



## The Sentencing of Parents of Dependent Children

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*Unless otherwise referenced all data and discussion referred to in this presentation is taken from: 'Who Cares: Analysing the place of children in maternal sentencing decisions in England and Wales' (2017) Minson, S., University of Oxford*

### The sentencing of primary carers in England and Wales: Relevant Case law

- *R (On the applications of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 (see Appendix PRT report 2015)
- *R v Mills* [2002] 2 Cr App R(S) 52
- *R v Bishop* [2011] WL 84407 Court of Appeal
- *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC
- *ZH (Tanzania)(FC) Appellant v Secretary of State for the Home Department* [2011] UKSC 4
- *R v Petherick* [2012] EWCA Crim 2214

### Principles for sentencing parents

- The criminal sentencing of a parent engages the Article 8 right to respect for family life of both the parent and the child. Any interference by the state with this right must be in response to a pressing social need, in pursuit of a legitimate aim, and in proportion to that aim. The more serious the intervention the more compelling the justification must be - the act of separating a mother from a very young child is very serious.  
*R(on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 paragraphs 78 and 87
- Non-custodial sentences are preferable for women with dependent children, (unless the offence is serious or violent or the woman represents a continuing danger). Even then, a custodial sentence should only be given after considering the best interests of the child, and ensuring that appropriate provision has been made for the child (*United Nations, 'the Bangkok Rules', 2010*)
- The welfare of the child should be at the forefront of the judge's mind.  
*ZH (Tanzania) (FC) Appellant v Secretary of State for the Home*

*Department [2011] UKSC4 paragraphs 25 and 26*

- There is no standard or normative adjustment for dependent children but their best interests are a ‘distinct consideration to which full weight must be given’.  
*R v Petherick [2012] EWCA Crim 2214 paragraph 19*
- In a case which is on the threshold between a custodial and non-custodial or suspended sentence a child can tip the scales and a proportionate sentence can become disproportionate.  
*R v Petherick [2012] EWCA Crim 2214 paragraph 22*

### **The social context of the children affected by parental imprisonment**

In England and Wales approximately 200,000 children are separated from their parent by imprisonment each year (Williams et al., 2012) and upwards of 17,000 of these children are separated from their mother (Wilkes-Wiffen, 2011). When a mother is sent to prison only 5 per cent of children remain in the family home (Caddle and Crisp, 1997) and only 9 per cent are cared for by their fathers (Corston, 2007: 20). This contrasts with the situation when fathers are imprisoned (Boswell and Wedge, 2002).

The impacts are wide reaching and affect every area of children’s lives including,

- Change of carer, change of home
- Relational changes affecting future stability
- Increased poverty
- Social isolation: stigma and shame
- Behavioural problems – ‘confounding grief’ (Minson, 2017)
- Diminished future outcomes – increased likelihood of criminal offending, mental health problems, drug/ alcohol addiction (Hirschi, 1969; Fox and Benson, 2000; Green and Scholes, 2004; Murray and Farrington, 2008)

### **Rights of the Child**

- **Human Rights Act 1998** incorporating the European Convention on Human Rights
  - Article 8: the right to respect for family life
- **United Nations Convention on the Rights of the Child 1989**
  - Article 2: non discrimination
  - Article 3: best interests of the child
  - Article 12: child to be heard in all proceedings affecting a child
  - Article 20: state support to be provided to any child separated from his or her parents

## State duty of Care

- There is a problematic dichotomy between the state separation of children from their parents in the family jurisdiction and in the criminal jurisdiction. (Minson, 2017)
- In the family jurisdiction (eg Care proceedings under section 31 of the Children Act 1989), children are at the centre of the process; the welfare of the child the paramount consideration of the court; provision is made for their care.

Why are children of prisoners treated differently when separated by the state from their parents?

There is no legal or moral justification for disregarding their rights in this situation. They suffer harm, the state has shown that it accepts a duty of care towards children, and in England and Wales judges have the ability and are indeed urged to consider children of defendants. (Minson, 2017)

## Are caring responsibilities mitigation?

*'Only if there's no one else to care for them and that's seldom the case so no.'*  
(Crown Court Judge)

*'Most judges are still of the school of thinking, that family mitigation is neither here nor there'* (Crown Court Judge) (Minson, 2017)

Arguments against:

- Unfair advantage to parents
- 'She should have thought of the children before she committed the offence'
- Views of motherhood and criminality 'the children are better off without her'

It is important for sentencers to understand what it is they are balancing - not just the physical separation of a parent and child, but the short and longer term impacts on children and caregivers

Research has found that taking on the care of the child of an imprisoned mother impacted on caregivers health, finances, relationships: spouse and dependents, unemployment, and had high personal cost. (Minson, 2017)

It is paradoxical that for the sake of caring for children carers 'alter their behaviour, reorient their expectations, suffer changes in their health, and otherwise experience the social and economic repercussions of punitive surveillance, confinement and control.' (Comfort, 2007), and yet the result of this disruption and lack of resourcing is stress and strain which increases the risk of poorer outcomes for children. (Minson, 2017)

## **Residual obligations**

- The state should ensure that the rights of children of offending parents are upheld and that as with any other child separated from their primary carer the same duty of care is offered towards such children, and their best interests are a primary consideration of the court (Minson, 2017)
- Should the state mitigate the harms to the child: appropriate care, prison visits, financial support, post release support? (Bulow, 2014)

## **In practice: South Africa**

- *M v The State [2007] CCT 53/06 ZACC 18* : Justice Albie Sachs
- In sentencing decisions the court considers four things: the offence, the offender, the community and the dependents.

## **The Future: sentencing parents of dependent children in Scotland**

1. Perhaps it should not be included as a mitigating factor linked to the offender, but should form a separate stage of the sentencing decision?
  - Offence
  - Offender
  - Other rights holders
2. Clear guidance is necessary
  - In England and Wales it is apparent that consistency is a problem without a guideline (Minson, Nadin, Earle, 2015)
  - 33 appeal cases 2003 -2011. In 21 of the 27 cases in which sentence was reduced on appeal, the child dependents were mentioned as reason for reduction, indicating the lower courts had not given the factor sufficient weighting. (Epstein, 2012; Minson and Condry, 2015)
3. Judicial education is needed on the impacts of primary carer imprisonment on children and their caregivers.

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