

# From mothering behind bars to parenting beyond barriers? The right to family life and the politics of imprisonment

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There are, of course, a number of concerns and difficulties associated with the imprisonment of a parent. In the present article, however, my discussion will focus only on one issue, namely access to and removal from prison mother and baby units. More specifically, this paper will look at recent case law on the prison service's administration of these units in order to suggest that more might be done in this context to protect the Article 8 rights, of both an imprisoned mother and her child.

## THE BACKGROUND: MOTHERING BEHIND BARS

Despite a European Parliamentary Assembly Resolution in 1995 (Recommendation 1257) encouraging more limited recourse to prison sentences for women, the past decade has seen a dramatic increase in the UK's female prison estate. On May 5, 2006, the women's prison population stood at 4,400, whilst in 1995 it stood at an average of 1,998. Yet, there is no evidence to suggest an increase in the severity of the crimes that women are committing. Indeed, most of this rise can be explained by a significant increase in the severity of sentences being issued. In 2001, a woman convicted of theft or handling at the Crown Court was two times more likely to be sent to prison than she was a decade previously, and the chances of a woman receiving a custodial sentence at the magistrates' court had risen seven-fold during this period. Yet the custodial sentences imposed on women continue to be of short duration and for minor offences. Indeed, the average length of sentence imposed upon a female prisoner is 10 months, with a substantial proportion of women serving sentences of three months or less. What's more, the vast majority of female prisoners continue to be held for non-violent offences, with drug offences and theft/fraud accounting for the bulk of convictions (Home Office, *Statistics on Women and the Criminal Justice System 2003* (Research Development and

Statistics Directorate, 2004) available at <http://www.homeoffice.gov.uk/rds/pdfs2/s95women03.pdf>.

Remarkably, official statistics on the percentage of women in prison who are also mothers have not in the past been collated. It is estimated, however, that more than 17,700 children are separated from their mother by imprisonment every year (see J Sherlock, *Young Parents: From Custody to Community*, Prison Reform Trust, 2004, p 2, and see also *Hansard*, House of Commons Written Answer, May 16, 2003). A survey carried out by Caddle and Crisp in 1996 found that 66% of female prisoners at that time were mothers, with one-third having one or more child under the age of five (see D Caddle & D Crisp, *Mothers in Prison*, Home Office Research Finding 38, 1997, and D Caddle & D Crisp, *Imprisoned Women and Mothers*, Home Office Research Study 162, 1997). While 71% of these women had been living with their children immediately before imprisonment, only 1% remained with them in a prison mother and baby unit. Grandparents cared for 24%, female family members or friends for 17% and 8% of the children had been placed in local authority care. Strikingly, fathers cared for only 9% of the children in this study.

Yet this contrasts sharply against surveys conducted with imprisoned fathers, which reveal that in the substantial majority of cases, children continue to be cared for by their mother or their father's partner during his imprisonment

(see C Van Nijnatten, “Children in Front of Bars” (1997) 41 (1) *International Journal of Offender Therapy and Comparative Criminology* 45 – 52). This disparity can, of course, partly be explained by the fact that approximately two thirds of female prisoners are lone mothers (M. Richards et al, *Imprisonment and Family Ties*, Home Office Research and Statistics Bulletin 38, 1996). But even where the children in Caddle and Crisp’s research had been living with both parents at the time of their mother’s imprisonment, it was twice as likely that they would be cared for by grandparents, rather than by their father, thereafter.

While we might well question these gender dynamics, what this suggests is that the impact of imprisonment on children will often be greater where it is their mother that is incarcerated. This has been supported, moreover, by studies which illustrate that the social, behavioural and psychological difficulties generally experienced by the children of imprisoned parents are, for various reasons, intensified in cases where the mother has been removed (see J Woodrow, “Mothers inside children outside” in R Shaw (ed) *Prisoners’ Children: What are the issues?* (Routledge, 1992), pp 29–40; and R Shaw, “Prisoners’ children and politics: an aetiology of victimisation”, (1997) 4 (3) *Children and Society* 315 – 25).

Together, then, these trends and studies have brought the issue of the treatment of imprisoned mothers and their children into sharp focus, and have led to increasing pressure upon the prison service to find new ways of maintaining, or at least properly respecting, the mother-child relationship. In a context in which almost half of all women prisoners are held more than 50 miles away from their homes and in which there has been a sharp decline in the number of visits being received by all prisoners – see *Just Visiting? A Review of the Role of Prison Visitors’ Centres*, Prison Reform Trust, 2001 – considerable attention has focused on mediating the negative impact of separation during imprisonment. An example of this has been the creation of more child-friendly visiting environments and the introduction of compassionate grounds for home leave for primary carers (*Justice for Women – the Need for Reform*, Report of the Committee on Women’s Imprisonment (Chaired by Professor D Wedderburn), Prison Reform Trust, 2000). Equally, however, there has been pressure from various quarters not just to mediate but actually to avoid altogether this mother-child separation, even after a conviction.

Thus, the Council of Europe’s report on *Mothers and Babies in Prison* recommended that the majority of female offenders with young children should be managed in the community, with custodial sentences only being invoked as a last resort (*Mothers and Babies in Prison*, Council of Europe Parliamentary Assembly, Doc 8762, 2000). While such sentencing policy has been challenged for perpetuating questionable gender stereotypes according to which men’s parental role is undermined whilst women’s maternal role is privileged – see M Fox, “Feminist Perspectives on Theories of Punishment” in D Nicholson & L Bibbings

(eds), *Feminist Perspectives on Criminal Law* (Cavendish, 2000), pp 49-70 – there is some evidence of judicial support for it. In the case of *R v Mills* (2002) *The Times*, January 14, for example, a custodial sentence imposed on a mother convicted of a dishonesty offence was overturned on the basis that she was responsible for her young children and was of previous good character.

### PRISON MOTHER AND BABY UNITS: PARENTING BEYOND BARRIERS?

One further way of dealing with at least some of the issues surrounding the separation of imprisoned mothers and their children lies, of course, in the provision of prison mother and baby units: see *Report of a Review of the Principles, Policies and Procedures on Mothers and Babies / Children in Prison*, Prison Service, 1999; *Response and Action Plan to the Report of a Review of the Principles and Procedures on Mothers and Babies / Children in Prison*, Prison Service, 1999. Whilst places in such units are extremely limited in England and Wales, where they are available they offer the possibility to postpone the moment of separation pending either alternative childcare arrangements or suitable bonding between a mother and her child. In addition, where the child is very young and the mother’s sentence is very short, they can avoid the need for separation altogether, whilst still ensuring that the convicted parent is incarcerated.

Perhaps unsurprisingly, there are conflicting views about the appropriateness of allowing babies and young children to reside with their mothers in a prison environment at all. A discussion on this issue is contained in *In the Best Interests of Babies?* The Howard League for Penal Reform Submission to the Prison Service Review of Mothers and Babies in Prison, 1999.

While some commentators have suggested that enforced separation of a mother and child constitutes a kind of “emotional mutilation” and have argued for the expansion of prison facilities to accommodate more children, others have suggested that the general unsuitability of the prison environment means that separation, if it must occur, should always take place at the point of imprisonment.

Settling on a compromise between these two positions, the English Prison Service has accepted that the welfare of a young child may require a brief stay with its mother in prison but has placed restrictions on such stays in recognition of the unsuitable nature of this environment for older children. As a result, Prison Service Order 4801, which deals with the provision and management of mother and baby units, has stipulated that, other than in exceptional circumstances where discretion may be exercised, children should not remain in a unit once they have reached the age of 18 months. But in a context in which the Prison Service and others have often accepted that this 18 month age limit is not supported by any compelling evidence establishing it to be the optimum age for mother-child separation, the legality and application of

this policy has been the subject of a number of high profile challenges in recent years.

In *P&Q v Secretary of State for the Home Department* [2001] EWCA Civ 1151 for example, the Court of Appeal, despite affirming the legality of this policy, noted that it should not be applied in too rigid a fashion in any given case. What's more, it accepted that this kind of enforced separation of a child from its imprisoned mother constituted an infringement of Article 8 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and so needed always to be carefully justified. This decision was followed, however, by the case of *CF v Secretary of State for the Home Department* [2004] EWCH 111 (Fam) in which the Family Division, under the judgment of Munby J, appeared to limit the scope for such scrutiny of the Prison Service's management of mother and baby units. (For a fuller discussion of the last two points see V Munro, "The emerging rights of imprisoned mothers and their children" (2002) 14 (3) *Child and Family Law Quarterly* 303 – 25, and V Munro, "Turning rights from the outside in: re-visiting the politics of separation in prison mother and baby units" (2005) 17 (4) *Child and Family Law Quarterly* 545 – 54).

Whilst not disputing that separation constituted an infringement of the Article 8 right to respect for family life, certainly of the mother and potentially also the child, the judgment of the court in *CF* focussed on the need to balance this with the right to respect for private life. More specifically, Munby J argued that respect for private life entailed the right to establish and develop relationships with other human beings and that since the child's ability to do this was restricted, if not obliterated, by residence in a prison mother and baby unit, a proper reading of Article 8 may in fact entail, rather than contraindicate, enforced separation.

Since the passing of the Human Rights Act 1998, decisions in cases such as *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 have indicated that there is a need for the court to engage in a more detailed and rights-oriented scrutiny of the actions of public bodies, including the Prison Service. Certainly, the Court of Appeal in *P&Q*, while acknowledging the need to show appropriate deference to the expertise of the Prison Service, did not suggest that this required uncritical acceptance. Indeed, the tone of that decision suggested that the lack, in prisons, of facilities such as child care and time-out provisions, parent training and counselling, which had in the past provided a self-perpetuating justification for enforced separation of imprisoned mothers from their children, would no longer be sufficient to justify an infringement of Article 8 (see, for example, *R v Governor HM Holloway Prison, ex parte L* (1999) December 23, (unreported)). Against that context, therefore, the tendency in Munby J's judgment in *CF* to take the current limitations of the prison environment as inevitable and immutable is striking, and also somewhat disappointing.

Indeed, this decision affords little opportunity for innovative thinking about the ways in which a child's right to develop relationships with others could be respected without separation.

The implications of this are considerable when we recall that prison service mother and baby units elsewhere in Europe are already offering different facilities, in consequence of which many accommodate far older children without any apparent detrimental effect on their welfare. In Germany, for example, children are allowed to stay in prisons until they are six years old, in the Netherlands until they are four, and in Switzerland, Portugal and Denmark until they are three (see D Caddle, *Age Limits for Babies in Prison – Some Lessons from Abroad*, Home Office Research Development and Statistics Directorate 80, 1998; R. Vis, *Mothers and Babies in Prison*, Council of Europe, 2000). Of course, we need to be careful about assuming an unproblematic transplant of prison practice from one jurisdiction to another, particularly where the penal culture may be quite different. There may be good cause to be a little more circumspect in England and Wales and to reject any spontaneous raising of age limits for children without broader reform.

To that extent, the concerns voiced in regard to the decision by the Governor of Scotland's Cornton Vale Prison in 2004 to allow children up to the age of five to remain with their imprisoned mothers were not without merit (see K Foster, "Jail's bold new step will allow children to stay with mothers", *Scotland on Sunday*, Sunday, August 15, 2004; L Catan, *The Development of Young Children in Prison Mother and Baby Units*, Home Office Research and Planning Unit Bulletin 26, 1989). That said, however, comparative experience from elsewhere does suggest that some fresh thinking around penal policy in general, and around the imprisonment conditions of women and mothers in particular, could play a vital role in permitting greater protection to Article 8 rights, as well as in ensuring that the best interests of individual children are safeguarded, both up to the 18 month age limit and some way beyond it.

At Askham Grange prison, it appears that a number of promising developments along these lines have already been undertaken. Its in-house nursery is attended not only by children resident in the prison, but also by fee-paying under threes from the local community. Children are taken swimming regularly and to a playgroup outside of the prison. What's more, mothers are directly encouraged to play with their children, to learn about health and nutrition and to go on day trips outside the prison grounds as a family (see J North, *Getting it Right? Services for Pregnant Women, New Mothers, and Babies in Prison*, The Maternity Alliance, 2005). It is lamentable, therefore, that despite the fact that the mother in the *CF* case had been approved for a move to Askham Grange by the time of the court hearing, Munby J did not consider the ability of her child to develop

relationships with others in furtherance of her Article 8 rights within this unit environment.

Of course, it is significant, and no accident, that Askham Grange is an open prison, and indeed the only open prison in England with a mother and baby unit facility. The scope for implementing similar regimes in closed prisons, where security restrictions are more demanding and the prison population is arguably more challenging, may be limited. That said, there are still important lessons to be learned from this good practice. In 2004, for example, a report on New Hall Prison noted that the mother and baby unit grounds had not been developed to allow mothers to take their babies outside despite the feasibility of so doing, whilst a report on Styal identified a lack of basic things such as toys and learning materials in the unit's communal area (J North, *Getting it Right? Services for Pregnant Women, New Mothers, and Babies in Prison*, The Maternity Alliance, 2005).

In addition, there remains here one further, and perhaps more pressing question – namely, if closed prisons cannot offer excellent services for mothers and babies, should the mothers and babies not be in an open prison? In 1997, the *Women in Prison* report (HM Chief Inspector of Prisons for England and Wales, *Women in Prison – A Thematic Review*, Home Office, 1997) recommended that there should be considerably more places for women in open prisons and in its 1999 Action Plan, the Prison Service acknowledged that the best interests of a child living with its mother in prison would indeed be served by living in a low security environment (*Response and Action Plan to the Report of a Review of the Principles and Procedures on Mothers and Babies / Children in Prison*, Prison Service, 1999). Despite this, the plan made no commitment to increase access to, and use of, such facilities for women. Indeed, between 1997 and the *Women in Prison* follow up report in 2001 (HM Chief Inspector of Prisons for England and Wales, *Follow Up to Women in Prison*, Home Office, 2001) the number of women in the UK's open prisons actually reduced.

The subsequent call in the Halliday Report (*Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, Home Office, 2001) for increased use of open and semi-open facilities for offenders convicted of non-violent crimes and serving short-term custodial sentences, which it might have been hoped would have an important impact upon the treatment afforded to female prisoners, has also yielded disappointing results: see, for example, E Player, "The reduction of women's imprisonment in England and Wales", (2005) 7 (4) *Punishment and Society* 419 – 39. And while new women's

prisons have subsequently been opened which include mother and baby units, it is arguably telling that these have all been established on the basis of a closed security arrangement.

## CONCLUSION

There are clearly a number of difficult questions posed by the increasing rates of female incarceration and by the complex interface between dealing with women as offenders and as mothers. While prison mother and baby units should not necessarily be looked upon as the best overall or ultimate solution, they do have a vital role to play in those cases in which a custodial sentence is appropriate and yet separating a child from its mother at the point of imprisonment would have a detrimental impact.

While Munby J was certainly right to emphasise the independent demands of respecting a child's right to private life under Article 8 in this context, it is disappointing that he drew on such a restricted pallet to paint the picture of how such rights could, and could not, be protected in the prison environment. In a context in which many of the progressive possibilities for prison mother and baby units are yet to be seen, and in which open and semi-open prison facilities are yet to be seriously pursued, the point at which both welfare and rights considerations dictate that a child should be separated from its imprisoned mother remains uncertain.

What's more, in a context in which, as Katz concludes (in "Young lives, lost rights", action for prisoners," *Action for Prisoners' Families News*, Autumn 2003, at p 17) that "large numbers of children (of imprisoned mothers) are in ad hoc, informal care arrangements...seldom checked by any statutory authority," we must surely question the extent to which we are in the end protecting these children by refusing them access to such mother and baby units. 

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