

**Best Interests of the Child when Sentencing a Parent:  
Some reflections on international and regional standards and practice**

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## **Some reflections on international and regional standards and practice**

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“The purposes of a sentence of imprisonment ... are primarily to protect society against crime and to reduce recidivism” (Rule 4.1 UN Standard Minimum Rules for the Treatment of Prisoners, “Nelson Mandela Rules”, adopted by the UN General Assembly, December 2015)

### **Introduction**

One of the areas in which the development of the concept and understanding of the rights of the child is beginning to have a significant effect is in relation to the impact of the child’s parent or caregiver coming into conflict with the criminal law. This raises perceptions of a clash between the rights of the child (why should a child suffer because of the actions of their parent?), the impartiality of the judicial system (to what extent should caring/parental responsibilities be taken into account when deciding on pre-trial measures or in sentencing?) and the issues of public protection and that sentences should have a deterrent effect. Further reflection on and understanding of the issues and the experience where the best interests of the child is taken into account may help to dispel the idea of such a conflict.

### **1. United Nations**

**UN Convention on the Rights of the Child**, to which the UK is a party, is relevant in many respects but most specifically in Article 3(1):

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.

And Article 9 which addresses separation of children from parents, in particular:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

In May 2016, the **UN Committee on the Rights of the Child** (the expert body which oversees the Convention and to which the UK is required to report on its implementation) recommended to the UK:

*Take into account the best interests of the child as a primary consideration when sentencing*

*parents, avoiding, as far as possible, sentences for parents which lead to their being separated from their children.*<sup>1</sup>

This reflects the Committee's interpretation of the Convention as set out in the report<sup>2</sup> on their 2011 Day of General Discussion:

The Committee emphasises that in sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).

And in various of its General Comments, which provide authoritative guidance about the Convention.<sup>3</sup>

The Committee has a pending case against Belgium concerning an imprisoned adolescent Roma mother who has been separated from her baby and which cites Articles 2, 3(1), 37(b)(c)(d), 40(1)(2)(3)(4)<sup>4</sup>.

**Other UN Bodies** have reflected the same position, in particular the **Guidelines for the Alternative Care of Children Without Parental Care**<sup>5</sup>, and various resolutions of the UN Human Rights Council<sup>6</sup> and General Assembly on the Administration of Justice and on the Rights of the

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- 1 CRC/C/GBR/CO/5, para. 54(b). **Family environment and alternative care (arts. 5, 9-11, 18 (paras. 1 and 2), 20-21, 25 and 27 (para. 4))**: Children of incarcerated parents: 54. The Committee is concerned that, due to insufficient cooperation between the courts and the child protection authorities, a parent may be sentenced to imprisonment and directly incarcerated while his or her children are left alone without proper care. 55. The Committee recommends that the State party: (a) Ensure that child protection authorities are always informed when a person who has a child or children is imprisoned, in order to avoid situations where children are left unattended; (b) Take into account the best interests of the child as a primary consideration when sentencing parents, avoiding, as far as possible, sentences for parents that lead to their being separated from their children. Similar Concluding observations have been made to India (CRC/C/IND/Co/3-4), Iraq (CRC/C/IRQ/CO/2-4), Kuwait (CRC/C/KWT/CO/2), Mauritius (CRC/C/MUS/CO/3-5), Thailand (CRC/C/THA/CO/2), UAE (CRC/C/ARE/CO/2). See the database of relevant concluding observations prepared by the Quaker UN Office at <http://www.crccip.com/>
  - 2 Committee on the Rights of the Child 30 September 2011: Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents", para. 30
  - 3 Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), CRC/C/GC/14 of 29 May 2013, paras. 28 and 69; General Comment No. 7 on Implementing Rights in Early Childhood (2005), para.31(b), CRC/C/GC/7/Rev.1 of 20 September 2006
  - 4 Belgium 34/2017: Conviction of Roma adolescent and alleged victim of trafficking for theft, separating her from her baby; CRC 2, 3(1), 37(b)(c)(d), 40(1)(2)(3)(4)
  - 5 Adopted by the UN General Assembly, 18 December 2009, para.48: When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered. Best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community. Para.82. States should pay special attention to ensuring that children in alternative care because of parental imprisonment or prolonged hospitalization have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard.
  - 6 Eg HRC resolution 19/37 (2012) Rights of the Child; resolution 30/7 (2015) Human Rights in the administration of justice, including juvenile justice; UNGA resolution A/RES/71/188 (2016) on Human Rights in the administration

Child, in addition to the UN Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (“Bangkok Rules”, unanimously adopted by the UN General Assembly in December 2010 and which in turn led to the revised UN Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), unanimously adopted by the UN General Assembly in December 2015.

Both sets of Rules refer to the children of prisoners, particularly relevant in this context are Bangkok Rule 64:

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

and Rule 2.2:

Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the child.

The provisions of the Bangkok Rules were limited to *women* because the mandate for these Rules only covered women, but the preamble recognised that the Rules should be applied equally to men in an equivalent position.<sup>7</sup>

## 2. Regional Standards

The most developed regional standard is the **African Charter on the Rights & Welfare of the Child** which has a specific provision<sup>8</sup> about expectant mothers and mothers of infants and young children who have been accused or found guilty of infringing the penal law. This has been considered by the expert oversight Committee when receiving reports from the States Parties, and in 2015 it adopted a General Comment providing interpretation of it. Significantly, the Committee reinterpreted the provision to apply to all sole or primary caregivers, including “another family member such as a grand-parent or a foster parent”, in light of the reality of the situation in Africa for many children.

In its General Comment the African Committee goes on to set out that:

23. The best interests of the child must be the primary consideration in relation to all actions that may affect children whose parents are in conflict with the law, whether directly or

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of justice; A/RES/68/147 (2014) and A/RES/71/177 (2016) on the Rights of the Child.

7 Preliminary Observations, para. 12. Some of these rules address issues applicable to both men and women prisoners, including those relating to parental responsibilities, some medical services, searching procedures and the like, although the rules are mainly concerned with the needs of women and their children. However, as the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of children. Accordingly, some of these rules would apply equally to male prisoners and offenders who are fathers.

8 Article 30

indirectly ... [and that] States should create and implement laws/policies to ensure this at all stage of judicial and administrative decision-making during the criminal justice process, including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community.

The Committee went on to set out how this should be done, adopting the general approach of the South African Constitutional Court in *S v M* (see below).

36. Implementation of Article 30 requires that States parties review their sentencing procedure and reform it accordingly so that:

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.
- (c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.
- (e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.

The Committee specifically addressed the question of whether this approach enables offenders to evade accountability:

39. Article 30 should not be interpreted as allowing for convicted parents/ primary caregivers to evade accountability for their offences. Taking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned. Such an approach would render systems of criminal law unworkable, to the detriment of society as well as the interests of children, who benefit along with everyone else from the prevention of crime. States Parties must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/parent.

**Council of Europe** Committee of Ministers, in April 2018, adopted a Recommendation on children of imprisoned parents.<sup>9</sup> Amongst its detailed provisions it explicitly states as a Basic Principle:

Where a custodial sentence is being contemplated, the rights and best interests of any

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9 Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents (Adopted by the Committee of Ministers on 4 April 2018 at the 1312<sup>th</sup> meeting of the Ministers' Deputies), available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807b3175](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807b3175) and Explanatory Memorandum available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168078b181](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168078b181)

affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.

**European Court of Human Rights** has found violations of the right to family life (Article 8 ECHR) of persons arrested/imprisoned (eg *Horych v Poland*, *Khoroshenko v Russia*) as well as (Article 3) inhuman/degrading treatment, (restrictions on and conditions of visits). In these cases, only the prisoner brought the case, but more recently the Court has been finding violations of the children's rights in these contexts because the child has been included in the claim, including:

*Ioan Pop and others v Romania*<sup>10</sup>: leaving a 12 year old who had witnessed the arrest of his parents unattended for several hours without taking measures to ensure an adult would look after him while the parents were held in police custody (left under the oversight of the villagers), violation of Article 3, ECHR (degrading treatment); and *Stoyanov and Others v. Bulgaria*<sup>11</sup> violent arrest of father in the family home amounted to degrading treatment under the ECHR in relation to the minor children who witnessed the event. A more recent case *Hadzhieva v. Bulgaria*<sup>12</sup> found a violation of Article 8 (right to family life) of a 14-year old both of whose parents were arrested when she was also at home: the police were aware of her existence at the time of the arrest, had checked her age, had not enabled her parents to make arrangements for her nor notified the relevant authorities. The Court found that the authorities failed to comply with their positive obligation under Article 8 of the Convention to act in order to ensure that the applicant, who was a minor left without parental care, was protected and provided for in her parents' absence. Two days later, her mother indicated that there was someone to look after the girl when she was asked about this in court, at which point the European Court of Human Rights ruled that no further (or continuing) violation existed, although it appeared that in fact no arrangement for her care had been made and the authorities had taken no steps to verify the situation.

**EU Charter of Fundamental Rights**, Art 24.2 (best interests) and Art.3 (maintain contact with both parents) are similar to Convention on the Rights of the Child, and various EU bodies, including the European Commission (and UNICEF) have recognised children of prisoners as a vulnerable group, and called for EU action in relation to them.<sup>13</sup>

### 3. State Practice

The most developed, and in this context most interesting State practice is in **South Africa** where 10 years ago the Constitutional Court ruled that the best interests of the child must be taken into account when sentencing a primary carer of minor children. The judgment sets out how the sentencing court should proceed, and subsequent practice has shown its application in action.<sup>14</sup>

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10 *Affaire Ioan Pop et autres c. Roumanie*, 6 décembre 2016 (Requête no 52924/09)

11 *Stoyanov and Others v. Bulgaria* (no. 55388/10)

12 *Hadzhieva v. Bulgaria* (Application no. 45285/12), 1 February 2018

13 European Parliament resolution of 27 November 2014 on the 25<sup>th</sup> anniversary of the UN Convention on the Rights of the Child (2014/2919(RSP)), para.13;

14 Ann Skelton and Lynne Mansfield-Barry, "Developments in South African law regarding the sentencing of primary caregivers", in *European Journal of Parental Imprisonment: Child impact assessments and sentencing* (Winter 2015), pp14-15

The Court specified that in addition to all the usual considerations in sentencing, separate consideration must be given to the best interests of the child/children, stating:

- The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so:
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- If the appropriate sentence is clearly non-custodial the court must determine the appropriate sentence bearing in mind the interests of the children.
- Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

Notably, this was not limited to *young* children (in the specific case the children were aged 16, 12 and 8 years), nor to mothers or parents only. Subsequently, the Constitutional Court limited its ruling to *single* primary caregivers<sup>15</sup> (not those co-parenting) but otherwise maintained the same principles. This decision may be criticised on the basis that the best interests of the child should still be considered, but what constitutes best interests and the weight to be given to them will differ from the case of a single parent/carer. In practice, some significant features include:

- the application to pre-trial measures,
- providing time for the parent to arrange the children's care before starting a prison sentence, and
- failure to take account of the best interests of the child in sentencing is grounds for leave to appeal.

The particular importance of the last point is not only the defence in the case, but also the prosecution (and the judges) have a vested interest in seeing that the process takes place, properly, and is documented as having been taken into account in the court's decision.

Other examples of State practice include:

**Italy:** First signed in 2014 and renewed in 2016, there is a Memorandum of Understanding between the Ministry of Justice, the National Ombudsman for Childhood and Adolescence and Bambinisenasbarre (an NGO), which includes (Article 1) asking judicial authorities to take into account the rights and requirements of minor children when deciding on pretrial measures and in sentencing persons who have parental responsibility, giving priority to measures alternative to pre-trial detention in prison, including choosing sentencing measures which take into consideration the child's best interests. Italy also has specific laws relating to women offenders who have children, designed to avoid pre-trial custody or imprisonment as much as possible.

**Argentina:** is developing a similar model to the Italian MoU. **Croatia, Portugal, Netherlands** are

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15 *MS v S* (2011(2) SACR 88 CC)

considering Italian MoU model but not finalised yet. The Netherlands allows time for mothers to make arrangements for their children before starting a prison sentence. In Croatia the judge has discretion to postpone the sentence of a mother until the baby is 6 months old.

**France:** When a person has declared that he or she is exercising sole parental authority over a minor aged sixteen or less who resides with him or her, the liberty and custody judge may not order that person's detention on remand without first having secured acceptable living conditions for the minor: Article 145(5) of the Code of Criminal Procedure: "Where, during his questioning by the investigating judge prior to the transfer of the case to the liberty and custody judge, a person makes it known that he has exclusive parental authority over a minor of under sixteen years, who lives with him, his placement in pre-trial detention may not be ordered unless one of the services or people described in article 8, paragraph 7, has first been mandated to research and propose all measures necessary to prevent the endangering of the minor's health, safety or morals or the serious compromising of his education. The provisions of the present Article shall not apply in cases of felony, misdemeanours committed against a minor, or in cases where the obligations of judicial supervision are not respected."

**Slovenia:** if both parents are sentenced to prison, it is possible for them to alternate serving their sentences in order to provide continuity for their children.<sup>16</sup>

**Norway:** delay in father starting prison sentence has been permitted in order to enable grandfather to care for boy who would otherwise have been placed in foster care.<sup>17</sup>

**England & Wales:** caring responsibilities for dependents can be a mitigating factor in sentencing, and sometimes is, but not applied consistently. See Prison Reform Trust discussion paper.<sup>18</sup>

**Serbia** caring responsibilities can be a mitigating factor in sentencing

**Canada** – *Inglis v BC* closure of only mother and baby unit in British Columbia was found by the Supreme Court of British Columbia to be a violation of the Charter rights of both the mothers and the babies. Subsequently, *Guidelines for the Implementation of Mother-Child Units in Canadian Correctional Facilities* developed by the Collaborative Centre for Prison Health and Education of the University of British Columbia.

**US Guidelines Manual 2016** has a provision about "Departures Based on Loss of Caretaking or Financial Support" in relation to sentencing.

**Uganda:** Sentencing Guidelines (2013) Prohibits custodial sentence for 'expectant woman', and has specific provisions about sentencing primary caregivers (for Defence to raise issue about

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16 COPE, p18

17 COPE, p30

18 Shona Minson, Rebecca Nadin and Jenny Earle: *Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children* (Prison Reform Trust, November 2015)

responsibility for dependents). However, implementation lags behind<sup>19</sup> caregiving responsibilities were taken into account as a mitigating factor during sentencing procedures – particularly for women convicted of petty crimes – but that this did not happen systematically and it depended very much on the gender awareness, experience and ‘proactivity’ of individual judges.

## Conclusion

1. There is an *international legal obligation* on States Parties to the Convention on the Rights of the Child to take account of the best interests of the child when sentencing or taking pre-trial measures in relation to parents or primary carers.
2. *Best practice* is to ensure that this is mandatory (not merely guidelines) for courts/judges making such decisions, as all the evidence is that guidelines are not always followed; that they have to set out in their decisions how they have done so, and that failure to take account of the best interests of the child in such circumstances is grounds for leave to appeal such decisions; and that this requirement applies to *all* measures, not only in relation to custody (detention or imprisonment).
3. The *scope* should cover all parents and all sole or primary carers given that the child has a right to maintain contact with both parents even when they are not acting as primary carers (provided it is not contrary to the child's best interests to do so). How the child's best interests are affected will be different depending on the nature of existing relationship.

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19 PRI/FHRI, A shared sentence: children of imprisoned parents in Uganda, p.12

## **Annex: Background materials**

**UN HRC resolution 19/37 (2012)**, para 67: Emphasizes that, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary carer, priority should be given to non-custodial measures, bearing in mind the gravity of the offence and after taking into account the best interests of the child.

The **European Parliament's Resolution of 13 March 2008 on the particular situation of women in prison** recommends: "14. (...) that the imprisonment of pregnant women and mothers with young children should only be considered as a last resort and that, in this extreme case, they should be entitled to a more spacious cell, and an individual cell if possible, and should be given particular attention, especially in terms of diet and hygiene; considers, furthermore, that pregnant women should receive antenatal and postnatal care and parenting classes of a standard equivalent to those provided outside the prison environment."

**UK Sentencing Guidelines** (presumably applicable to England & Wales in practice), being the "sole primary carer for dependent relatives" is considered a mitigating factor for sentencing purposes, see eg Robbery Definitive Guideline, UK Sentencing Council, effective from 1 April 2016. See Prison Reform Trust: *Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children* (2015).

### **US Guidelines Manual 2016:**

Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

- (i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.
- (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.
- (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.
- (iv) The departure effectively will address the loss of caretaking or financial support.

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

### **Uganda: Sentencing Guidelines (2013)**

Prohibits custodial sentence for 'expectant woman', and has specific provisions about sentencing primary caregivers (for Defence to raise issue about responsibility for dependents):

#### **PART IX – SENTENCING PRIMARY CARE GIVERS AND CHILD OFFENDERS**

##### **49. Sentencing a primary care-giver.<sup>20</sup>**

(1) Where it is brought to the attention of the court that an offender is a primary care-giver, the court shall consider the following—

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<sup>20</sup> "primary care-giver" means a person who takes primary responsibility of a child below 4 years;

- (a) the effect of a custodial sentence to a child if such a sentence is passed;
  - (b) whether the child will adequately be cared for while the caregiver is serving the custodial sentence;
  - (c) the importance of maintaining the integrity of family care by protecting innocent children from avoidable harm.
- (2) For the purposes of sub-paragraph (1), the court shall—
- (a) recognise each child as an individual with a distinct personality; and
  - (b) shall strike a fair balance between the circumstances of the care-giver and the circumstances of the case.
- (3) Where the appropriate sentence is clearly non custodial, the court shall determine the sentence bearing in mind the interests of the child.
- (4) Where there is a range of sentences available to the court, the court shall use the welfare principle as provided for under section 3 of the Children Act in deciding which sentence to impose. (5) In determining a sentence for an offender who is a primary care-giver, the court shall ensure that the sentence is the least damaging sentence to the interest of the child.<sup>21</sup>

However, implementation lags behind: in 2015, Lawyers interviewed for this research<sup>22</sup> stated that caregiving responsibilities were taken into account as a mitigating factor during sentencing procedures – particularly for women convicted of petty crimes – but that this did not happen systematically and it depended very much on the gender awareness, experience and ‘proactivity’ of individual judges. There is also no provision or practice for children’s views to be taken into account during any stage of the trial and sentencing proceedings of their parents although they may be represented by older people in some cases.

**CRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14), 29 May 2013**

6 (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.

15 (a) Reviewing and, where necessary, amending domestic legislation and other sources of law so as to incorporate article 3, paragraph 1, and ensure that the requirement to consider the child's best interests is reflected and implemented in all national laws and regulations, provincial or territorial legislation, rules governing the operation of private or public institutions providing services or impacting on children, and judicial and administrative proceedings at any level, both as a substantive right and as a rule of procedure;

**(b) “courts of law”**

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21 Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013

22 PRI/FHRI, A shared sentence: children of imprisoned parents in Uganda, p.12

28. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee<sup>23</sup> underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.

69. In cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children.<sup>24</sup>

### **European Court of Human Rights**

Situations may arise in which children are otherwise separated from a parent, for example as a result of the parent's imprisonment. The ECtHR was faced with such a situation in *Horych v. Poland*, (ECtHR, *Horych v. Poland*, No. 13621/08, 17 April 2012) where it addressed the issue of the conditions in which the applicant, categorised as a dangerous prisoner, had received visits from his minor daughters (aged 6, 11 and 16 at the time of his arrest). It noted that "visits from children [...] in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited". The Court went on to say that "positive obligations of the State under Article 8, [...] include a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment". (para. 131)

The Court would note that, by the nature of things, visits from children or, more generally, minors in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited. However, positive obligations of the State under Article 8, in particular an obligation to enable and assist a detainee in maintaining contact with his close family (see paragraphs 123-124 and 129 above), includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment. That duty is not discharged properly in situations where, as in the present case, the visits from children are organised in a manner exposing them to the view of prison cells and inmates and, as a result, to an inevitably traumatic, exceptionally stressful experience. The Court agrees that, as the applicant said, the exposure to prison life can be shocking even for an adult and, indeed, it must have caused inordinate distress and emotional suffering for his daughters (see paragraphs 39 and 119 above). It further notes that, owing to the authorities' failure to make adequate visiting arrangements, the applicant, having seen the deeply adverse effects on his daughters, had to desist from seeing them in prison. Throughout his detention from 14 July 2004 to the end of 2008 he saw his oldest daughter twice and each of the two younger ones once. In effect, he was deprived of any personal contact with them for several years (see paragraphs 33-34 and 37 above).

132. In view of the foregoing, the Court concludes that the restrictions imposed by the

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23 General comment No. 10 (2007) on children's rights in juvenile justice, para. 10.

24 See recommendations of the Day of general discussion on children of incarcerated parents (2011).

authorities on the applicant's visiting rights, taken together with their continued and prolonged failure to ensure proper conditions for visits from his daughters, did not strike a fair balance between the requirements of the "dangerous detainee" regime on the one hand, and the applicant's Convention right to respect for his family life on the other. Accordingly, there has been a violation of Article 8 of the Convention.

### **Respect for private and family life**

Ban on long-term family visits to life prisoners: violation *Khoroshenko v. Russia* - 41418/04 Judgment 30.6.2015 [GC] Facts – The applicant is currently serving a sentence of life imprisonment. During the first ten years of detention in a special-regime correctional colony, he was placed under the strict regime, implying, inter alia, restrictions on the frequency and length of visits and a limitation on the number of visitors, and various surveillance measures in respect of those meetings. The applicant could correspond in writing with the outside world, but there was a complete ban on telephone calls except in an emergency.

The Court was struck by the severity and duration of the restrictions in the applicant's case and, more specifically, by the fact that, for an entire decade, he had been entitled to only two short visits a year. The Court's case-law had consistently taken the position that, in general, prisoners continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention fell expressly within the scope of Article 5 of the Convention, and that a prisoner did not forfeit his or her Convention rights merely because he or she had been detained following conviction.

Thus, the relevant Russian legislation did not take the interests of the convict and his or her relatives and family members adequately into account, as required by Article 8 of the Convention, the content of other international law instruments concerning family visits and the practice of international courts and tribunals, which invariably recognised as a minimum standard for all prisoners, without drawing any distinction between life sentence and other types of prisoners, the right to an "acceptable" or "reasonably good" level of contact with their families.

The very strict nature of the applicant's regime prevented life sentence prisoners from maintaining contacts with their families and thus seriously complicated their social reintegration and rehabilitation instead of fostering and facilitating it. This was also contrary to the recommendations of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) in this area and to Article 10 § 3 of the International Covenant on Civil and Political Rights, in force with respect to Russia since 1973, and also several other instruments. Thus, the interference with the applicant's private and family life resulting from the application for a long period, solely on account of the gravity of his sentence, of a regime characterised by such a low frequency of authorised visits, had been, as such, disproportionate to the aims invoked by the Government. The effect of this measure had been intensified by the long period of time it was applied, and also by various rules on the practical arrangements for prison visits, such as the ban on direct physical contact, separation by a glass wall or metal bars, the continuous presence of prison guards during visits, and the limit on a maximum number of adult visitors. This had made it especially difficult for the applicant to maintain contact with his child and elderly parents during a time when maintaining family relationships had been particularly crucial for all the parties involved. In addition, certain of his relatives and members of the extended family had simply been unable to visit him in prison throughout this entire period.

Having regard to the combination of various long lasting and severe restrictions on the applicant's ability to receive prison visits and the failure of the regime on prison visits to give due consideration to the principle of proportionality and to the need for rehabilitation and reintegration of long-sentence prisoners, the measure in question had not struck a fair balance between the applicant's right to the protection of his private and family life, on the one hand, and the aims referred to by the respondent Government on the other. It followed that the respondent State had overstepped its margin of appreciation in this regard. Conclusion: violation (unanimously).

It further notes that the effect of this measure was intensified because it was applied over such a long period of time, as well as by various rules on the modalities of prison visits, such as the ban on direct physical contact, separation by a glass wall or metal bars, the continuous presence of prison guards during visits, and the limit on a maximum number of adult visitors. In the applicant's case the above-mentioned additional restrictions made it especially difficult for him to maintain contacts with his child<sup>25</sup> and elderly parents during a time when maintaining contact with his family was particularly crucial for all the parties involved (see paragraphs 23-25 and 97 above). A complete ban on direct physical contact with the applicant and the presence of a guard within hearing distance during this period contributed to the applicant's inability to establish close bonds with his son during the key period of the latter's early life.

### **African Charter on the Rights and Welfare of the Child**

Article 30.1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

### **General Comment of the African Expert Committee on the Rights and Welfare of the Child:**

Such measures, among others, should include the following:

- (a) As a general rule, States Parties should ensure that alternatives to custodial sentences for expectant prisoners or those with children. In this regard, States Parties should undertake both legislative and administrative measures to ensure they give priority consideration to non-custodial measures when courts sentence or decide on pre-trial measures for a child's sole or primary carer,

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<sup>25</sup> His son was 3 years old at the time of his arrest

subject to the need to protect the public and the child and bearing in mind the gravity of the offence.<sup>26</sup> This necessarily entails that States Parties should ensure that where protection of the public is not at issue, and subject to the seriousness of the offence, an alternative to imprisonment should be applied;

(b) States Parties should ensure that their respective legislation provides for safeguards to expectant prisoners or those with children where it is considered imperative for judges or magistrates to impose custodial sentences to such prisoners. Such safeguards should include judicial consideration of the impact of a custodial sentence on the best interests of a child of the accused or convicted parent or caregiver; (c) States Parties should put in place legislative and administrative mechanisms to ensure that a decision for a child to live in prison with his/her mother or care giver is subject to judicial review. Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with mother and the existence of quality alternatives available to the family; (d) States Parties should include consideration of the child's own views and give them due weight in accordance with the age and maturity of the child; (e) States Parties should put in place both legislative and administrative measures to ensure that they take into account the importance of maintaining direct contact with parents or caregivers on a regular basis particularly during early childhood as well as the overall conditions of incarceration. Contact with the parent or caregiver living outside the detention facility and other family members should be facilitated by State Parties.

3.1.1 Ensure that a non-custodial sentence will always be first considered when sentencing such mothers

35. The African Committee is fully aware that sentencing procedures are diverse and complex in the various States Parties to the African Children's Charter. The African Committee is also aware that many States Parties do not take into account the childcaring responsibilities of a convicted person when they are taking decisions on sentencing.

36. Implementation of Article 30 requires that States parties review their sentencing procedure and reform it accordingly so that: (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.

(c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.

(e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the

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<sup>26</sup> A similar obligation is imposed on States by the UN General Assembly Resolution 63/241. See UN General Assembly, Resolution: Rights of the Child, A/RES/ 63/241, para 47; and United Nations Human Rights Council resolution 19/37 on the rights of the child, para 69.

best interests of the child as an important guide in deciding which sentence to impose.<sup>13</sup>

37. Therefore, a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interest of the child into consideration.

38. Article 19 of the African Children's Charter grants a child the entitlement to enjoyment of parental care and protection. With the sentencing of parents to prison or custodial settings, the rights of a child in terms of Article 19 of the African Children's Charter are restricted. Article 19(1) reaffirms that only a judicial authority can separate a child from parental care, and only if it is in the best interest of such child. Therefore, when considering custodial sentences against convicted mothers/ parents, the court in a Member State must have considered the best interest of children, as not only Article 30(1)(a) and Article 4 requires it, but also Article 19(1) in relation to the separation of a child from his/ her parental care.

39. Article 30 should not be interpreted as allowing for convicted parents/ primary caregivers to evade accountability for their offences. Taking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned. Such an approach would render systems of criminal law unworkable, to the detriment of society as well as the interests of children, who benefit along with everyone else from the prevention of crime. States Parties must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/ parent.

40. If the parent/primary caregiver of the child is imprisoned, then States Parties are under an obligation to ensure appropriate alternative care for such child/ children in accordance with Article 25 of the African Children's Charter. Such care could be informal with existing family, or in formal institutions, foster care or even adoption.<sup>27</sup>

#### **Extracts from *S v M* (South African Constitutional Court) per Sachs, J**

“the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence” para. 10)

A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. (para.24)

[26] This Court, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation.

[28] The directions in this matter referred to sentencing of primary caregivers, not to the wider class of breadwinners. Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the

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<sup>27</sup> This guidance is loosely based upon that provided in a South African case *S v M* Case CCT 53/06 [2007] ZACC 18, paragraph 36

expressly protected right of a child to parental care under section 28(1)(b).

We are accordingly not called upon in this judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver.

Suffice it to say that, as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise.

[29] Counsel for the State submitted that sentencing practices in our courts already took account of the impact on children through applying the Zinn triad, that is, through looking at the crime, the criminal and the community. She contended that sentencing courts as a matter of routine consider the personal circumstances of the criminal, including their parental obligations, and weigh them against the gravity of the crime and its impact on the community. Hence, it was said, no change in present sentencing practice is called for, and the sentence imposed by the High Court should not be interfered with.

[30] The tart reply of the amicus was that a child of a primary caregiver is not a “circumstance”, but an individual whose interests needed to be considered independently. The weight to be given to those interests and the manner in which they were to be protected would depend on the particular circumstances. But, she contended, these interests were not to be swallowed up by and subsumed into the consideration of the culpability and circumstances of the primary caregiver.

[31] The curator and the amicus also pointed out that South Africa’s obligations under international law underscored the special requirement to protect the child’s interests as far as possible. ...

[32] The curator emphasised that section 28(2) of the Constitution should be read with section 28(1)(b) which provides that every child has a right to family or parental care, or appropriate alternative care when removed from the family environment. Taken together, he contended, these provisions impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue. They are:

- To establish whether there will be an impact on a child.
- To consider independently the child’s best interests.
- To attach appropriate weight to the child’s best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.

[33] These appear to me to be practical modes of ensuring that section 28(2) read with section 28(1)(b), is applied in a sensible way. They take appropriate account of the pressures under which the courts work, without allowing systemic problems to snuff out their constitutional responsibilities. Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all

the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.

[34] In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.

[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.

[36] There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If on the Zinn triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

[39] The second consideration is the duty on the State to punish criminal misconduct. The approach recommended in paragraph 36 makes plain that a court must sentence an offender, albeit a primary caregiver, to prison if on the ordinary approach adopted in Zinn a custodial sentence is the proper punishment. The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the Zinn approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them.

[41] The Zinn triad postulates that an element of the circumstances of the primary caregivers that will be taken into account is the special severity for the caregivers of being torn from their children. This, however, is a consequence of their misconduct for which the law, in the light of all the circumstances, will require that they take appropriate responsibility. Section 28(1)(b) is concerned with something different, namely, the indirect but potentially very powerful impact on the children.

[42] The children are innocent of the crime. Yet, as the amicus points out, children's needs and rights tend to receive relatively scant consideration when a primary caregiver is sent to prison. The amicus asserts that in practice the Zinn triad is usually applied in a manner that focuses on the offender and pays little attention to the children. Yet, separation from a primary caregiver is a collateral consequence of imprisonment that affects children profoundly and at every level. Parenting from a distance and a lack of day-to-day physical contact places serious limitations on the parent-child relationship and may have severe negative consequences. The children of the caregiver lose the daily care of a supportive and loving parent, and suffer a deleterious change in their lifestyle. Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.

