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# Mothers in Prison:

## the sentencing of mothers and the rights of the child<sup>1</sup>

*Rona Epstein is an Honorary Research Fellow, Coventry Law School, Coventry University.*

**The Human Rights Act 1998 came into force in October 2000. Section 6 obliges all public bodies, including the courts, to comply with the European Convention on Human Rights. Article 8 of the European Convention on Human Rights and Fundamental Freedoms (1950) (ECHR) states that everyone has the right to respect for private and family life. As imprisonment of a father or mother entails the forcible separation of a child from its parents and therefore impacts on the child's Article 8 rights, sentencing courts are required to obtain information on dependent children and then conduct a balancing exercise weighing the Article 8 rights of potentially affected children against the seriousness of the parent's offence. I have undertaken research to explore to what extent, if at all, the required balancing exercise is being carried out in the English sentencing courts and whether the courts are complying with the Human Rights Act in this respect. The research covered 75 cases of the imposition of custody (suspended and immediate) on mothers who care for a dependent child**

### Introduction

The last ten years or so have seen a dramatic rise in the number of women in prison, from an average of 1560 in 1993 to about 4460 in June 2006 (the Prison Reform Trust).<sup>2</sup> In August 2010 the number of women in prison in England and Wales was 4,230. Of the 10,181 women and girls who entered prison in England and Wales in 2011, about half were on remand, spending an average of four to six weeks in prison.<sup>3</sup>

Following conviction, 61 per cent of women sentenced to custody received sentences of less than six months. In 2008 3,000 women (27 per cent) were sentenced to custody for 3 months or less of whom 176 were sentenced to 10 days or less.<sup>4</sup> This suggests that a significant number of women are imprisoned for relatively minor offences. Many have dependent children. Most of the rise in the female prison population can be explained by a significant increase in the severity of sentences.<sup>5</sup> In 1996, 10 per cent of women convicted of an indictable offence were sent to prison; in 2006 the figure was 15 per cent.<sup>6</sup>

Sixty-six per cent of women prisoners are mothers of children under the age of 18, and each year it is estimated that more than 17,700 children are separated from their mothers by imprisonment. Only 5 per cent of children remain in their own home once their mother has been sentenced. At least a third of mothers in prison are lone parents before imprisonment. A Home Office study found that, for 85 per cent of mothers, prison was the first time they had been separated from their children for any significant length of time.<sup>7</sup>

Research in the UK and across Europe on the effects of parental imprisonment has identified 'complex health, social and welfare disadvantages, including the impact of poverty, family discord, substance abuse and mental health issues. The imprisonment of mothers, for example, has been described as having 'wreaked havoc on family stability and children's well-being'.<sup>8</sup> A number of studies have shown long-term detrimental effects on children of the incarceration of their parents.<sup>9</sup> Murray and Murray report that parental incarceration is a strong risk factor for long-lasting psychopathology with antisocial outcomes.<sup>10</sup> Parental incarceration might threaten children's attachment security because of parent-child separation,

1. This research was funded partly by Coventry University and partly by *The Oakdale Trust*. I am grateful for this support which provided payment for the transcripts of sentencing remarks. I would also like to thank *Women in Prison* for their help in making this research possible.
2. Statistics from the Bromley Briefing produced by the Prison Reform Trust (2010): [www.prisonreformtrust.org.uk/](http://www.prisonreformtrust.org.uk/)
3. Number of female receptions 2011, Ministry of Justice statistics.
4. Ministry of Justice, Freedom of Information Request.
5. Hough M., Jacobson, J. and Millie A. (2003) *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, London.
6. Ministry of Justice (2007) *Sentencing Statistics 2006*, London.
7. Home Office Research Study 162 (1997), *Imprisoned Women and Mothers*, Home Office, London.
8. Convery, U. and Moore, L. (2011) Children of imprisoned parents and their problems, in *Children of Imprisoned Parents*, (Ed.) Peter Scharff-Smith and Lucy Gampell, European Network for Children of Imprisoned Parents, Denmark, p 12.
9. Murray, J., Farrington, D. P., & Sekol, I. (2012). Children's antisocial behavior, mental health, drug use, and educational performance after parental incarceration: A systematic review and meta-analysis, *Psychological Bulletin*.
10. Murray, J., & Murray, L. (2010). Parental incarceration, attachment and child psychopathology, in *Attachment & Human Development*, 12(4), pp 289-309.

restricted contact with incarcerated parents, and unstable care giving arrangements. Maternal incarceration tends to cause more disruption for children than paternal incarceration and may lead to greater risk for insecure attachment and psychopathology.

### The Human Rights Framework

#### THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989

The Convention on the Rights of the Child 1989 (CRC) is the specific international instrument intended to secure specific children's rights. Article 3 (1) of the CRC reads as follows:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*<sup>11</sup>

The Committee on the Rights of the Child has indicated that the best interests of the child of a defendant or an imprisoned parent must be considered carefully and independently by 'competent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child'.<sup>12</sup>

The need to consider the best interests of the child was recently cited by Lady Justice Hale in a Supreme Court case concerning deportation of a mother of young children.<sup>13</sup>

The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- the best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);

- the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).

#### THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) 1950

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 ...

Imprisonment of a parent involves the forcible separation of parent and child — it interferes with the Article 8 rights of the child by depriving the child of parental care.

It is clear from both the Convention on the Rights of the Child and the European Convention on Human Rights that the rights and best interests of the child must be a primary consideration when a court of law is considering a decision which may cause the separation from a parent due to incarceration.

Maternal incarceration tends to cause more disruption for children than paternal incarceration and may lead to greater risk for insecure attachment and psychopathology.

#### Leading cases

Two early cases considered the impact of the Article 8 rights of the child on the criminal process.

*R (on the application of Stokes) v Gwent Magistrates Court*<sup>14</sup>

Ms Stokes, mother of 4 children, age 16, 15, 6 and 9 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.

11. The CRC was adopted in 1989 and entered into force in 1990 in the UK.

12. Lagoutte, Stephanie, (2011) *The human rights framework*, in *Children of Imprisoned Parents*, (Ed.) Peter Scharff-Smith and Lucy Gampell, European Network for Children of Imprisoned Parents, Denmark, p 34. See also: Townhead, Laurel, *Women in Prison & Children of Imprisoned Mothers*, Quaker United Nations Office, April 2006.

13. *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*[2011] UKSC 4, at para 23. Hale LJ stated: 'For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"'.<sup>14</sup>

14. [2001] All ER (D) 125 (Jul).

The Court stated that a court considering an order to imprison 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*<sup>15</sup> was a Court of Appeal case concerning the prison rule that babies in a Mother and Baby Unit had to leave the unit at the age of 18 months. Two mothers, known as P and Q, challenged the inflexible application of that rule.

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':

*Illumination of the task confronted by a court in a case concerned with a prospective violation of a child's Article 8 rights has recently been provided by Hale L J in the quite different context of interim care orders ... After saying ... that respect for family life was fundamental to the philosophy underpinning the ECHR, and describing the different levels of interference with the right to respect for family life inherent in the different types of order a court might make, she said:*

*Such an interference can only be justified under Article 8.2 if three conditions are fulfilled:*

*i) It must be 'in accordance with the law'...*

*ii) It must be in pursuit of one of the legitimate aims provided for in the Article ...*

*iii) It must be 'necessary in a democratic society': that is to say, the reasons given for the interference must be 'relevant and sufficient'... It must correspond to a 'pressing social need' and be 'proportionate' to the legitimate aim pursued ... .<sup>16</sup>*

Thus 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.

These principles still hold good today and were confirmed and re-stated recently in the High Court and in the Court of Appeal.<sup>17</sup>

### The research

Does the required balancing exercise actually take place? My research aimed to explore the question whether, and to what extent, the balancing exercise is undertaken in the criminal courts when a mother with the care of a dependent child is at risk of imprisonment either on remand or on sentence.

This study concerned the duties of the courts under Article 8 of the ECHR: what these duties are and whether they are being carried out. The research aimed both to look at examples of current practice and to raise the issue of how the rights of children potentially affected by parental incarceration could be better protected in the criminal courts. Although the law regarding the rights of the child to a parent's care applies equally to a father and mother, I studied the imprisonment of mothers; in the vast majority of cases, it is imprisoning mothers that results in the loss of parental care.

I analysed 75 cases of the sentencing of mothers convicted of imprisonable offences: 5 in magistrates' courts, 31 in Crown Courts and 39 in the Court of Appeal (these were sentencing appeals against sentences pronounced in Crown Courts). In the 75

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15. [2001] EWCA Civ 1151.

16. *Ibid*, at para 65.

17. *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 (Admin) in the High Court; *R v Bishop* [2011] WL 844007, Court of Appeal, *R v Petherick* [2012] EWCA Crim 2214.

cases the courts imposed 3 Community Orders, 2 imprisonments were replaced by Community Orders by the Court of Appeal, there were 51 sentences of immediate imprisonment and 19 suspended.

| Offences in cases studied        |           |            |
|----------------------------------|-----------|------------|
| Offences                         | No. cases | Percentage |
| Benefit fraud                    | 23        | 30         |
| Drugs                            | 11        | 15         |
| Perverting the course of justice | 9         | 13         |
| Fraud and deception              | 7         | 9          |
| Assault                          | 3         | 4          |
| Possessing a weapon              | 3         | 4          |
| Handling stolen goods            | 3         | 4          |
| Car offences                     | 2         | 3          |
| Council Tax default              | 2         | 3          |
| Shoplifting                      | 1         | 1          |
| Other*                           | 11        | 14         |
| Total                            | 75        | 100        |

\* This includes aiding illegal entry to the UK, blackmail, robbery, transfer of criminal property, conspiracy to evade duty.

The shortest sentence was 2 weeks for Council Tax default; the longest was 15 years for drugs importation. There were 19 suspended sentences and 51 sentences of immediate custody. There were also 3 sentences of imprisonment reduced by the Court of Appeal to a Community Order.

| Sentences: Immediate custody imposed, 51 cases |           |            |
|--|-----------|------------|
| Sentences                                      | No. cases | Percentage |
| <i>Imprisonment:</i>                           |           |            |
| 6 months or less                               | 20        | 40         |
| more than 6 months, up to 1 year               | 17        | 32         |
| more than 1 year, up to 3 years                | 8         | 16         |
| more than 3 years                              | 6         | 12         |
| Total  | 51        | 100        |

| Non custodial sentences, 24 cases                     |           |            |
|---|-----------|------------|
| Sentences   | No. cases | Percentage |
| Court of Appeal replaced custody with Community Order | 3         | 13         |
| Magistrates impose Community Order                    | 2         | 8          |
| Sentence of imprisonment suspended                    | 19        | 79         |
| Total   | 24        | 100        |

All the defendants/appellants were mothers of dependent children. The law reports, sentencing remarks and press reports studied indicate that about 155 children under the age of 18 were living with the defendants or appellants at the time of sentencing. Several were very young infants, only a few weeks old. There were a number of cases where the children were disabled.

### Findings

#### (a) No evidence of consideration of Article 8 rights

This study of 75 cases of the sentencing of mothers has found that in the cases studied there was no evidence of any specific consideration of the Article 8 rights of the child. There was a wide variation in the extent to which the care of dependent children appeared to be considered in sentencing, with the stress on the welfare of children rather than on the child's rights. In some cases, the court made no mention at all of the accused's children. In other cases the courts alluded to the trauma and misery caused to the children, but blamed the defendant, did not consider the rights of the children and did not appear to impose an alternative or reduced sentence. In some cases the court considered the welfare of the children and ordered a suspended term of imprisonment. In only a few Court of Appeal cases did the judges acknowledge the plight of the child and order a reduction in the length of sentence. However, even in the Court of Appeal, specific reference was not made to the Article 8 rights of the child.

There were seven cases where the sentencing remarks or notes in the magistrates' court made no mention at all of the dependent child or children.

#### Case studies: no mention of dependent child

*CD is a single mother of a 6-year-old child, who was on income support. Magistrates sentenced her to 2 weeks in prison for council tax default. The file notes make no reference to the fact that she is the sole carer of a young child. Had this imprisonment been challenged by judicial review it would almost certainly have been held to be unlawful and quashed. This is because the magistrates had the alternative of ordering repayment of the tax due by deduction from benefit and chose to impose imprisonment instead. It is not lawful to imprison if the magistrates have an alternative course available to them.<sup>18</sup>*

*Leanne Gidney was 18 years old, the mother of a two-year-old child. She was a heroin addict*

18. See: Epstein, R, Masson, I, and Wise, I. (2011). Imprisonment For Debt: A Case Study. *Coventry University Law Journal*, 16(2): 56-63.

*who had attempted to rob a sixteen-year-old student of the sum of £1. The judge ordered her to serve six months of an earlier sentence and twelve months for the attempted robbery, a total of 18 months. Eleven days into her sentence she committed suicide.*

In a case involving misfeasance in a public office (granting extension of student leave to would-be immigrants), the Crown Court judge appeared to refuse to obtain information about the children. The defendant was a single parent, sole carer of her 4 children aged 19, 9, 7, and 5.

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.*

It should be noted that a pre-sentence report would normally tell the court whether dependent children were living with the defendant, how old they were, if any had disabilities or special needs, and who would care for them in the event of the mother going to prison.

In cases where sentencers imposed immediate custody the balancing exercise appeared not to have been carried out. In the case of suspended terms of imprisonment it appeared that the welfare of the children (rather than their Article 8 rights) has been weighed against the seriousness of the offence.

#### **(b) Care of children is a mitigating factor**

The fact that children's rights were not specifically referred to in sentencing does not mean that sentencers are silent on the matter of defendants' dependent children. The care of children has long been regarded as a mitigating factor. Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 reflect long accepted responsibility of the sentencing court to consider the interests of children of a criminal defendant. Thus, in the Assault Guideline, which took effect on 13 June 2011, and again in the Drug Offences Guideline, which took effect on 29 February 2012, among other features the defendant's responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation.

In cases where sentencers imposed immediate custody the balancing exercise appeared not to have been carried out.

Sentencers frequently expressed in various ways their awareness of the plight of children of imprisoned mothers. However, this is not the same as taking account of the child's Article 8 rights and conducting the balancing exercise to weigh the child's rights against the seriousness of the offence. Sentencers did not always seek information on the dependent children as they are required to do ('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 ...')<sup>19</sup>

This research has found examples of apparent breaches of the obligation to consider the rights and welfare of the child and some sentencing remarks in which the existence of affected children is entirely ignored. In the majority of cases studied dependent children were mentioned. The courts usually regarded the fact that the defendant is caring for a child as a mitigating factor. In *R v McClue*<sup>20</sup>, for example, the Court of Appeal judge stated that the appellant, who had committed fraud, had a daughter age seven who suffered from the abandonment by her father and was emotionally vulnerable. The sister of the appellant suffered from schizophrenia and the appellant had looked after her sister's 4-year-old child since her birth. The Court of Appeal said:

*The effect on these two children of the loss of the appellant and the fear of separation has been devastating for them. ... We have been moved by the mitigation factors ... and in particular the disastrous consequences for the appellant's child and her sister's child.*

The court reduced the sentence from 18 to 8 months.

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'.<sup>21</sup>

In a number of the cases studied the courts' concern for children appeared to be expressed by:

19. *(R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 115) at para 79.

20. [2010] EWCA Crim 311.

21. Mr Justice Wyn Williams in *R v Evelyn Arinze* [2010] EWCA Crim 1638.

- 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 cited 'the effect on children', not the child's Article 8 rights.

**(c) The sentencing guidelines**

In a number of cases the judge made a remark along the lines of 'I take into account the fact that you have dependent children' and then quoted 'sentencing guidelines' when imposing immediate custody, with no mention of the children's Article 8 rights. For example, in sentencing a mother for benefit fraud, the Crown Court judge said:

*The sentencing guidelines are perfectly plain in this case and I regard these offences as so serious that only immediate custody is appropriate. The sentence I impose is twenty weeks imprisonment.*

In accordance with s. 170(9) of the Criminal Justice Act (CJA) 2003, the Sentencing Guidelines Council issued definitive guidelines. By virtue of the CJA 2003, every court must 'have regard to a relevant guideline. This guideline applies to the sentencing of offenders convicted of statutory offences of fraud who are sentenced on or after 26 October 2009'.<sup>22</sup> The CJA 2009, s. 120 states that every court 'must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case ... unless the court is satisfied that it would be contrary to the interests of justice to do so'. As the section below shows, it is entirely legal to follow the guidelines with respect to the length of sentence, and then, bearing in mind the rights and welfare of affected children, suspend imprisonment.

**(d) Suspended imprisonment**

There were 51 cases of the immediate imposition of custody and 19 cases of imprisonment being suspended. Of the cases of suspended imprisonment 17 (23 per cent of the cases studied) were suspended by the sentencing court and 2 (3 per cent) by the Court of Appeal.

There were 23 cases (31 per cent of the cases studied) where mothers had committed benefit fraud. Of these 8 (one third of the benefit fraud cases) were sentenced to immediate custody. If we look at those who had committed benefit fraud and were not imprisoned, 2

were given Community Orders (punishment in the community) and 13 were given sentences of imprisonment which were suspended. 3 were heard in Magistrates' Courts and 20 in a Crown Court. The 13 cases of suspended imprisonment show a strong awareness of the effects of a mother's imprisonment on her children, and although none of them mentioned the rights of the child, it is perhaps implicit in their approach.

In one case of benefit fraud the Crown Court judge said:

*[Y]ou have chosen to have a large family, I do not criticise you for that ... You have a child who has significant difficulties, she is 13, and I am told ... that, if deprived of your care, it would have a significant detrimental effect upon her. You have another 16 year old child who has learning difficulties ...*

Her husband had very serious health problems. In this case her sentence of 10 months' imprisonment was suspended for two years.

The sentencers usually cited more than one reason for suspending the imprisonment. Reasons given were:

1. The potentially disastrous effects on the family.
2. The fact that the defendant is paying back the money fraudulently obtained.
3. The view that imprisonment would be disproportionate.
4. An early guilty plea.
5. The very high costs to the taxpayer of imprisonment.

**(e) The effects on the children**

I have already referred to the various studies carried out in a number of different countries. These studies have reported damaging effects of parental incarceration, and particularly serious negative effects when it is the mother who is separated from children by imprisonment.

In my research the mothers in prison related 'devastating' effects on their children. One mother wrote her children were 'distracted'. Another reported:

*The lives of my children are in disarray. My eldest of 17 years is doing 'A' levels .. and my youngest daughter who is in remission from cancer is in year 6.*

A mother of a three-year-old boy wrote:

**In my research the mothers in prison related 'devastating' effects on their children.**

22. Foreword to Sentencing Guidelines, October 2009.

*It's my family who is receiving the biggest punishment as this is a massive burden. The first words that comes out of my son's mouth when I see him or speak to him are 'When are you coming to pick me up?' or 'I want you to take me home mummy' and it is breaking my heart.*

Perhaps the most serious effects were on the child of a woman who should never have been sent to prison at all: Amanda Aldous was sentenced to 3 months in prison by magistrates for a council tax debt. Following intervention due to this research project, a High Court application led to the granting of bail, and later a High Court hearing. The decision of the magistrates to commit her to prison was declared unlawful and was quashed.<sup>23</sup> She is the mother of 5 children including a 15 year-old autistic boy. While she was in prison for 74 days (of a 90 day sentence) Mrs Aldous's daughter looked after the boy. She was 8 months pregnant at the time and she struggled to cope. When her baby was born she was of low birth weight, and the obstetrician said that this was probably due to stress suffered during the pregnancy. While his mother was in prison the boy did not want to go to school, and the school wrote letters complaining about his behaviour.

*When he got home from school he would hide himself in his bedroom and refused to come out or do anything: he would just stay at home and didn't really want to talk about the situation: he wouldn't let us know how he was feeling, every time we tried to speak to him he just changed the subject or totally avoided us.*

After his mother returned home, she reported that he is always frightened and nervous:

*He will ring me from school just to check that I'm still there. He still worries that his mother will suddenly leave again, and has fears for the future, what lies ahead for him.<sup>24</sup>*

## **A recent decision of the Court of Appeal**

*R v Rosie Lee Petherick* [2012] EWCA Crim 2214, 3 October 2012.

A recent decision in the Court of Appeal, given after the data collecting stage of the research had been completed, brought the complex issues of the Article 8 rights of the child in criminal sentencing sharply into focus.<sup>25</sup> Rosie Petherick pleaded guilty to causing death by dangerous driving and driving with excess alcohol. She was sentenced to 4 years and nine months imprisonment. She is the sole parent of a two-year-old boy who has had little contact with his father. In October 2012 the Court of Appeal heard her appeal against sentence. The Court reduced the length of imprisonment to 3 years and 10 months, and explained in detail the Court's view of the consideration that must be given by a sentencing court to the Article 8 rights of children potentially affected by parental imprisonment.

The Court stressed:

1. A criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration.

2. The importance of the balancing exercise which is required by article 8.

3. When a case stands on the cusp of custody the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely

innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.

## **Conclusion**

This study of 75 sentencing decisions concerning mothers has found that the courts did not appear to have considered the Article 8 rights of children potentially affected by their mother's imprisonment. An analysis of the sentencing remarks of Crown Court judges, together with the reports of the Court of Appeal and the files of magistrates indicated that practice regarding the required balancing exercise is inconsistent. 'A balancing exercise' is a vague phrase with no clearly defined set of procedures.

23. *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 Admin. See: Epstein, R, Masson, I, and Wise, I. (2011). Imprisonment For Debt: A Case Study. *Coventry University Law Journal*, 16(2): 56-63.

24. See Epstein, R, Masson, I, and Wise, I. (2011). Imprisonment For Debt: A Case Study. *Coventry University Law Journal*, 16(2): 56-63.

25. See: Epstein, R. 'Mothers Behind Bars', *CL&JW*, (2013) 177 JPN 531.

Given the vagueness of the concept, the fact that sentencers have considerable discretion in terms of sentencing generally, and the absence of any guidelines, one can expect a large degree of inconsistency in judicial attitudes and practice in this area.

In a few rare cases where the imprisonment of a mother had caused great suffering to young children, a sentence of imprisonment was appealed, and reduced in length or suspended by the Court of Appeal. Some may conclude from this: 'Well, the Court of Appeal will come to the rescue and justice will be done'. Not so. For the vast majority of mothers in prison there will be no sentencing appeal. Those on short sentences will have no opportunity to appeal. Those sentenced for council tax debt are not given any advice on how to apply for bail, and would find great difficulty in mounting a judicial review even if they were advised that this is how their sentence must be challenged.<sup>26</sup>

Procedures must be developed as to how the balancing exercise should be carried out. Should it be a requirement that this be articulated in the sentencing remarks made by judges and magistrates when they pronounce sentence? If there is no clear reference to the balancing exercise how can we be confident that it has taken place?

No legal authorities have set out exactly what this balancing exercise should consist of. Lord Justice Phillips in *P and Q*<sup>27</sup> stated that the court considering imprisonment of a mother must have 'sufficient information' on the children likely to be affected by a parent's imprisonment. There is currently no system for ensuring that the court has this information. Reliance on what others involved in

the criminal trial have to say about the child is an inadequate way of understanding what the child's needs are and how they are to be met. Similarly, pre-sentence reports cannot be relied upon to assist the court. These reports are concerned with the history and attitudes of the defendant, are chiefly concerned with the risk of re-offending, and are not directed at the interests of the child. It is unlikely that the authors of such reports will have the expertise or qualifications to assess the child's interests. Urgent consideration is needed to how to inform sentencing courts about the child's interests. This will enable the child's interests to be given appropriate weight in deciding whether a custodial sentence which will result in separation of a child from its mother is proportionate. Action should be taken to ensure that unnecessary, lasting damage is not done to young children who are separated from their mothers for no fault of their own.

It is a legal requirement that where a mother with a dependent child is at risk of a custodial sentence, the sentencer must acquire information about the dependent children, and must then weigh the Article 8 rights of the children against the seriousness of the offence. For the most serious offences the balance will come down on the side of custody. But in some instances the court will suspend imprisonment or impose a community order rather than a custodial punishment. The vast majority of women are imprisoned for less serious offences and receive short sentences: the balancing exercise should now take centre stage.

*email: R.Epstein@coventry.ac.uk*

*A version of this article has been published by the Howard League for Penal Reform. It can be addressed via:*

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26. Epstein, R. and Wise, I. (1995) Magistrates in the Dock, *New Law Journal*, 567.

27. See Footnote 15.