whom 176 were sentenced to ten days or less. This suggests that a significant number of women are imprisoned for relatively minor offences. Many are mothers of dependent children.*

## Legal obligations

The *Human Rights Act 1998* obliges all public bodies, including courts, to comply with the *European Convention on Human Rights*. Article 8 provides that:

1. Everyone has the right to respect for their private and family life, home and correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

When a court sentences a mother with care of a dependent child,

the Article 8 rights of the child are engaged. Two cases set out the impact of the Article 8 rights of the child on the criminal process.

*R (on the application of Stokes) v Gwent Magistrates Court* [2001] All ER (D) 125 (Jul)

Ms Stokes, mother of four children, age 16, 15, six and nine months was committed to prison for 12 days, suspended on payment of £5 per week for outstanding fines and compensation orders. The High Court held at judicial review that the decision of the magistrates was perverse:

*Under article 8 of the European Convention on Human Rights ... a court dealing with fine enforcement in the circumstances of the present case, and contemplating making a committal order which would separate completely a mother from her young children with unknown consequences of the effect of that order on those children, had to take into account the need for proportionality and ask itself whether the proposed interference with the children's right to respect for their family life was proportionate to the need which made it legitimate. Committal to prison must be a remedy of final resort if all else has failed.*

*R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 This Court of Appeal case concerned the prison rule that held that babies in a Mother and Baby Unit had

to leave the unit at the age of 18 months. Two mothers, P and Q, challenged the inflexible application of that rule. Lord Phillips, Master of the Rolls, (at paragraph 79) stated:

*It goes without saying that since 2nd October 2000 sentencing courts have been public authorities within the meaning of section 6 of the Human Rights Act. If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound ... to carry out the balancing exercise ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under section 6(1), ask for more.*

Lord Phillips stated that, in sentencing a mother with dependent children, the rights of the child have to be weighed against the seriousness of the offence in a 'balancing exercise'. This judgment made clear that magistrates and judges must a) acquire information about dependent children; and b) balance the Article 8 rights of the child against the seriousness of the mother's offence.

## The Judicial College

The role of the Judicial College (formerly the Judicial Studies Board) is to train judges and magistrates. After the two cases cited above, the College should have trained the magistrates and the judges as to how they should acquire information about the dependent children; and having acquired information, conduct the balancing exercise weighing the seriousness of the offence against the article 8 rights of the child.

In fact, no training was undertaken by the College for either judges or magistrates on how the *Human Rights Act* now required a consideration of the Article 8 rights of the child in the criminal courts.

## A 'balancing exercise'?

Our research set out to establish whether this 'balancing exercise' takes place when sentencers consider custody for mothers either on remand or on sentence. The study covered 42 cases of imprisonment of mothers: two in magistrates' courts, ten in Crown Courts and 30 in the Court of Appeal.

An analysis of the sentencing remarks of Crown Court judges, the reports of the Court of Appeal and the files of magistrates indicates that the required balancing exercise is not being undertaken in the Crown Courts, the magistrates' courts or in the Court of Appeal. Sentencers express in various ways their awareness of the plight of children of imprisoned mothers, but do not make express reference to the child's Article 8 rights. They do not always seek information on the dependent children (see, for example, below, Croydon Crown Court) nor do they balance the child's rights against the seriousness of the offence. Some judges completely ignore the fact that the defendant has young children (four cases).

In a case of misconduct in a public office (granting extension of student leave to would-be immigrants), the judge at Croydon Crown Court (16 April 2010) refused to obtain information about the children. The defendant was a single parent and sole carer of four children aged 19, nine, seven and five.

The judge said:

*I am asked to adjourn sentence for a pre-sentence report. I am bound to say that I do not consider that a pre-sentence report would assist me.*

Although the Article 8 rights of the child are not specifically mentioned, the courts may state that the effects of imprisonment on children must be considered and refer to:

*the well-understood principle that an offender who is the carer of*

*three young children should be sentenced to imprisonment only if that is absolutely necessary, and secondly, if it is, for the shortest term that is conceivably commensurate with the offences in question.* (Mr Justice Wyn Williams in *R v Evelyn ARINZE* [2010] EWCA Crim 1638)

In the cases we examined, the courts' concern for children appears to be expressed by: a) asserting that courts must have regard to the effects of imprisonment on children; and b) regarding exceptionally needy and disabled children as having a right to care and to have this weighed against the seriousness of the offence. The Court of Appeal cites 'the effect on children', not the child's Article 8 rights.

In *R v Shantelle Davis*, the defendant was initially sentenced to 12 months' imprisonment for blackmail, but the Court of Appeal reduced it to nine months' suspended imprisonment. The defendant had a 23-month-old severely disabled daughter, who was blind, had cerebral palsy and required round-the-clock care.

## Imprisonment for council tax debt

Women in Prison (WiP) is a charity that supports this research. Through WiP two cases of imprisonment ordered by magistrates for council tax debt came to light. This was surprising since, except in exceedingly rare circumstances, imprisonment for council tax debt is unlawful (see Epstein, 1998; and Epstein and Wise, 1995).

One case was a single mother of a six-year-old child. Her child was not mentioned in the file notes. The

other, AA, was sentenced to three months in prison by Dartford Magistrates' Courts. She owed £7,000 in council tax arrears. AA has an autistic child. This research led to a successful legal challenge and she was released on bail. At Judicial Review on 6 July 2011 the magistrates' decision to imprison her was found to have been unlawful and was quashed.

## Conclusion

The rights of the child are engaged whenever a mother who has the care of a dependent child is at risk of imprisonment, either on remand or on sentence. The courts must undertake a balancing exercise, weighing the seriousness of the offence against the rights of the child. Such a balancing exercise may be

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a difficult and complex task, with a number of factors intervening. The research reported in this paper is a preliminary study. A fuller study, funded by The Oakdale Trust, which it is hoped will bring the total to 70 cases of imprisoned mothers, is underway. ■

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Women in Prison can be found at: [www.womeninprison.org.uk](http://www.womeninprison.org.uk)

## References

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