

**MOTHERS IN PRISON:
the sentencing of mothers and the rights of the child**

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MOTHERS IN PRISON: the sentencing of mothers and the rights of the child

1. SUMMARY

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.¹ Following conviction, 61% of women sentenced to custody received sentences of less than six months (Prison Reform Trust). Many women are imprisoned for minor offences and are mothers of dependent children.

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.

When courts sentence a mother with a dependent child, the Article 8 rights of the child are engaged. This was made clear in a 2001 case, *R (on the application of P and Q) v Secretary of State for the Home Department*, concerning the prison rule which provided 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, said:

It goes without saying that since 2nd October 2000² 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.³

Accordingly, sentencers must:

1. acquire information about dependent children; and

¹ Number of female receptions 2011, Ministry of Justice statistics.

² The Human Rights Act 1998 entered into force on 2 October 2000.

³ [2001] EWCA Civ 1151), at para 79.

2. balance the Article 8 rights of the child against the seriousness of the mother's offence.

Does this balancing exercise actually take place? This study 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 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.

In the 51 cases of immediate custody that were studied there were 7 cases where the sentencers made no mention at all of the defendant's dependent children. There was no express reference to the Article 8 rights of the child in any of the 75 cases studied. In one case the judge refused to hear a pre-sentence report.⁴ In the 19 cases where imprisonment was imposed but suspended the sentencers made reference to the potentially damaging effects on children of imprisoning the mother. This may be interpreted as undertaking a balancing exercise, weighing the welfare of the child against the seriousness of the offence.

In some cases sentencers referred to the plight of children of imprisoned mothers.

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

1. asserting that courts must have regard to the effects of imprisonment on children; and
2. regarding exceptionally needy and disabled children as having a right to care and to have this weighed against the seriousness of the offence.

This research has found that the Article 8 rights of the child appeared not to have been considered in the cases studied. Concern for the welfare of dependent children was expressed by some of the sentencers; yet no mention was made of the Article 8 rights of children potentially affected by the incarceration of their mother. However, these rights *are* legally engaged whenever a mother with a dependent child is at risk of imprisonment and they should be a primary consideration during the sentencing process.

⁴ The pre-sentence report is the process by which the court would normally receive information on a defendant's dependent children. The defence advocate would also be expected to provide information about any dependent children.

2. INTRODUCTION

The Human Rights Act⁵ 1998 obliges all public bodies, including the courts, to comply with the rights protected by the European Convention on Human Rights 1950 (ECHR). Article 8 of the ECHR states that everyone has the right to respect for his private and family life. Under Article 8 (2), any interference with this right, resulting from the forcible separation of a child from his or her mother or father caused by imprisonment of the parent, must be in accordance with the law, in pursuit of one of the legitimate aims provided for in Article 8 (2) and must be 'necessary in a democratic society'. Thus the court must conduct a balancing exercise weighing the seriousness of the offence against the Article 8 rights of the child.

No legal authorities have set out exactly what this balancing exercise should consist of. Lord Justice Phillips in *P and Q*⁶ 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. This raises the question of what 'sufficient information' is: what steps should a criminal court take to inquire into the health, care and welfare of a defendant's children? Should the court rely on a pre-sentence report or is something more required? One might suppose that an expert report made by an independent qualified person would meet the basic requirement. No set of procedures has been established by the judicial authorities.

The rights of the child must be 'balanced' against the seriousness of the offence. Again, 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? This 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.

This is a report on research carried out by the author to explore to what extent, if at all, the required balancing exercise appears to be carried out in the English criminal courts. It is aimed at those concerned with penal reform and at policy-makers.

Although the law regarding the rights of the child to a parent's care applies equally to a father and mother, this research concentrates on the imprisonment of mothers; in the vast majority of cases, it is the custody of the mother that results in the loss of parental care. This study concerns the duties of the courts under

⁵ The Human Rights Act 1998 entered into force in October 2000.

⁶ See Footnote 3.

Article 8 of the ECHR: what these duties are and whether they are being carried out. The focus is on the Convention rights of the child and how these relate to the sentencing of mothers.

In order to consider the topic in an appropriate context, and to indicate the scale of the problem, I start with quantitative information about women prisoners. I will then look briefly at the human rights framework, including the case law regarding the rights of the child when courts consider imposing custody on mothers. Research on whether the courts refer to and consider the rights of the child when sentencing mothers is then reported and discussed with an analysis of 75 cases of the sentencing of mothers convicted of imprisonable offences. At the end of this report I present my conclusions.

3. BACKGROUND

A. The scale of the problem

i. The numbers

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 statistics above and those following are quoted from The Prison Reform Trust.⁷

In August 2010 the number of women in prison in England and Wales was 4,230. In the past decade the women's prison population has increased by 33%. 11,044 women entered prison in the UK in 2009. In 2011 10,181 women entered prison. About half were on remand, spending an average of four to six weeks in prison. Following trial, 61% of women sentenced to custody received sentences of six months or less. In 2008 3,000 women were sentenced to custody for 3 months or less of whom 176 were sentenced to 10 days or less.⁸ This suggests that a significant number of women are imprisoned for relatively minor offences: many have dependent children.

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% of women prisoners' 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% of mothers, prison was the first time they had been separated from their children for any significant length of time.⁹

⁷ Statistics from the Bromley Briefing produced by the Prison Reform Trust (2010): www.prisonreformtrust.org.uk/

⁸ Ministry of Justice, Freedom of Information Request.

⁹ Home Office Research Study 162 (1997), *Imprisoned Women and Mothers*, Home Office, London.

Most of the rise in the female prison population can be explained by a significant increase in the severity of sentences.¹⁰ In 1996, 10% of women convicted of an indictable offence were sent to prison; in 2006 the figure was 15%.¹¹

ii. Vulnerabilities

A number of studies have highlighted how vulnerable women in prison are. More than half of women in UK prisons say that they have suffered domestic violence and one in three has experienced sexual abuse. The formal educational level of achievement of women prisoners is lower than for male prisoners. 74% left school at 16 or before. Only 39% have any qualifications at all, compared to 82% of the general population. 41% of women prisoners have not worked in the past five years. One in four women in prison has spent time in local authority care as a child.

A report published by the Public Health Department of the University of Oxford on the health of 500 women prisoners reported:

[W]omen in custody are five times more likely to have a mental health concern than women in the general population, with 78% exhibiting some level of psychological disturbance when measured on reception to prison, compared with a figure of 15% for the general adult female population.

The research found high levels of drug use amongst the female prison population, with 58% having used drugs daily in the 6 months before prison and 75% having taken an illicit drug in those 6 months. 66% of sentenced women in prison say they were either drug dependent or drinking to hazardous levels before custody. Women entering prison had very poor physical, psychological and social health. The Oxford study found that, between 2002 and 2009, there were 55 self-inflicted deaths of women prisoners.¹² 37% per cent of women going into prison reported that they had attempted suicide at some time in their life.¹³

70% of women prisoners have 2 or more diagnosed mental health issues. Recorded incidents of self-harm or injury in women's prisons rose 48% between 2003 and 2007. In 2006, women accounted for 11, 503 or 49% of total recorded incidents of self-harm, even though they form only around 6 per cent of the prison population.

On 22 June 2010 Clive Chatterton, then Governor of Styal Prison, gave a talk at a meeting at the Prison Reform Trust. He spoke about his shock at coming into the

¹⁰ Hough M., Jacobson, J. and Millie A. (2003) *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, London.

¹¹ Ministry of Justice (2007) *Sentencing Statistics 2006*, London.

¹² Plugge, E., Douglas, N., and Fitzpatrick, R. (2006) *The Health of Women in Prison Study Findings*, Department of Public Health University of Oxford, Oxford.

¹³ Corston, J. (2007) *The Corston Report: Women with Particular Vulnerabilities in the Criminal Justice System*, The Home Office, London.

women's prison estate having had extensive experience of working in men's prisons:

But one of the things that troubled me ... was the level of self-harm. I'd never experienced anything like it, and I know my colleagues in male prisons hadn't. In a male prison almost twice the size, you'd probably have, on a daily basis, about half a dozen prisoners on ACCT procedures – at risk of self-harm. At Styal there are about fifty a day, on special observation for self-harm.

The second thing that struck me was the level of mental health issues. The place generally runs on its medications. A lot of the ladies are substance abusers and anything from 40-60% can be on methadone maintenance programmes. I've never seen such a concentration of damaged fragile people. Trained prison officers, dedicated committed professionals who do a fantastic job, are being asked to look after people who have clearly got severe mental health issues, and a large percentage of the population have got other social care needs. We are trying to do something that we're very good at, but it's not what we were trained for.¹⁴

In 2007 foreign national women made up 22% of the female prison population. The majority of sentenced female prisoners are held for non-violent offences. In March 2008, the largest group (28%) were held for drugs offences.¹⁵ Most of the rise in the female prison population can be explained by a significant increase in the severity of sentences.¹⁶ In 1996, 10% of women convicted of an indictable offence were sent to prison; in 2006 the figure was 15%.¹⁷

B. The effects of imprisonment

There is considerable evidence that separation from their children causes great anxiety and distress to mothers in prison. Ruth Wyner, for example, wrote in her prison memoir:

Bernice was consumed with worry. I offered her my sympathy unable to imagine the agony I would have felt if I had been imprisoned when my kids were young. Those attachments are as crucial to life as breathing, and such separation can do deep and irreparable damage to a child, quite apart from the effect on the woman herself. The barbarism of imprisoning young mothers was such a thoughtless, primitive vengeance that I felt ashamed to have been blind to it for so long. As a society, we ought to know better.¹⁸

¹⁴ Prison Reform Trust: www.prisonreformtrust.org.uk

¹⁵ Ministry of Justice (2009), *Statistics on Women and the Criminal Justice System*. Recent changes to sentencing guidelines for drug importation offences may in time lead to a reduction in the length of sentences for drugs 'mules'.

¹⁶ Hough M., Jacobson, J. and Millie A. (2003) *The Decision to Imprison: Sentencing and the Prison Population*, Prison Reform Trust, London.

¹⁷ Ministry of Justice (2007) *Sentencing Statistics 2006*, London.

¹⁸ Ruth Wyner (2003), *From the Inside: Dispatches from a women's prison*, Aurum Press.

Quite distinct from the question of the effects of separation from their children on mothers, there is the question of the effects on the children. 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" '.¹⁹ A number of studies have shown long-term detrimental effects on children of the incarceration of their parents.²⁰ Murray and Murray report that parental incarceration is a strong risk factor for long-lasting psychopathology with antisocial outcomes.²¹ Parental incarceration might threaten children's attachment security because of parent-child separation, restricted contact with incarcerated parents, and unstable caregiving arrangements. Maternal incarceration tends to cause more disruption for children than paternal incarceration and may lead to greater risk for insecure attachment and psychopathology.

4. THE HUMAN RIGHTS FRAMEWORK

A. 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.*²²

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

¹⁹ 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.

²⁰ 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*.

²¹ Murray, J., & Murray, L. (2010). Parental incarceration, attachment and child psychopathology, in *Attachment & Human Development*, 12(4), pp 289-309.

²² The CRC was adopted in 1989 and entered into force in 1990.

decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child'.²³

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.²⁴

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).

Further Lady Hale made mention of the separation of parent and child due to parental detention:

*This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.*²⁵

B. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) 1950

As noted above (page 3) the Human Rights Act 1998 obliges all public bodies, including courts, to comply with the rights contained in the European Convention on Human Rights. Article 8 of the ECHR protects the right to respect

²³ 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.

²⁴ 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".

²⁵ *Ibid*, at para 25.

for private and family life of all citizens. When courts sentence a mother with care of a dependent child, the Article 8 rights of the child are engaged.

It is clear from both the Convention on the Rights of the Child and the European Convention on Human Rights, together with the case law above, 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.

5. 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*²⁶

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. 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.

The next leading case was *R (on the application of P and Q) v Secretary of State for the Home Department*.²⁷ This Court of Appeal decision concerned the prison rule which provided 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 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:

²⁶ [2001] All ER (D) 125 (Jul)

²⁷ [2001] EWCA Civ 1151

"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'.

iv) It must correspond to a 'pressing social need' and be 'proportionate' to the legitimate aim pursued ... ".²⁸

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.²⁹

6. RESEARCH ON SENTENCING PRACTICE

This is a report based on research to explore to what extent, if at all, this balancing exercise takes place. I examined 75 cases of the sentencing of mothers convicted of an imprisonable offence: 5 in magistrates' courts, 31 in Crown Courts and 39 in the Court of Appeal (these were sentencing appeals from decisions made in the Crown Courts). There were 3 cases where the Court of Appeal reduced a prison term to a Community Order, 2 where magistrates imposed a Community Order, 19 suspended prison sentences, and 51 terms of immediate imprisonment.

i. Sources of data

The remarks made by magistrates (5 cases), Crown Court judges (31 cases) and judges in the Court of Appeal (39 cases) were analysed to examine how the sentencers referred to the dependent children of mothers, convicted of imprisonable offences, in order to determine whether or not the balancing exercise weighing the seriousness of the offence against the Article 8 rights of the child appeared to have been carried out.

²⁸ *Ibid*, at para 65.

²⁹ *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.

There were three sources for the sentencing remarks relating to imprisoned mothers. Firstly, the website of the Court of Appeal provides the reports of sentencing appeals. Of the 75 cases in this study, 39 were Court of Appeal cases reported on the Court's website. Secondly, there were press reports of mothers being sentenced to imprisonment, immediate or suspended. Press reports of benefit fraud cases are posted online at <http://benefitfraud.blogspot.co.uk>. Where possible I applied to the court concerned for permission to obtain a transcript of the sentencing remarks from the private firms who produce them.

Thirdly, the charity *Women in Prison* works in all the women's prisons and has supported this research.³⁰ They asked women in prison whether they wanted to participate in this research. If so, the participant filled in a form which asked the number and ages of her children living with her at the time of sentencing and who cared for the children while the mother was in prison, the court and date of sentencing, and the type of offence. I then applied to the sentencing court for a transcript of the sentencing remarks: 8 Crown Court cases came from this source. I also looked at the files of 2 Magistrates' court cases dealt with by *Women in Prison*.

Table 1: Sources of cases

Source	No. cases	Percentage
Court of Appeal website	39	52
Press Reports of Crown Court Cases	23	30
Press Reports of Magistrates' Cases	3	4
<i>Women in Prison</i> Magistrates' Courts cases	2	3
<i>Women in Prison</i> Crown Court Cases	8	11
Total	75	100

ii. The cases

A. Dates

The oldest case was 2003 (Gidney); the most recent was May 2012. The dates of the cases are given in the table below.

Table 2: Cases studied by year

Year	No. cases	Percentage
2003	1	1

³⁰ Women In Prison <http://www.womeninprison.org.uk>

2007	1	1
2009	10	14
2010	39	53
2011	21	27
2012	3	4
Total	75	100

B. Offences

Table 3: 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.

C. Sentences

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.

Table 4: Sentences: Immediate custody imposed, 51 cases

Sentences	No. cases	Percentage
Imprisonment: 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

Table 5: 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

D. Children

All the defendants/appellants studied were the 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.³¹ Several were very young infants, only a few weeks old. There were a number of cases where the children were disabled.

iii. Findings

An analysis of the sentencing remarks of Crown Court judges, together with the reports of the Court of Appeal and the files of magistrates indicates that practice regarding the required balancing exercise is inconsistent. 'A balancing exercise' is a vague phrase with no clearly defined set of procedures. Given the vagueness of the concept, the fact that sentencers have considerable discretion in terms of sentencing generally, and the absence of any guidelines, there is an obvious risk of a large degree of inconsistency in judicial attitudes and practice in this area.

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

This 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

³¹ It was not possible to calculate the precise number of children affected by these 75 sentencing decisions. In some cases the sentencer referred to the affected children and gave the number and ages of the children. The forms filled in with the help of Women in Prison gave details of numbers and ages of children. However, in some instances the sentencing remarks referred to 'the defendant's young children' without stating the number of children. It was therefore necessary to estimate the number.

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.

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 ...')³²

A. No mention of dependent children

In this study 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. Two of these imprisoned mothers committed suicide in prison. Information and comment on these cases can be found in the Appendix. Some examples of cases in which the court did not refer to the children potentially affected by imprisonment of their mother follow.

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 have been 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. Imprisonment is not to be imposed if the magistrates have an alternative course available to them.

In one case of benefit fraud which received wide press coverage the judge at the Crown Court mentioned 'problems around families' but made no express reference to the defendant's young children. He said:

The guidelines suggest, even for a person with no previous convictions, an immediate custodial sentence. You fit the guidelines exactly. I make no comment about the length involved. It is always the case that people in your position have

³² (R (on the application of P and Q) v Secretary of State for the Home Department [2001] EWCA Civ 115) at para 79.

problems financially. You have problems often around families and I have some sympathy for your own individual circumstances, but I have got a wider duty to perform. There has got to be a very clear message from the court that people who milk the system go to prison, and I am afraid I cannot do anything else than give you five months' imprisonment immediately.

The 42-year-old defendant in this case had three young children. Her defence counsel had told the court that a prison sentence would leave her children without a parent.

In another benefit fraud case, where the defendant was 31 years old and the mother of three young children, the judge at the Crown Court made no mention of the children. His sentencing remarks were as follows:

GM, you have pleaded guilty, and I give you credit for a prompt plea of guilty, to this serious series of offences of benefit fraud. You persisted in a course of fraudulent conduct over a period of time and on two occasions staff came to check your position. You had the opportunity then of deciding whether to go on perpetrating this fraud, or whether to come clean and admit that you were in fact living with someone else who was genuinely working. You chose to be dishonest. I do not consider that a suspended sentence is appropriate in those circumstances. Rather, I think the inevitable sentence must be immediate prison. Had there been a trial it would have been 30 weeks. You have pleaded guilty and the sentence is 20 weeks. The sentence is 20 weeks concurrent on each of these counts and that will start forthwith. On your release the rest will be, in effect, suspended and only brought into effect were you to re-offend. That is the sentence. Off you go into custody now.

B. No information sought on dependent children

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.

C. The case of the looted shorts

Ursula Nevin, who has two children aged 1 and 5, slept through riots in Manchester but was jailed after accepting a pair of shorts looted by a friend (see *The Guardian* 20 August 2011). Ms Nevin admitted handling stolen goods after her lodger gave her a pair of shorts which she (the lodger) had looted from a Manchester city centre store during the riots in August 2011. Ms Nevin had no previous convictions. At the magistrates' court a district judge imposed a 5-month prison sentence, telling her she was supposed to be a role model for her children. She appealed against her sentence at Manchester Crown Court where Judge Andrew Gilbert QC, said the sentence had been 'wrong in principle' because she had not been at the scene of the disturbances.

The solicitor who represented Nevin at the appeal hearing, said the devoted mother had been put in a terrible position by her housemate and had been devastated to find herself separated from her children and in jail. 'Hers has been a very public shame and a very public humiliation indeed. She was offered a pair of shorts which she quite foolishly and dishonestly decided to keep for herself. She's paid an extremely high price for her limited criminality.' Judge Gilbert said: 'Ursula Nevin did not go into Manchester city centre - we regard it as wrong in principle that she was made the subject of a custodial sentence.' He told her to leave the court and go and look after her children, as her relatives wept in the public gallery.

D. Concern for dependent children: mitigation

As the discussion above indicates, 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. This was not what was found in the majority of cases studied. The courts usually regarded the fact that the defendant is caring for a child as a mitigating factor. In *R v McClue*³³, 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 suffers from schizophrenia and the appellant has 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

³³ [2010] EWCA Crim 311

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'.³⁴

In *R v Shantelle Davis*³⁵ the defendant was initially sentenced to 12 months imprisonment for blackmail but the Court of Appeal reduced it to 9 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.

Again, *R v Lisa Ann Dawson*³⁶ illustrates the importance that courts sometimes give to the welfare of young children. Dawson pleaded guilty to being concerned in supplying cocaine, and was sentenced to 30 weeks' imprisonment. She was pregnant at the time and was also the primary carer of her two-year-old son. The Court of Appeal said:

Being parted from her son has been extremely difficult for her. She has for lengthy periods refused to leave her cell. The effect on her son of the absence of his mother can be imagined ... [W]e consider that the appellant's pregnancy, although material, is very much less important than the welfare of her two year old son ... It has been said in this court before that a sentencing court should only sentence a mother of children for whom she is the primary carer to a term of imprisonment, after the most careful consideration, particularly when any term of imprisonment will be short. We endorse that as a proposition in respect of any primary carer. Of course, the mere fact that an offender is a mother or father or other carer does not mean that she or he cannot be made the subject of an immediate sentence of imprisonment, and some crimes are so serious that only an immediate term of imprisonment will be appropriate. However, there are other cases in which the stress and disorientation caused to a family by the absence of a parent or other carer may justify either a non-custodial sentence or the suspension of a sentence of imprisonment, particularly where the length of any sentence could properly only be short.

The Court of Appeal revoked the sentence of imprisonment and replaced it with a 12 month community order.

E. 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, Horton was sentenced at Crown Court in March 2011 for benefit fraud. The judge said:

³⁴ Mr Justice Wyn Williams in *R v Evelyn Arinze* [2010] EWCA Crim 1638.

³⁵ [2010] EWCA Crim 594

³⁶ [2011] EWCA Crim 1947

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".³⁷ 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 perfectly 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.

F. Suspended imprisonment

This study of mothers convicted of imprisonable offences looked at 51 cases of the immediate imposition of custody and 19 cases of imprisonment being suspended. Of these 17 (23% of the cases studied) were suspended by the sentencing court and 2 (3%) by the Court of Appeal. It is interesting to see what the Court of Appeal held. Nicole Clarke, age 23, appealed against a sentence of 15 months imprisonment. She was convicted of perverting the course of justice (she had made false allegations against her ex-husband). She had a girl age 6 and was pregnant at the time of her appeal against sentence. The Court of Appeal reduced the sentence from 15 to 12 months, and suspended the sentence for 18 months. Giving judgment the Court said:

At the time of sentencing in June of this year she was seven months pregnant, expecting her first child by her new partner, with whom she has a stable relationship. An immediate sentence of imprisonment would bear particularly hardly on her and, more importantly, her two children in those circumstances ... the imposition of an immediate custodial sentence was too severe.³⁸

There were 23 cases (31% 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.

³⁷ Foreword to Sentencing Guidelines, October 2009.

³⁸ Court of Appeal [2010] EWCA Crim 2076.

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.

I will cite two examples which are typical of the sentencers' approach in these cases.

The defendant pleaded guilty to benefit fraud of about £30,000 in Crown Court. The Recorder gave her a suspended 6-month sentence because she had 'responsibilities' for her children and her mother, and because locking her up would be an additional financial burden for the taxpayer, and would be a 'disproportionate' punishment.

The defendant had failed to inform the council of her circumstances during a four-year period in order to claim income support and housing and council tax benefit to which she was not entitled. She was paying £30 per month back at the time of sentencing. The Recorder sitting at Crown Court imposed a twelve-month suspended sentence, saying that she was 'of good character' and her imprisonment would have a negative impact on her three young children.

G. Imprisonment for Council Tax Debt

Two of the forms filled in by serving prisoners through the work of *Women in Prison* came from mothers committed by magistrates for council tax default. This was surprising since, except in exceedingly rare circumstances, imprisonment for council tax debt is unlawful.³⁹ The magistrates have to bear in mind that imprisonment is a last resort and all alternatives must be tried first.

³⁹ Epstein, R. (1998) Imprisonment for debt: the courts and the poll tax, *Journal of Social Welfare and Family Law* 20 (2) 165 – 185.

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

CD (see above), a lone parent of a 6-year-old child, was on income support when she appeared before magistrates for council tax default. The magistrates should have ordered deduction from benefit to repay the tax owed, rather than imposed imprisonment. Her child was not mentioned in the file notes.

There is also the case of Amanda Aldous, which highlights the importance of the court making adequate enquiries about the affected dependent children. On 14 January 2011 Dartford Magistrates committed her to prison for 90 days for failure to pay Council Tax arrears amounting to approximately £7,000 for the period 2003 to 2009. She is the mother of five children and had been the victim of domestic violence. Her youngest child is aged 15 and has been diagnosed with autism and other associated conditions. She was sent immediately to prison where she served 74 days of the sentence. She had not been in custody before and this was the first time she had been separated from her autistic son.

Following intervention due to this research project, on 29 March 2011 a High Court application led to the granting of bail. On 6 July 2011 the case was heard in the High Court. The decision of the magistrates to commit her to prison was declared unlawful and was quashed.⁴⁰

H. The High Court decision in *R (on the application of Amanda Aldous)*

The High Court found the decision of the magistrates to sentence Mrs Aldous to imprisonment was unlawful because the court should have taken into account Mrs Aldous' offer to pay £20 per week towards discharging her liability. The magistrates should have decided whether the failure to pay was due to culpable neglect or wilful refusal. In this case, they failed to distinguish between the two and failed to make the finding that was necessary as a precondition to fixing a term of imprisonment. There were other ways, which the court should have considered, through which the local authority might have been able to obtain payment, for example, by attachment of the earnings of her husband.

Finally, there is the effect of imprisonment on the children. The High Court stated:

*The existence of children cannot of course keep a person out of prison who should properly be sent to prison, but a sentencing court needs to be able to bear in mind what the effect on the children will be, and, if there are children and if the court does not have to information it needs in order to assess the effect of the parent's imprisonment on them, then the court must make enquiries so that it is properly informed. Those enquiries were not made in this case.*⁴¹

7. THE EFFECTS ON THE CHILDREN

⁴⁰ (*R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 Admin).

⁴¹ (*R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151; *R v Bishop (Wayne Steven)* [2011] WL 844007).

I have already referred to the various studies carried out in a number of different countries which have found damaging effects of parental incarceration, and particularly serious negative effects when it is the mother who is separated from children by imprisonment (above page 8).

In this study the mothers in prison reported 'devastating' effects on their children. One mother wrote her children were 'distracted'. Another reported that: '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:

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.

Another woman, a single mother of young children wrote:

I was the sole carer of my children and they were already unfortunate enough to have a father in prison. I had always cared for my children and they had never even spent a night away from me. I missed birthdays and first days at school and I felt that my sons' emotional wellbeing was not even taken into consideration. It was my family who received the bigger punishment as the burden was put on them. I think it has particularly affected my oldest son as he still constantly talks about police, prisons, and mummy being taken away, he is now being seen by our local children's mental health service.

Perhaps the most serious effects were on the child of a woman who should never have been sent to prison at all: Amanda Aldous's 15 year-old autistic son. 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.*⁴²

8. OVERVIEW OF THE FINDINGS

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. The study of these cases has found a wide variation in the extent to which the care of dependent children appears 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 makes no mention at all of the accused's children. In other cases the courts allude to the trauma and misery caused to the children, but blame the defendant, do not consider the rights of the children and do not appear to impose an alternative or reduced sentence. In some cases the court considers the welfare of the children and orders 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.

Whatever may be the cause of such diversity of approach, it cannot be right that some judges appear to ignore the welfare and the rights of affected children. Those working in the criminal courts are well aware of great differences in approach. This may be to some extent inevitable. Given the inevitable differences in approach, the question that arises is how to establish an Article 8-compliant framework within which judicial discretion can be exercised.

Mitigating factors, such as the effects of imprisonment on children, relate to the defendant and not directly to the Article 8 rights of the child. This research points to the need for the judiciary, the Judicial College, the Sentencing Council, defence advocates and the public to be better informed on these issues, so that, when mothers with dependent children are before the courts, sentencers will bear in mind the Article 8 rights of affected children.

I would argue that there is a need for more rigorous and in-depth training of the judges which would result in sentencing that is more uniform in its approach to the rights of the child, and in which the balancing exercise weighing the Article 8 rights of the child against the seriousness of the offence is always carried out. The fact that this is not always done is evidenced by the number of cases, cited and discussed above, where a mother is sentenced to a term of imprisonment by a trial judge, and a sentencing appeal in the Court of Appeal results in either a considerably reduced sentence or custody replaced with a suspended sentence.

9. THE IMMEDIATE IMPACT OF THIS RESEARCH

⁴² R.Epstein, I.Masson, I. Wise, (2011) Imprisonment for debt: a case study, *Coventry Law Journal*, Vol 16, Issue No. 2, December.

The most immediate impact of conducting this research was the release on bail of Amanda Aldous. In the normal course of events those sentenced to imprisonment for council tax debt get no advice and no help, and have no idea that their imprisonment is unlawful and that a bail hearing can and should be arranged. While in prison Mrs Aldous filled in the form given out by Women in Prison asking if she wanted to participate in this study. On receipt of the form, I immediately contacted the barrister Ian Wise QC (Head of the Public Law team at Doughty Street Chambers). He found a solicitor willing to take on the case, and they were able to obtain legal aid. This led to her release on bail, followed by the High Court hearing during which her imprisonment for council tax default was declared unlawful on five grounds.

In the course of doing this research I have corresponded with officials who are responsible for the training of judges and of the clerks to the justices who advise magistrates on the law.

After the High Court ruled on the case of Amanda Aldous I wrote to the office concerned with the training of the justices' clerks in the magistrates' courts as follows:

The magistrates make their sentencing decision on the advice of the justices' clerk concerned. It is of course the justices' clerk who has legal training which magistrates do not have. This raises the question of what training had been given to the clerk in this case. The advice the clerk gave to the magistrates that they should imprison Ms Aldous was seriously flawed, with devastating consequences for a vulnerable family caring for a severely disabled child. It leads also to the more general question on the training given to justices' clerks on this area of law and practice... I would be grateful if you could tell me whether the case of R (on the application of Amanda Aldous) has been brought to the attention of the justices' clerks in our magistrates' courts to ensure that such costly injustices do not occur in the future.

Following this I learned that a news-sheet will be issued to all justices' clerks and members of the Justices' Clerks Society drawing their attention to the case *R (on the application of Aldous)* and that this case will be included in future Legal Adviser training events.

10. LIMITATIONS OF THIS RESEARCH

The lack of readily available data has imposed significant limitations. Firstly, it is extremely difficult to study sentencing in the magistrates' courts where the majority of criminal cases are heard. Using the search methods available to me, it has not been possible to collect information on mothers imprisoned on short and very short sentences. As discussed earlier, most women are sent to prison for short periods, 61% for less than 6 months and 27% for less than 3 months. Press reports tend to be of notorious cases, usually involving assaults or large-scale fraud, which are not typical of women in prison. The cases referred to the Court of Appeal are, of course, the more serious cases. For those women on short

sentences there is little point in making an appeal. The charity *Women in Prison* supports women who are experiencing problems and these most often arise in the course of long periods of incarceration.

The other limitation is in the nature of sentencing remarks. The duty of the judge is set out in statute: the court must 'state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed' (Criminal Justice Act 2003, Section 174; Legal Aid, Sentencing and Punishment of Offenders Act 2012, Section 64). On pronouncing sentence, judges have many issues to bear in mind. Among them are the seriousness of the offence and any aggravating features; the defendant's previous convictions, if any; the effect on the victim (if there is an identifiable victim) and often the presence of the victim and his or her family in court; the mitigation put forward by the defence; the sentencing guidelines issued by the Sentencing Council; the awareness of public expectation that wrong-doing will be punished and the public view that only imprisonment is real punishment. There is always the possibility that the judge may have considered the rights of the child, and conducted some sort of balancing exercise, but not made this explicit in the sentencing remarks. Nevertheless, it can be argued that the study of sentencing remarks reveals much about the attitudes and reasoning of judges. If the sentencer takes the rights of the child into account, and conducts the required balancing exercise, it is reasonable to expect that this will be reflected in some way in the course of the sentencing remarks.

11. VERY SHORT SENTENCES

The most recent statistics available are those of 2008. In that year 986 women were sent to immediate custody for periods of 4 weeks or less; a further 123 were imprisoned for fine default. Sentences of less than and including 10 days were imposed on 139 women, and a further 37 were sent to prison for fine default. The number sent to prison for 3 months or less was 3,338 with a further 147 sent to prison for fine default: this made up 27% of women sent to prison.

Clive Chatterton expressed his views as follows⁴³:

The other thing that struck me was the use of short sentences: there are hundreds. Yesterday I got the stats to prepare for this meeting. 107 ladies are on remand: we can make an educated guess that probably 50% are not going to receive a custodial sentence. 119 prisoners are doing 12 months or less: 72 of them six months or less. I've done a presentation to the North West Criminal Justice Boards, and one of the slides I used was from a two-month period last year. During October and November at Styal we received 34 ladies doing eight days or less. Eight of those were sentenced to one day. One lady was discharged before she slept for the night. She was a fine defaulter. Quite frankly I find that startling. I'm not judge and jury and I'm not saying I want to be. I would like to inform the discussion. If I am asked in my professional capacity about short sentences – the PGA [Prison Governors Association] has made a statement on short sentences, but these are my own views -

⁴³ 22 June 2010, meeting at the Prison Reform Trust, London.

when I see a young lady that I saw last year, with a ligature which left her unconscious, and if we hadn't rescued her she would have died, almost every part of her body was covered with slashes, she then set fire to herself, and received burns that meant that again she almost died, and when she had recovered from that she drank disinfectant.... And I am asked: do short sentences work? I remain to be convinced by that.

It is obvious that one has to question such short sentences.⁴⁴ What could be the point of sending someone to prison for a period of less than eight days? In the light of this research, it raises the question, what about consideration of the rights of the child? If the offence is so minor that it merits a sentence of imprisonment measured in days, how can it outweigh the rights of the child to be cared for by his or her mother? Logically, it surely cannot.

12. FUTURE RESEARCH

The methods available to me meant that only 5 out of the 75 cases studied were decisions of the magistrates' courts. In view of the fact that 95% of criminal cases are heard in the magistrates' courts I would argue that research into sentencing decisions should be carried out in the magistrates' courts as well as in the higher courts.

This research has found wide variations in the extent to which the courts appear to have considered the impact that the imprisonment of a mother is likely to have on a dependent child. There are two issues:

1. If the balancing exercise has been carried out should this not be made clear in the sentencing remarks?
2. Has the balancing exercise taken place in fact or have the child's rights not been considered by the court?

Further studies are needed which could include interviews with judges and magistrates and an analysis of why there are such great differences. Do the variations reflect their personal attitudes and experiences? To some extent one may hypothesise that this would be the case. It may also be the result of differences in their judicial training.

Research should be carried out into the imprisonment of mothers on very short sentences. The shorter the sentence, the less serious the offence, and the more strongly the rights of the child should weigh in the balance. There should therefore be very few, if any, mothers imprisoned on very short sentences. However, when one looks at the prison statistics one finds very large numbers of women sent to prison on very short sentences (27% for less than 3 months). It is important to find out in what circumstances such sentences are imposed. For what types of offence? What reasons are given in the court for imposing custody

⁴⁴ The minimum custodial sentence which a Magistrates' Court can impose for an offence is 5 days (not taking account of early release). The maximum sentence for fine default of a sum up to £200 is 7 days.

in these cases? Does the sentencing court in these cases make enquiries about dependent children? Are the rights of the child considered? Such imprisonment is in breach of our human rights obligations, cannot be a responsible use of public resources and defies common sense. In my view, the only body which could carry out research of this type is the Ministry of Justice. I believe it is important that this research be done.

13. 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. 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.

I print below citations from the Court of Appeal judgment which express the Court's approach to the proper consideration of the child's Article 8 rights when a parent is to be sentenced. These points are to be stressed in the context of this research study:

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 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.

The Court of Appeal said:

[Defence counsel has drawn attention] to the fact that the article 8 rights to family life of the defendant's infant son were clearly engaged by the sentencing process. ... [Para 15]

[T]he Supreme Court has considered the correct approach to the article 8 position of dependent children, not in sentencing directly but in cases where the extradition of one or more parents is sought. (*HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25.) [para 16]

First, the sentencing of a defendant inevitably engages not only her own article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart-rending effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be turned upside down by crime. ...

Second, the right approach in all article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within article 8.2? C. Is the interference proportionate given the balance between the various factors? ... That approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment.

Third, long before any question of article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing. That is most conveniently to be extracted from the careful words of Lord Judge, CJ, in *HH* at paragraphs 126 to 130, to which reference should be made if this point is taken. In particular, at paragraphs 128 and 129 he said: "128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years." ...

Fourth, it follows that 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. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.

Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just deserts, the needs of society for appropriate deterrence (see section 142 of the Criminal Justice Act 2003) and the requirement that there ought not to be

unjustified disparity between different defendants convicted of similar crimes. ...

Sixth, it will be especially where the case stands on the cusp of custody that 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.

Seventh, the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver ...

Eighth, in a case where custody cannot proportionately be avoided, the effect on children or other family members *might* (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.

Ninth, those briefly stated principles are we think sufficient to guide sentencing judges and do no more than reflect what has been the practice of the criminal courts since long before arguments were habitually couched in terms of article 8 or human rights generally. ...

[I]t is the balancing which is required by article 8 in the form that we have endeavoured to set it out which is the effective test for sentencing.

14. 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. In a number of the cases studied the courts' concern for children appeared 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 cited 'the effect on children', not the child's Article 8 rights.

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.⁴⁵

It can be argued that the law is very successful at compartmentalising its various activities to the extent that it is able to turn a blind eye to the glaring anomalies that arise from treating children as victims to be helped and protected in child care issues and ignoring or minimizing the harm done to them when they are the dependent offspring of offenders. These anomalies and inconsistencies do not seem to have troubled either our judges or legislators.⁴⁶

It is a legal requirement that in every case 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. In the most serious cases 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.

15. APPENDIX: Prison suicides

Two of the mothers in this study sentenced to imprisonment committed suicide while in prison.

In 2007 the Home Office published the Corston Review, which it had commissioned to look into the treatment of vulnerable women in the criminal justice system. Baroness Corston reported on all women's prisons and the issue of the care and treatment of vulnerable women within the system⁴⁷. The Report stated:

There is no doubt that there have been significant improvements in the provision of health services for women in prison in recent years as a result of prison health care being absorbed into the NHS and a similar exercise between the NHS and police is now necessary to bring consistency and higher standards of health care to police custody suites. But prisons are being asked to do the impossible; the fact is that many women in prison have been failed by society including the NHS long before they arrived at the prison gates and many are simply too ill for prison to be an appropriate location for them. Prison is being used to contain those for whom there is no proper provision outside prison, or who have already been excluded from

⁴⁵ Epstein, R. and Wise, I. (1995) Magistrates in the Dock, *New Law Journal*, 567.

⁴⁶ Professor Michael King, University of Reading, personal communication.

⁴⁷ Corston, J. (2007) *The Corston Report: Women with Particular Vulnerabilities in the Criminal Justice System*, The Home Office, London.

society. And of course prisons are being asked to do this on the cheap. It is also clear that mental health services in the community are failing to adequately address the mental health needs of women, notwithstanding the existence of the Department of Health's women's mental health strategy and implementation guidance.

R v Gidney was the starting point of this research.⁴⁸ She was 18 years old and the mother of a two-year-old child. She was a heroin addict 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. The sentencing remarks do not mention her child. Eleven days into her sentence she committed suicide.

R v Beswick (Portsmouth Crown Court, 2009) raises the issue of the courts' understanding of and attitude to mental health issues. M. Beswick committed suicide in prison and left two children aged 4 and 8.

She had committed fraud, dishonestly transferring funds from the bank account of her employer to herself over a 10-month period. Referring to the risk of suicide, the judge said:

I want this to be carefully noted by the prison authorities, this woman is a serious suicide risk and she is to be carefully watched by those who now have the responsibility for her safety.

I here reproduce the sentencing remarks of *R v Beswick*, in full.

IN THE CROWN COURT Indictment No. S20080392
AT PORTSMOUTH

The Courts of Justice Portsmouth 6th March 2009

Before:
HIS HONOUR JUDGE PRICE
R E G I N A -v - MELANIE BESWICK

SENTENCE REMARKS

6th March 2009

JUDGE PRICE: Stand up, please. I give you credit for your pleas of guilty. I take account of everything that has been said and written about you. You were employed as the Financial Officer by the local branch of Citizens Advice Bureau. During the course of some ten months you systematically and dishonestly transferred sums totalling £19,250 from their bank account to your bank account. You knew perfectly well what you were doing, you knew perfectly well that you were stealing from the charity that was employing you.

When the auditor became suspicious, you produced a journal which you had maintained, in which you had falsely entered various items that you said the money had been spent on, spent, you said, for the

⁴⁸ Crown Court, 2003.

benefit and on behalf of Citizens Advice Bureau. Those entries were totally fictitious, invented by you in an amateur attempt to cover your tracks for the dishonesty in which you had engaged. This was a systematic and persistent fraud. There is no alternative other than to send you to prison immediately. You will go to prison for nine months on each of the charges concurrent. Your earliest release date, which is nothing whatsoever to do with the courts or the judges, it is entirely a matter for Government, will be provided to you on your arrival at the prison. Go with the officer please and, I want this to be carefully noted by the prison authorities, this woman is a serious suicide risk and she is to be carefully watched by those who now have the responsibility for her safety. Go with the officer please.

I make the orders requested because I must under the Proceeds of Crime Act [2002]. I need not recite them, I hand them down to my clerk to put into the record and there are some timings and dates to avoid overleaf, if you please. There will be no order for cost or compensation because the defendant is in no position to pay either.

Thank you for your assistance.

These sentencing remarks raise a number of issues:

- i. What training has been provided to judges in the criminal courts concerning the treatment of women with mental health problems?
- ii. The Corston Report made a very detailed study of mental ill-health among women prisoners: did the Judicial College bring this Report to the attention of all sentencers?
- iii. How can we explain the remarks of the judge in this case, emphasising that he is aware that the defendant represents a suicide risk, imposing a custodial sentence and stating that she is the responsibility of the prison service?

In the light of this report I would question whether it is justified that no mention was made of the two young children whom Melanie Beswick left behind. Where was the consideration of their human rights? It is crucial that court procedures comply with all the requirements of the Human Rights Act.