

MITIGATING MOTHERHOOD: CENTERING THE RIGHTS OF CHILDREN AND MOTHERS IN CRIMINAL SENTENCING IN ENGLAND AND WALES

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Abstract

This Article examines the evolving legal and policy frameworks surrounding the sentencing of mothers and pregnant women in England and Wales, focusing on the balance between punitive justice and the rights of children. Tracing two decades of legal precedent, it highlights key milestones, including the landmark case *R v. Petherick*, and subsequent developments in case law and sentencing guidelines. Despite incremental progress, inconsistencies in lower courts persist, with sentencers often failing to adequately weigh the disproportionate impact of imprisonment on dependent children and pregnant women. Notable cases reveal the judiciary's gradual recognition of the unique harms associated with maternal incarceration, underscored by catastrophic events such as infant deaths in prison that have spurred public and professional discourse. This Article underscores the necessity for legislative reforms to prioritize non-custodial sentences for mothers and pregnant women, ensuring a comprehensive assessment of family impacts in sentencing decisions. Recent appeals in 2024 illustrate a growing judicial awareness, though gaps remain in first-instance courts' application of these principles. To safeguard children's welfare and uphold family rights, this Article advocates for statutory presumptions against custodial sentences in these contexts, aligning justice with broader social and developmental outcomes.

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INTRODUCTION

When a mother or pregnant woman is sentenced in a criminal court, the decision and its outcome may interfere with her child or children's right to family life.¹ In 2001, the civil division of the Court of Appeal of England and Wales formally recognized the need to consider dependent children when sentencing a mother in a public law case that challenged prison policy on the upper-age limit for babies living in prison Mother and Baby Units.² However, it has taken more than twenty years for the criminal courts to catch up and formally recognize the true impact of a sentence on dependent children or a woman's pregnancy as an essential part of the sentencing calculus when a woman is sentenced.³

In this Article, we analyze the development of sentencing practice over the past two decades to understand the process of change. The landmark case of *R v. Petherick*⁴ set out the considerations English courts should give to the rights of dependent children under Article 8 of the European Convention of Human Rights (ECHR)⁵ to respect family life and provide a precedent for maternal sentencing cases. Since *Petherick*, nineteen sentencing appeals from mothers have been reported in the criminal division of the Court of Appeal, and this Article considers each of the decisions in those cases in order to chart the development of legal practice concerning the sentencing of mothers and pregnant women. The case law

1 Human Rights Act 1998, c. 42 pmb1. (UK) (stating that in England and Wales the right to family life as set out in Article 8 of the European Convention of Human Rights is given effect in domestic law by the Human Rights Act 1998).

2 *R (on the application of P and Q) v. SOS for the Home Department* [2001] EWCA (Civ) 1151 (Eng.).

3 See *Sentencing Pregnant Women and Mothers*, SENT'G COUNCIL (Apr. 1, 2024) (UK), <https://www.sentencingcouncil.org.uk/news/item/sentencing-pregnant-women-and-new-mothers/> [https://perma.cc/HHY9-SPZQ].

4 *R v. Petherick* [2012] EWCA (Crim) 2214 ¶ 17 (Eng.) (“First, the sentencing of a defendant who has a family inevitably engages not only her own article 8 right to family life but also that of her family and that includes (but is not limited to) any dependent child or children.”).

5 European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

and sentencing guidelines⁶ have established new principles and created new obligations for the sentencing courts with regard to pregnant women and mothers, but the process of change has been piecemeal and incremental. There have been periods of accelerated activity when policy and practice have been influenced by particular catastrophic events such as the COVID-19 pandemic, prison overcrowding,⁷ and the deaths of two babies in women's prisons in England.⁸ However, application of these principles remains knee-jerk and inconsistent. Without legislative change that significantly limits custodial options, mothers will continue to suffer punishments that cause disproportionate harm to themselves and their children.

I. 2001–2012: *Petherick* and the Right to Family Life

The first reported case to recognize a child's Article 8 ECHR right to family life in the context of maternal sentencing was *R (on the application of P and Q) v. SOS for the Home Department* in 2001.⁹ Lord Phillips stated that the sentencing of a parent for a criminal offense engages the right to family life of both the parent and the child, and the right is not automatically lost by reason of criminal conviction.¹⁰ He noted that Article 8 dictates that any interference by the state with a person's right to family life must be in response to a pressing social need and proportionate to the legitimate aim pursued; the more serious the interference, the more compelling the justification must be; and interference cannot be much more serious than the act of separating a mother from a very young child.¹¹ The following year, a thirty-three-year-old mother of two was sentenced to eight months of

6 The Sentencing Council for England and Wales issues sentencing guidelines for use in the courts. See SENT'G COUNCIL (UK), <https://www.sentencingcouncil.org.uk> [https://perma.cc/7VJT-PJXP].

7 See *R v. Manning* [2020] EWCA (Crim) 592 ¶¶ 41–42 (Eng.); *R v. Seed and Stark* [2007] EWCA (Crim) 254, ¶ 2 (Eng.) (“When considering the length of a custodial sentence it should properly be borne in mind that the prison regime is likely to be more arduous as a result of overcrowding.”).

8 See PRISON & PROB. OMBUDSMAN, INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY B AT HMP & YOI STYAL ON 18 JUNE 2020 (2022) (UK) [hereinafter INDEPENDENT INVESTIGATION INTO DEATH OF BABY B]; PRISON & PROB. OMBUDSMAN, INVESTIGATION INTO BABY DEATH AT HMP BRONZEFIELD IDENTIFIES KEY FAILINGS (2021) (UK) [hereinafter INDEPENDENT INVESTIGATION INTO DEATH OF BABY A]; SURREY COUNTY COUNCIL, INQUEST TOUCHING THE DEATH OF AISHA CLEARY: FINDINGS AND CONCLUSION (2023) (UK), https://www.surreycc.gov.uk/__data/assets/pdf_file/0003/346557/A-Cleary-Findings-and-Conclusion-28-July-2023.pdf [https://perma.cc/QL9M-WTQV] [hereinafter SURREY CORONER'S COURT].

9 *R (on the application of P and Q) v. SOS for the Home Department* [2001] EWCA (Civ) 1151 (Eng.).

10 *Id.*

11 See *id.* ¶ 78.

imprisonment for two counts of obtaining services by deception.¹² On appeal to the Court of Appeal, the Lord Chief Justice said, “With a mother who is the sole support of two young children . . . the judge has to bear in mind the consequences to those children if the sole carer is sent to prison.”¹³ The Court of Appeal found that it was not necessary for the mother to be sent to prison, and they quashed the original sentence, replacing it with a community rehabilitation order for six months.¹⁴ “The message that this court would like to convey to those who have the difficult task in sentencing in cases of this sort is that a community sentence is normally appropriate but if imprisonment is necessary, the shortest prison sentence possible should be imposed.”¹⁵

The next widely reported case was *R v. Bishop*¹⁶ in 2011, which established that it is the responsibility of the sentencing court to obtain sufficient information to allow it to balance the punishment of the offender against the impact of the offender’s punishment on the child. In the same year, the High Court heard a judicial review challenge to a magistrate court’s decision to commit a mother to prison for non-payment of Council Tax.¹⁷ The decision was made without any consideration of the potential impact on her children, including who might care for them in her absence.¹⁸ She did not expect to be imprisoned and took her children to school on the morning of the hearing, fully expecting to collect them that afternoon. The High Court found:

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 the information it needs in order to assess the effect of the parent’s imprisonment on them, then the court must make inquiries so that it is properly informed.¹⁹

12 *R v. Mills* [2002] EWCA (Crim) 26 (Eng.).

13 *Id.* ¶ 15.

14 *See id.* ¶ 19.

15 *Id.* ¶ 18.

16 *R v. Bishop* [2011] EWCA (Crim) 1446 (Eng.).

17 *See R (on the application of Aldous) v. Dartford Magistrates’ Court and Gravesham BC* [2011] EWHC (Admin) 1919 (Eng.).

18 *See id.* ¶ 15.

19 *Id.* ¶ 16.

Despite the cases at the start of the new millennium that drew attention to the relevance of children's rights in maternal sentencing decisions, many sentencers continued to pass sentences that failed to properly balance the harm to children with the need to punish or deter. A review of thirty-three sentencing appeals from mothers who had been sentenced to imprisonment between 2003 and 2011 revealed that in twenty-one of the twenty-seven cases where the sentence was reduced, the consideration of dependent children was a specified factor leading to that reduction, indicating that the lower courts were not affording due weight to that issue when sentencing.²⁰

The issue of dependent children had, however, reached a level of recognition by the Sentencing Council of England and Wales, and this was the next step forward in the incremental change of approach. Judges and magistrates must sentence in accordance with the sentencing guidelines produced by the Sentencing Council of England and Wales unless there is an exceptional reason to depart from them.²¹ Guidelines develop in response to precedents set in case law, relevant research, and social policy considerations. Prior to 2011, the guidelines made no reference to dependent children, but for the first time in 2011, the assault guideline²² included in the list of factors that *could* be considered in mitigation whether "the defendant is the sole or primary carer for dependent relatives."²³ That mitigating factor has been included in every sentencing guideline published since that date. It is significant that the importance of considering dependents reached the Sentencing Council and that they chose to embed it in a guideline.

20 See Shona Minson & Rachel Condry, *The Visibility of Children Whose Mothers Are Being Sentenced for Criminal Offences in the Courts of England and Wales*, 32 *LAW CONTEXT* 28, 39 (2015); see also Rona Epstein, *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*, 2012 *COVENTRY L.J.* 1 (2012). Cases referenced in these papers were found through daily searches of court lists and newspapers and by placing notices in magazines for women in prison. The sample analyzed forty-three appeal cases, ten from the magistrates' court to the Crown and thirty-three in which mothers appealed their custodial sentences from the Crown Court to the Court of Appeal between 2003 and 2011. In seven of the cases appealed to the Crown Court, the Crown Court judge reduced the sentence because the children had not been given sufficient consideration. In twenty of the cases appealed to the Court of Appeal, the appeal court found that the original sentencing court had given insufficient weight to the defendant's motherhood as a mitigating factor.

21 See *About the Sentencing Council*, SENT'G COUNCIL (UK), <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/> [<https://perma.cc/L5C9-4GYU>].

22 SENT'G COUNCIL FOR ENG. & WALES, *ASSAULT DEFINITIVE GUIDELINE (2011) (UK)*, [<https://perma.cc/GS36-8QU5>].

23 *Id.* at 5.

The next significant advancement in ensuring judicial consideration of child dependents when sentencing mothers took place in 2012. In the cases of *R v. Solliman*²⁴ and *HH v. Italy*,²⁵ the United Kingdom Supreme Court stated that the rights of children are a distinct consideration that must weigh heavily in decisions about them. Then, in October 2012, in the case of *R v. Petherick*,²⁶ an appeal of the sentence levied on a mother, the Court of Appeal was invited to consider the relevance of the rights of a child to family life under Article 8 of the ECHR. Rosie Lee Petherick was twenty-two years old and the single mother of a sixteen-month-old boy.²⁷ She pleaded guilty to causing death by dangerous driving and driving with excess alcohol and was sentenced to a term of imprisonment of four years and nine months.²⁸ She appealed her sentence to the Court of Appeal on the grounds that her son's right to family life under Article 8 was engaged in the sentencing process.²⁹ The court took the opportunity to set out a number of principles that sentencing courts should apply. They can be summarized as follows:

1. The sentencing of a defendant inevitably engages their own Article 8 right to family life, but also that of their family, including any dependent child or children.
2. Three questions should be asked in any case that impinges on family life:
 - (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?

24 *R v. Solliman* [2011] EWCA (Crim) 2871, ¶ 32 (Eng.) (“[T]he judge failed to consider the consequences of the sentence of imprisonment on the appellant, given that he was the sole carer for the children. The sentence involved serious consequences for the children, breaching their rights . . . This was not an appropriate case for a deterrent sentence.”).

25 *HH v. Italy* [2011] (UKSC) EWCA (Crim) 2871 (Eng.) (“Where the decision directly affects the child's upbringing, such as the decision to separate a child from her parents, then the child's best interests are the paramount, or determinative, consideration.”).

26 *R v. Petherick* [2012] EWCA (Crim) 2214 (Eng.).

27 *Id.* ¶ 2.

28 *Id.* ¶ 1.

29 *See id.* ¶ 15.

3. When there are dependent children, that is a relevant factor in sentencing.
4. A criminal court should be informed about the domestic circumstances of a defendant, and if the family life of others, especially children, will be affected, the criminal court “will take it into consideration.”
5. The legitimate aims of sentencing need to be balanced against the effect of a sentence on family life.
6. When the case is on “the cusp of custody,” the interference with the family life of children can sometimes tip the scales and make an otherwise proportionate custodial sentence disproportionate.
7. The likelihood of it being disproportionate is reduced the more serious the offense.
8. Even if custody cannot be avoided, the effect on children might afford grounds for mitigating the length of sentence. There is no standard or normative adjustment.

Ms. Petherick’s sentence was adjusted to “reflect the combined factors of personal mitigation, coupled with the effect upon the child”³⁰ and was reduced to a term of three years and ten months.

II. Following Petherick: 2012–2017

Despite the clarity of *Petherick*, there was not an immediate or discernible change in the principles applied when sentencing mothers of dependent children. Whether the judiciary was unaware of the precedent or failed to apply it properly at the first instance, a series of appeal cases confirmed that even the Court of Appeal was reluctant to give weight to the impacts of a prison sentence on dependent children when sentencing mothers.

In the first appeal from a sentence that cited *Petherick*, *R v. Reasat*³¹ in 2013, a mother appealed her sentence of six months of imprisonment for social security fraud on the grounds that it was manifestly excessive and that the judge failed to pay sufficient attention to the fact that she was the main caregiver for her autistic son. There was evidence at appeal that the sentence had been “life changing” for her son, who, according to a local-authority social worker, was having an “extreme reaction” to his mother’s imprisonment.³² He was

30 *Id.* ¶ 27.

31 *R v. Reasat* [2013] EWCA (Crim) 2124 (Eng.).

32 *Id.* ¶ 16, 19.

displaying suicidal tendencies, had tried to kill himself with an overdose, and had tried to burn himself with an iron.³³ The letter to the court stated that “his behaviours range from despair and sadness to rage and anger.”³⁴ It is hard to imagine a clearer example of a case in which the interference with the family life of children could “tip the scales” and mean that a proportionate sentence would become disproportionate. Shockingly, the Court of Appeal did not grant the appeal; they described the six-month sentence as “merciful.”³⁵ The offense had crossed “the custody threshold,” and they did not believe it was appropriate to suspend the sentence.³⁶ The court did not explain why the sentence could not be suspended despite noting that “the effect of the appellant’s sentence [had] been life-changing on her son.”³⁷

The Court of Appeal’s decision was unsympathetic, and it sent the message that even in a non-violent offense, the impact of a relatively short sentence on a disabled child whose life had been gravely affected by his mother’s incarceration, even to the point of suicidal attempts, is insufficiently serious to make immediate custody disproportionate.

In the case of *R v. H(R)*³⁸ in 2016, a mother appealed a sentence of twenty months of imprisonment on the basis that the sentence was too long and the judge paid insufficient attention to the impact of imprisonment on her child. The Court of Appeal did not seem to think that *Petherick* had established a duty for the court to consider dependent children. Rather, it stated that it was “open to the court” whether to include children as a relevant consideration.³⁹ The court referenced *Petherick*:

This is not a matter of mitigation personal to the offender; rather, it arises from the need for the court to have regard to the interests of a child or children affected. Careful consideration of the principles laid down by this

33 *Id.* ¶ 19.

34 *Id.*

35 *Id.* ¶ 24.

36 *Id.*

37 *Id.* In this jurisdiction, any sentence of up to two years of imprisonment can be suspended for a period of two years. This means that the sentence is a custodial sentence, but it is not activated during the term unless the subject of it breaches the conditions attached or commits another offense, at which point they will be imprisoned immediately to serve their original sentence. Criminal Justice Act 1967, c. 80, § 39 (Eng.).

38 *R v. H(R)* [2016] EWCA (Crim) 1754 (Eng.).

39 *Id.* ¶ 14.

court in *R v. Petherick* . . . is required so that wider public interests and those of a child are dealt with proportionately.⁴⁰

The court described the impact on the child as “a situation which has been caused entirely by the applicant’s own irresponsible and criminal actions which placed her own priorities before those of the child.”⁴¹ They gave no explanation as to how either they or the court below considered the separate rights of the child in the balance and simply said that they were unpersuaded that anything other than the sentence imposed would have been appropriate.

Practice within the judiciary more widely had not caught up with the clear direction set by the Sentencing Council, Supreme Court, and Court of Appeal. Research undertaken with Crown Court judges from 2014 to 2015⁴² found that, as with the Court of Appeal, although there was some awareness of the case law on consideration of dependent children, the judiciary was simply not taking a consistent approach to its application. Each judge was asked, “Do you know of any sentencing guidelines or authorities which you would follow when determining the weight that should be given to a defendant’s primary or sole caregiving status?” The judges demonstrated a striking lack of knowledge of the guidelines, with three saying they “were not aware that the sentencing guidelines contained any guidance on the consideration of dependents in sentencing.”⁴³ In terms of the Court of Appeal authorities on the issue, three were unaware of higher court guidance on this subject; two knew of authorities but did not believe that they needed to be considered in every case; and, most surprisingly, three claimed to know of the authorities and interpreted them to mean that children should not be a factor that mitigated in favor of a shorter or non-custodial sentence.⁴⁴ Just over half the judges “knew that there were Court of Appeal and Supreme Court authorities on the point and understood that these required them to balance the impact on the family with the other factors in the case,” and two mentioned the leading authority of *R v. Petherick*.⁴⁵ However, eleven judges reported relying on their own judgment to determine the relevance of dependents when making sentencing

40 *Id.*

41 *Id.* ¶ 25.

42 See SHONA MINSON, MATERNAL SENTENCING AND THE RIGHTS OF THE CHILD 139–40 (2019).

43 *Id.* at 139.

44 See *id.* at 139–40.

45 *Id.* at 140.

decisions.⁴⁶ Some judges even believed that they should not consider dependent children when sentencing because to do so would be “contrary to justice.”⁴⁷ In terms of the best interests of the child, “[n]o judge said that the interests of the child must always be a consideration . . . nor did any judge refer to the duty on the court to ensure that they have sufficient information about the children to undertake the correct balancing exercise.”⁴⁸

Third-sector organizations turned their attention to these issues, fueled by courts’ continued resistance to recognizing the relevance of motherhood in mitigation and their concern about increasing numbers of women in prison. In 2015, an independent U.K. charity, the Prison Reform Trust, published a paper entitled, “Sentencing of Mothers: Improving the Sentencing Process and Outcomes for Women with Dependent Children.”⁴⁹ The paper developed from research discussed at two roundtable meetings, at the second of which “senior members of the judiciary and legal experts considered ways in which principles of fairness, proportionality and child welfare apply in the sentencing of mothers and others with primary care responsibilities.”⁵⁰ The paper’s proposals included developing a new overarching principle that courts have a duty to determine whether the defendant had dependent children for whom they had sole or primary caring duties before specifying how the children’s rights and well-being were to be taken into account.⁵¹ They suggested that the court would also be directed to ensure that it had all information relevant to such a determination and, if necessary, adjourn the sentencing decision to obtain this.⁵²

The chair of the Sentencing Council attended the roundtable meeting in 2015, and the Sentencing Council published the “Imposition of Custodial and Community Sentences” guideline in 2017.⁵³ It included limited direction on considering dependents, focusing on

46 *See id.*

47 *Id.*

48 *Id.*

49 SHONA MINSON, REBECCA NADIN & JENNY EARLE, SENTENCING OF MOTHERS: IMPROVING THE SENTENCING PROCESS AND OUTCOMES FOR WOMEN WITH DEPENDENT CHILDREN (2015).

50 *Id.* at 3.

51 *Id.* at 15.

52 *Id.*

53 *Imposition of Community and Custodial Sentences*, SENT’G COUNCIL (Feb. 1, 2017) (UK), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/> [<https://perma.cc/K4WG-PA9U>].

cases where an offender was on the cusp of custody: “For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.”⁵⁴

The guideline also set out the factors to be weighed when determining whether a custodial term of less than two years could be suspended. One of the three factors that make it appropriate to suspend a custodial sentence is that “immediate custody will result in significant harmful impact upon others.”⁵⁵

The guideline represented notable progress by setting out that the consideration of child dependents was a necessary and reasonable step for sentencers to take. A “Sentencing Decision Flowchart” in the guideline indicated two points at which dependent children should be considered.⁵⁶ First, when determining whether the custody threshold applies, the court should address whether the sentence could in fact be a community sentence because the impact on dependents of a custodial sentence would make custody a disproportionate sentence.⁵⁷ Second, if the sentence was less than two years, the courts should determine whether the sentence could be suspended.⁵⁸ This was a significant change in the procedure and practice of sentencing.

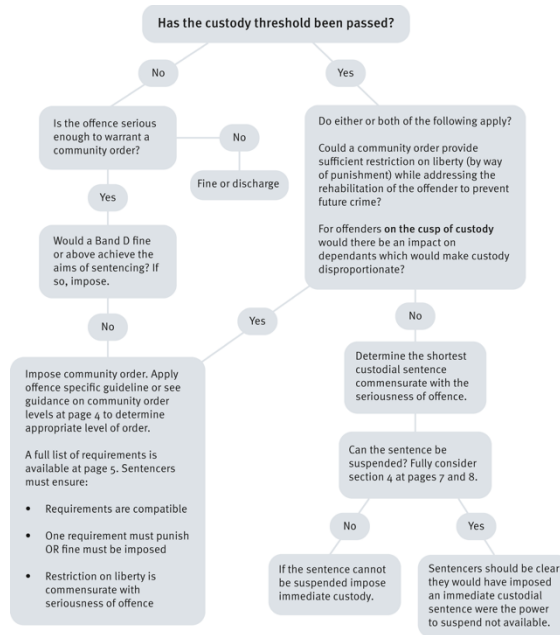
54 *Id.*

55 *Id.*

56 *Sentencing Decision Flowchart*, SENT’G COUNCIL (Feb. 1, 2017) (UK), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-decision-flowchart.pdf> [<https://perma.cc/Z82X-48X7>].

57 *See id.*

58 *See id.*



SENTENCING COUNCIL OF ENGLAND AND WALES, *Sentencing Decision Flowchart*

Two months after the *Imposition of Community and Custodial Sentences Guideline* came into force, the use of the guideline was tested in the Court of Appeal in the case of *R v. Modhwadia*.⁵⁹ Ms. Modhwadia, a thirty-six-year-old mother and the sole carer of three children aged five, nine, and fifteen, was sentenced on February 23, 2017, to six months of imprisonment for the offense of assisting an offender.⁶⁰ The pre-sentence report prepared for the judge at the sentencing hearing expressed “grave concern for the care of her three children if an immediate custodial sentence were imposed.”⁶¹ The report recommended a suspended prison sentence with a rehabilitation activity requirement. The judge at first instance acknowledged the mitigating factor but concluded that “when someone accepts that a serious criminal offense which strikes at the route of the criminal justice system has been committed, a custodial sentence is inevitable. When that happens those who suffer most are the nearest and dearest.”⁶² The judge did not specifically address the issue of

59 *R v. Modhwadia* [2017] EWCA (Crim) 501 (Eng.).

60 *See id.* ¶ 2.

61 *Id.* ¶ 10.

62 *Id.* ¶ 12.

whether the sentence could be suspended, and he was not invited to consider the new guideline. The submission on appeal was that all three factors mitigating in favor of a suspended sentence were present, and it was apparent that immediate custody would result in significant harmful impact upon the children. The appellate court accepted the submissions, followed the new guideline, and concluded that “in all the circumstances . . . the proper outcome would have been to suspend the sentence of imprisonment.”⁶³ The court quashed the sentence of six months’ immediate imprisonment and instead imposed a sentence of six months, suspended for eighteen months.⁶⁴

III. 2018–2020: Political and Policy focus

From 2018 to 2019, more attention was paid to the issue of maternal imprisonment in both policy and political spheres. On June 27, 2018, the government published the *Female Offender Strategy* which aimed to “reduce the female prison population, with fewer offenders sent to custody for short periods.”⁶⁵ There was specific mention of the impact of a custodial sentence on children and the damaging effect of even short prison sentences on women and their families. The publication also emphasized improving the quality and content of pre-sentence reports and a commitment to supporting training material for judges, lawyers, and probation staff.⁶⁶

In 2019, the Parliamentary Joint Committee on Human Rights (“JCHR”) undertook an inquiry on *The Right to Family Life: Children Whose Mothers are in Prison*.⁶⁷ They concluded that urgent change was required in four areas: data collection, sentencing, support for children whose mothers go to prison, and pregnancy and maternity care for women in prison. With regard to sentencing, their recommendations were as follows:⁶⁸

63 *Id.* ¶ 18.

64 *See id.*

65 MINISTRY OF JUSTICE, FEMALE OFFENDER STRATEGY, 2018-6, CM. 9642 (UK).

66 SHONA MINSON, SAFEGUARDING CHILDREN WHEN SENTENCING PARENTS (2018); *see also* Shona Minson, *Safeguarding Children when Sentencing Mothers*, YOUTUBE (Apr. 27, 2020), <https://www.youtube.com/watch?v=XBY7hjsb-O0> [<https://perma.cc/U6VS-D9W6>].

67 JOINT COMMITTEE ON HUMAN RIGHTS, THE RIGHT TO FAMILY LIFE: CHILDREN WHOSE MOTHERS ARE IN PRISON, 2019, HC 160 (UK).

68 *Id.* ¶¶ 46–55.

- The judge must not sentence a primary carer unless a pre-sentence report is available at the hearing. The report must contain sufficient information for the judge to make an assessment of the impact of sentencing on the child.
- Judges should state how they have taken this information into account in their sentencing remarks.
- The duty, established by case law, to keep a child's welfare at the forefront of a judge's mind during sentencing of a primary carer, should be given statutory force.
- If a custodial sentence is given the court must be satisfied that there are care arrangements in place for any children and should defer sentence to allow those arrangements to be made.

There was clearly a growing appreciation of the importance of considering child dependents, and on October 1, 2019, the Sentencing Council published the *General Guideline: Overarching Principles* which provided an “expanded explanation” of the mitigating factor of “sole or primary carer for dependent relatives” that aligned with the recommendations of the JCHR report.⁶⁹ The outcome of many years of dialogue between the judiciary, researchers, lawyers, and parliamentarians, the guideline reflected a growing social awareness of the long-term outcomes children may face as a result of their early-year experiences. The expanded explanation consolidated the principles established in case law and included guidance about the steps the court *should* take to ensure that the impact on children was properly considered in the sentencing process. It included the following principles: for offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. The court should ensure that it has all relevant information about dependent children before deciding on sentence. When an immediate custodial sentence is necessary, the court must consider whether proper arrangements have been made for the care of any dependent children and, if necessary, consider adjourning sentence for this to be done.⁷⁰ When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the Probation Service to address these issues in a pre-sentence report.⁷¹

69 *General Guideline: Overarching Principles*, SENT'G COUNCIL (Oct. 1, 2019) (rev. Apr. 1, 2024), <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> [<https://perma.cc/EQ8F-HM77>] [hereinafter *General Guideline*].

70 *See id.*

71 This has now been removed as a consequence of the Sentencing Guidelines (Pre-Sentence) Reports Bill, which is due to come into force in fall 2025.

In addition, when sentencing a pregnant woman, relevant considerations may include “any effect of the sentence on the health of the offender” and “any effect of the sentence on the unborn child.”⁷²

IV. Pregnancy and Postnatal Mothers

Despite evolving perceptions about mothers with dependent children, it was not uncommon to hear judges say that a woman who was pregnant was trying to manipulate the court, and women must not think that pregnancy was a “get out of jail free card.” The provision of Mother and Baby units in some prisons meant that some sentencers viewed prison as a “good” place for pregnant women, despite the fact that a place on such a unit was not guaranteed and mother/child separation might still take place given the upper age limit of eighteen months for babies in the unit.⁷³ Sentencers had no information about the health care available to pregnant women, nor the risks to women and their children of pregnancy and birth when imprisoned. This began to change in 2019 when the expanded explanation in the sentencing guideline included its first mention of pregnancy, advising sentencers that the effect of the sentence on the woman and the unborn children could be a “relevant consideration” in sentencing.⁷⁴

However, incremental change in sentencing considerations was not enough. Pregnant women continued to be sent to prison, and two babies died in tragic circumstances, bringing public attention to the issues in the years following the publication of the revised sentencing guidelines. In September 2019, an eighteen-year-old woman, Rianna Cleary, gave birth to her daughter Aisha (“Baby A”) in a prison cell alone, and Aisha died.⁷⁵ Nine months later, in June 2020, another baby, Brooke Powell (“Baby B”), was stillborn in a different women’s prison in England.⁷⁶ The Prison and Probation Ombudsman (“PPO”) conducted inquiries

72 *Id.*

73 Michelle Conway, *Prison Mother and Baby Units in England and Wales*, BACK INTO SOC’Y (Apr. 12, 2021), <https://backintosociety.co.uk/2021/04/12/prison-mother-and-baby-units-in-england-and-wales/> [<https://perma.cc/MPF5-M7QL>].

74 *General Guideline*, *supra* note 69.

75 See INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY A, *supra* note 8; see also Hamish Mureddu-Reid, *HMP Bronzefield: Mum Whose Baby Died in Jail Says System is Cruel*, BBC (UK) (Nov. 15, 2023), <https://www.bbc.com/news/uk-england-surrey-67421943> [<https://perma.cc/PMZ9-AY26>] (providing the name of the woman who gave birth in a prison cell in September 2019 and her baby’s name).

76 See INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY B, *supra* note 8; see also May Bulman, *Woman Gave Birth to Stillborn Baby in Jail Without Specialist Help After Nurse Said It Was ‘Painful Period’, Says*

into the deaths of both infants, and a coroner's inquest was held into the death of Aisha Cleary.⁷⁷ Critical findings were made by the coroner in 2023 against the prison and the midwifery provision.⁷⁸ The five-week inquest in 2023, which explored how a baby came to die behind a locked prison door, attracted a great deal of publicity and public awareness on ante- and postnatal care in prison.⁷⁹ This led to new public and professional concern about the continuing practice of imprisoning pregnant women. As mentioned, sentencers did not seem to hesitate to imprison women because of their pregnancy, assuming adequate maternity care was available in prisons, but the PPO Report on Aisha Cleary made it clear that prison was not a safe place for pregnant women and their children:

We consider that all pregnancies in prison should be treated as high risk by virtue of the fact that the woman is locked behind a door for a significant amount of time. In addition, there is likely to be a higher percentage of “avoidant” mothers who have experienced trauma and who are fearful of engaging with maternity care.⁸⁰

Once the high-risk nature of pregnancy in prison was established, appellate courts began to scrutinize sentencing decisions more closely. Some of the women whose appeals were heard contacted solicitors after seeing or hearing media coverage of the tragic baby deaths in prison. The public conversation influenced engagement with the courts. Appeals from the Magistrates Court to the Crown Court are not reported, but since 2020, there have been ten reported sentencing appeals from the Crown Court to the Court of Appeal

Report, INDEPENDENT (UK) (Jan. 10, 2022), <https://www.the-independent.com/news/uk/home-news/prison-baby-stillborn-woman-styal-ombudsman-b1990131.html> [<https://perma.cc/CCG3-CG3B>] (providing the name of the woman who gave birth in a prison in June 2020 and her baby's name).

77 See generally INDEPENDENT INVESTIGATION INTO DEATH OF BABY A, *supra* note 8; INDEPENDENT INVESTIGATION INTO DEATH OF BABY B, *supra* note 8; SURREY CORONER'S COURT, *supra* note 8.

78 See SURREY CORONER'S COURT, *supra* note 8.

79 See generally Tanya Gupta, *HMP Bronzefield Baby Death Followed Systemic Failings – Inquest*, BBC (UK) (July 28, 2023), <https://www.bbc.com/news/uk-england-surrey-66339627> [<https://perma.cc/D3KX-RS7K>]; Diane Taylor, “*Serious Failings*” *Contributed to Baby's Death in 12-hour Lone Prison Birth*, GUARDIAN (UK) (July 28, 2023), <https://www.theguardian.com/society/2023/jul/28/serious-failings-contributed-to-babys-death-in-12-hour-lone-prison-birth> [<https://perma.cc/XFC5-7QMX>]; Channel 4 News, “*Serious Failings*” *Contributed to Baby Death in Bronzefield Prison – Inquest*, YOUTUBE (July 28, 2023), <https://www.youtube.com/watch?v=bbiIaeFRCNQ> [<https://perma.cc/YA2U-T2PE>]; Bulman, *supra* note 75; Katie Razzall, *HMP Styal: My Baby Died Due to Errors in Prison, Says Former Inmate*, BBC (UK) (Sept. 20, 2021), <https://www.bbc.com/news/uk-england-manchester-58598608> [<https://perma.cc/M6JK-WCHM>].

80 INDEPENDENT INVESTIGATION INTO THE DEATH OF BABY A, *supra* note 8.

from women who were either pregnant or had a very young infant. These cases, which are considered in the next few paragraphs of this Article, have provided the appeal court with the opportunity to utilize the expert information available to develop guidelines for sentencing a pregnant or postnatal mother.

In the case of *R v. Doyle*⁸¹ in March 2020, a woman who had a young child and was pregnant was given an immediate custodial term of six months, despite the pre-sentence report recommending a community sentence. The Court of Appeal allowed the appeal and substituted a suspended sentence, noting that the judge at first instance had not referred to the authorities, guidelines, or the ECHR:

This was a case in which the court could and should have suspended the sentences which it imposed . . . Having regard to the young child and to the fact that the appellant is about to give birth, in our judgment, this was a clear case for suspending the term of imprisonment.⁸²

In June 2020, an appeal was heard in the case of *R v. Cheeseman*.⁸³ Ms. Cheeseman gave birth to a baby nine days after being sentenced to six years in prison.⁸⁴ Her appeal was allowed, and the sentence reduced to four years so that she would be able to leave prison with her baby when her baby was eighteen months old, rather than mother and child being separated at that stage.⁸⁵ The cases of *Petherick* and *Doyle* were relied upon in submissions.

The case of *R v. Charlton*⁸⁶ was the first case to consider the relevance and weight of pregnancy in the context of mandatory minimum statutory provisions. The appellant had committed a “third strike” burglary for which the court was required to impose a minimum sentence of three years⁸⁷ unless satisfied that doing so would be “unjust.”⁸⁸ Ms. Charlton was found to be pregnant with twins once in prison serving a three-year

81 *R v. Doyle* [2020] EWCA (Crim) 429 (Eng.).

82 *Id.* ¶¶ 15–16.

83 *R v. Cheeseman* [2020] EWCA (Crim) 794 (Eng.).

84 *Id.*

85 *Id.* ¶ 32.

86 *R v. Charlton* [2021] EWCA (Crim) 2006 (Eng.).

87 *See* Sentencing Act 2020, c. 7, § 314 (Eng.).

88 *R v. Charlton* [2021] EWCA (Crim) 2006 [7] (Eng.).

custodial sentence.⁸⁹ She was the mother of a ten-year-old, and the pre-sentence report had recommended a community punishment (notwithstanding the statutory provisions).⁹⁰ The appeal in December 2021 was allowed, and the original sentence was substituted with a two-year term, suspended for two years.⁹¹ The Court of Appeal recognized that imprisonment is a “heavier” punishment when a woman is pregnant:

Had the recorder [judge] been aware of that fact, we have no doubt he would rightly have taken it into account and given considerable weight to it, for three reasons. First, because imprisonment would now be a far heavier punishment for this applicant than for most other prisoners; secondly, because the pregnancy and births can be expected to increase her motivation to remain drug free; and thirdly, because it is necessary to have regard to the rights of the children who, as things stand, will be born in prison.⁹²

In October 2022, the sentence of five years of imprisonment in the case of *R v. McGrory*⁹³ was successfully appealed, relying on *R v. Rescorl*. Ms. McGrory was the mother of a young child and had given birth to a baby in prison. Her sentence was reduced to four years on the basis that the sentencing judge had sentenced without having any information about the children, when this information “should have been central to the assessment of her personal mitigation.”⁹⁴ This important development illustrated the importance of considering the impact upon children even in cases where custody was inevitable and the offense was not otherwise on the cusp of the custody threshold or suspension.

In *R v. Stubbs*,⁹⁵ the sentence was allowed to stand because although the nine-month sentence of immediate imprisonment was not suspended and Ms. Stubbs was pregnant, the judge had determined the sentence length as “an act of mercy to reduce the sentence

89 *Id.*

90 *Id.*

91 *Id.* ¶15.

92 *Id.* ¶ 14.

93 *R v. McGrory* [2022] EWCA (Crim) 1361 (Eng.).

94 *Id.* ¶ 18.

95 *R v. Stubbs* [2022] EWCA Crim 1907 (Eng.).

to the extent that the applicant's baby would be born after release."⁹⁶ The Court of Appeal therefore did not give leave to appeal. That sentence, of course, did not take account of the possibility of the baby arriving early or any of the concerns about antenatal care in prison, which have now come to the fore. It is not clear that the outcome would be the same if that case were heard today. In January 2024, in the case of *R v. Tamang*,⁹⁷ an appeal against a two-year custodial sentence was quashed and substituted with a ten-month sentence, suspended for twelve months, on the basis that the starting point had been too high and the personal mitigation and the impact on a fourteen-month-old child had not been referred to by the judge.⁹⁸ The Court of Appeal noted that the judge failed to refer to the 2017 Imposition Guideline: "A child of just over a year old should not suffer the incalculable harm of its mother being in prison at such a formative stage of its young life."⁹⁹ The case involved a breach of trust and vulnerable victims, and the court recognized that the "usual" need for immediate custody in such cases could and should nevertheless be modified where there would be an impact on a dependent child.¹⁰⁰

Also in January 2024, the Court of Appeal heard *R v. Bassaragh*,¹⁰¹ the first appeal of its kind since the *Cleary* inquest and findings and the first case to ever consider the impact of pregnancy in the context of mandatory minimum provisions for firearms offenses. The Court of Appeal determined that it was appropriate to depart from such provisions on the grounds of "exceptional circumstances" if "the imposition of the minimum term would result in an arbitrary and disproportionate sentence."¹⁰² The appellant was pregnant, and the original mandatory minimum term of five years of imprisonment was quashed and substituted with a term of two years, suspended for two years. Importantly, the Court of Appeal admitted expert midwifery evidence¹⁰³ and accepted that the following inescapable risks arise when imprisoning a pregnant woman:

96 *Id.* ¶ 30.

97 *R v. Tamang* [2024] EWCA Crim 62 (Eng.).

98 *Id.* ¶ 25.

99 *Id.* ¶ 23.

100 *Id.* ¶¶ 23–25.

101 *R v. Bassaragh* [2024] EWCA (Crim) 20 (Eng.).

102 *Id.* ¶ 13.

103 *Id.* ¶¶ 19–28 (considering the expert evidence provided by Dr. Laura Abbott).

- Pregnant women in prison are seven times more likely to suffer a stillbirth than women in the community and twice as likely to give birth prematurely.¹⁰⁴
- Over one in five pregnant women in prison miss midwifery appointments, increasing the risk of premature birth, miscarriage, and stillbirth.¹⁰⁵
- One in ten pregnant women in prison give birth in-cell or on the way to hospital.¹⁰⁶
- Between 2020 and 2022, four babies born to women in prison required neonatal unit admission (compared with a national average of one in seven).¹⁰⁷
- Criminal justice proceedings and imprisonment are highly distressing environments for pregnant women, with 82% of women in prison reporting that they have mental health problems.¹⁰⁸ Antenatal stress is proven to increase levels of the hormone cortisol in the mother's body, which, when it crosses the placenta, can affect the health of the baby, their brain development, emotional attachment, and early parenting interactions.¹⁰⁹

By 2024, it was undeniable that pregnancy in prison posed grave risks to both mothers and children. A public campaign, “No Births Behind Bars,” brought attention to the issue with media coverage of babies protesting alongside their mothers outside prisons that held pregnant women. The Sentencing Council launched a consultation process on additional guidance for the sentencing of pregnant women. On April 1, 2024, a new factor was added

104 Hannah Summers & Nic Murray, *Pregnant Women in English Jails are Seven Times More Likely to Suffer Stillbirth*, *GUARDIAN* (Mar. 25, 2023), <https://www.theguardian.com/society/2023/mar/25/pregnant-women-in-english-jails-are-seven-times-more-likely-to-suffer-stillbirth> [<https://perma.cc/5QYA-EC4Q>] [hereinafter *Pregnant Women in English Jails*]; Nic Murray & Hannah Summers, *Jailed Women in UK Five Times More Likely to Suffer Stillbirths, Data Shows*, *GUARDIAN* (Dec. 5, 2021), <https://www.theguardian.com/society/2021/dec/05/jailed-women-in-uk-five-times-more-likely-to-suffer-stillbirths-data-shows> [<https://perma.cc/K8P8-EH99>].

105 Press Release, Nuffield Trust, *Ill-Equipped Prisons and Lack of Health Care Access Leave Pregnant Prisoners and Their Children at Significant Risk* (July 19, 2022) (UK), <https://www.nuffieldtrust.org.uk/news-item/ill-equipped-prisons-and-lack-of-health-care-access-leave-pregnant-prisoners-and-their-children-at-significant-risk> [<https://perma.cc/Z8V3-SC89>].

106 Miranda Davies, *Pregnancy and Childbirth in Prison: What Do We Know?*, *NUFFIELD TRUST* (Nov. 22, 2019), <https://www.nuffieldtrust.org.uk/news-item/pregnancy-and-childbirth-in-prison-what-do-we-know> [<https://perma.cc/3SBD-457X>].

107 *Pregnant Women in English Jails*, *supra* note 100 (discussing a Freedom of Information response to a request from Level Up).

108 SOPHIE ELLIS, *PRISON REFORM TRUST, BROMLEY BRIEFINGS PRISON FACTFILE 60* (2024).

109 Alan Stein et al., *Effects of Perinatal Mental Disorders on the Fetus and Child*, 384 *LANCET* 1800, 1811 (2014).

to the list of mitigating factors in sentencing guidelines.¹¹⁰ As with previous additions to the guidelines, this change embedded many of the principles established through case law and from evidence gathered during the consultation process:

When considering a custodial or community sentence for a pregnant or postnatal offender (someone who has given birth in the previous 12 months) the Probation Service should be asked to address the issues below in a pre-sentence report. If a suitable pre-sentence report is not available, sentencing should normally be adjourned until one is available.¹¹¹

When sentencing a pregnant or postnatal woman, relevant considerations may include:

- the medical needs of the offender including her mental health needs
- any effect of the sentence on the physical and mental health of the offender
- any effect of the sentence on the child

The impact of custody on an offender who is pregnant or postnatal can be harmful for both the offender and the child including by separation, especially in the first two years of life.

Access to a place in a prison Mother & Baby Unit is not automatic and when available, the court may wish to enquire for how long the place will be available.

Women in custody are likely to have complex health needs which may increase the risks associated with pregnancy for both the offender and the child. The NHS classifies all pregnancies in prison as high risk.

There may be difficulties accessing medical assistance or specialist maternity services in custody.

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered.

...

For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

110 *Sentencing Pregnant Women and New Mothers*, SENT'G COUNCIL (Apr. 1, 2024), <https://www.sentencingcouncil.org.uk/news/item/sentencing-pregnant-women-and-new-mothers/> [<https://perma.cc/KGK8-7SWT>].

111 The requirement for a pre-sentence report was removed on June 16, 2025, due to the Sentencing Guidelines (Pre-Sentence Reports) Bill, which will come into force in fall 2025.

Where immediate custody is unavoidable, all of the factors above may be relevant to the length of the sentence.

The court should address the issues above when giving reasons for the sentence.¹¹²

In the appeals which have followed the new guideline, the Court of Appeal has been very conscious of the risks not only of birth in prison but also of subsequent mother and child separation. In the June 2024 appeal of *R v. Byron*,¹¹³ the Court of Appeal considered Ms. Byron's sentence imposed in January 2024, prior to the pregnancy mitigating factor being in force. She was the sole carer for her fourteen-year-old daughter and, at the time of the plea in November 2023, was twelve weeks pregnant.¹¹⁴ The first instance judge dealt with mitigation briefly, deducting six months "for [her] good character."¹¹⁵ Despite the pre-sentence report recommending a community sentence, the sentencing court passed an immediate sentence of twenty-seven months' imprisonment and implied the mother's pregnancy was an attempt to avoid imprisonment: "She knew that she was facing and she knew that she was going to plead guilty. What does that say about responsibility in a mature woman that she decides, 'I'll tell you what, I'll get pregnant again'?"¹¹⁶ The Court of Appeal "concluded that the risk to mother and baby calls overwhelmingly for a merciful approach."¹¹⁷ Moreover, the court remarked,

The judge's remarks which we have set out above should not have been made. It is inappropriate to pass comment on how or why a female defendant has become pregnant . . . whether a pregnancy is planned or not can be of no concern to a sentencing judge whose focus must be on the risks to mother and baby of pregnancy and birth in custody.¹¹⁸

112 *General Guideline*, *supra* note 69.

113 *R v. Byron* [2024] EWCA (Crim) 818 (Eng.).

114 *See id.*

115 *Id.*

116 *Id.* ¶ 11.

117 *Id.* ¶ 23.

118 *Id.* ¶ 18.

In the end, the court quashed the sentence and replaced it with a sentence of twenty-one months suspended for twenty-four months.¹¹⁹ This case marked an important transition, forbidding courts from treating pregnant women negatively, suspiciously, or as if they are attempting to manipulate the court.

In July 2024 the sentence in the case of *R v. Byrne*¹²⁰ was successfully appealed. Ms. Byrne had a nine-month-old baby who was initially separated from her when she was sentenced to forty-four months of immediate imprisonment in May 2023.¹²¹ It seemed that there had been no arrangements made for the child's care, and he was taken from court by Ms. Byrne's mother.¹²² After problems arose with feeding the baby, he was returned to the mother in prison in August 2023.¹²³ However, the child could only stay in the prison with his mother until September 7, 2024, at which time he was scheduled to be placed in foster care.¹²⁴ Reports available to the Court of Appeal from a psychologist provided the following information:

[P]rison was distressing for her [mother] and was likely to have caused harm both to her and the child over the short and long term. Separation had had a significant negative effect. There would be negative outcomes for both related to behavioural development and emotional problems.¹²⁵

The Court of Appeal found “the interests of the child and the fact that the child will end up in foster care outweigh the factors that justified the length of the sentence that was originally imposed.”¹²⁶ The sentence was reduced to two years and eight months—thirty-two months instead of forty-four—with the aim of ensuring that the mother and child did not face further separation.¹²⁷

119 *See id.*

120 *R v. Byrne* [2024] EWCA (Crim) 801 (Eng.).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* ¶ 29.

126 *Id.* ¶ 35.

127 *Id.*

The final postnatal appeal case of 2024 was *R v. Thompson* which came before the Court of Appeal in August 2024.¹²⁸ Ms. Thompson was sentenced to 38 months' imprisonment without a pre-sentence report when her baby was one month old, reduced from an initial fifty-four-month sentence due to her guilty plea. The Court of Appeal substituted a reduced sentence of thirty months, affirming the principle that a pre-sentence report should be considered when a woman is pregnant or has recently given birth.¹²⁹ Regarding the balancing of custody with the impact on a child, the court wrote,

In our judgment, the seriousness of this case does mean that immediate custody cannot be avoided. Sentences must adequately reflect the pernicious influence of Class A drugs on society. But sentencing must also reflect the value that society places on the importance of unfettered family relationships and the rights of a child. In a case such as this, the child is one of the innocent victims of the parent's wrongdoing. Harm to the child is often inescapable. But a custodial sentence that would for as long as this one have such an adverse impact on the relationship between this mother and this baby would, in our judgment, be disproportionate to the legitimate aims pursued by the imposition of a custodial sentence.¹³⁰

The court also found that even if a mother is able to have her baby with her in prison, "it cannot be considered that presence in the mother and baby unit is the equivalent of conducting a mother and child relationship outside the confines of a prison."¹³¹

It is socially significant that the courts have shifted from unwillingness to recognize pregnant or postnatal women as suffering from any additional "pains of imprisonment" to a concern for children's well-being and rights. This shift now encompasses an understanding of the critical nature of the mother-child relationship and the fundamental importance of secure attachment, and beyond that, to the mother's own health and well-being.

However, as pregnancy began to receive greater consideration by the courts, mothers of older children continued to receive prison sentences. Between 2021 and 2024, there were four reported substantive criminal appeals against sentences before the Court of

128 *R v. Thompson* [2024] EWCA (Crim) 1038 (Eng.).

129 *Id.* ¶ 27.

130 *Id.* ¶ 24.

131 *Id.* ¶ 23.

Appeal from mothers with dependent children. In each case, as we will now examine, the Court of Appeal reaffirmed the need for serious consideration of a sentence's impact on all dependent children, not just babies and young infants.

In *R v. Rescorl*, Ms. Rescorl faced the prospect of separation from her eight- and twelve-year-old children when she was sentenced to an immediate term of fifteen months in prison. However, Ms. Rescorl's appeal in December 2021¹³² was successful, and the sentence was suspended for two years on the basis that the sentencing judge lacked sufficient information about how the children would be cared for during the mother's imprisonment. The Court of Appeal judgment noted that "the judge must have the information necessary to reach a fair conclusion."¹³³

In July 2023, the appeal of a sentence in *R v. Foster (Carla)*¹³⁴ was successful, reducing a twenty-eight-month term of imprisonment to fourteen months, suspended for eighteen months. This decision was based in part on the judge's failure to sufficiently consider the effect of the sentence on Ms. Foster's three children. Additionally, concerns about overcrowded prisons following the COVID-19 pandemic influenced the court's decision.¹³⁵ The court also referenced the information in the Equal Treatment Bench Book,¹³⁶ which it said sentencers should consult—in particular the sections entitled "Women as Offenders" and "Dependants and Primary Carers"—and noted that sentencing courts should appreciate that women are often held far from home.¹³⁷ The Court of Appeal sitting on that occasion seemed to have a good understanding of the impacts of mother and child separation.

In *R v. Smethurst*, Ms. Smethurst's successful appeal of her five-year sentence concluded in December 2023.¹³⁸ Ms. Smethurst was the sole caregiver for her five children. Although the judge at first instance had taken the impact on the children into account,

132 *R v. Rescorl* [2021] EWCA (Crim) 2005 (Eng.).

133 *Id.* ¶ 12.

134 *R v. Foster* [2023] EWCA (Crim) 1196 (Eng.).

135 *See id.* ¶ 42 ("Judges can and in our judgment should therefore keep in mind that the impact of a custodial sentence is likely to be heavier during the present circumstances of overcrowding in the female estate than it would otherwise be.")

136 JUD. COLLEGE, EQUAL TREATMENT BENCH BOOK (2024) (UK), <https://www.judiciary.uk/wp-content/uploads/2022/09/Equal-Treatment-Bench-Book.pdf> [<https://perma.cc/2JGV-7NEA>].

137 *Id.*

138 *R v. Smethurst* [2023] EWCA (Crim) 1621 (Eng.).

the Court of Appeal found that the sentence was “manifestly excessive” and reduced the sentence to four years of imprisonment, half of which would be served in custody.¹³⁹ Then, on January 26, 2024, the case of *R v. Williamson*¹⁴⁰ was also successfully appealed, and the original twelve-month custodial sentence was reduced to eight months, suspended for two years. Ms. Williamson was the mother of five children, four of whom were minors, and the pre-sentence report had suggested a community order with an unpaid work requirement because she was found to have a low risk of reoffending, significant time had passed since the offense was committed, and a period of custody could have resulted in the loss of her home and would have had a detrimental impact on her children.¹⁴¹ The judge took the view that the sentence should be a deterrent and was an offense “that can only be marked by the imposition of an immediate custodial sentence.”¹⁴² The Court of Appeal disagreed with this and quashed the original sentence: “[I]n our judgement everything pointed in favor of suspending the sentence.”¹⁴³ This case made it clear that even when there is a public interest reason for deterrent sentencing (for example, drugs being brought into prisons, as in this case)¹⁴⁴ the sentence can still be suspended if the harms to dependent children are properly considered. Suspending the sentence in order to ensure the impact on a child is properly recognized did not “signal any inappropriate lessening of the seriousness with which the courts take the supply of illicit items into prisons.”¹⁴⁵

CONCLUSION

In England and Wales, the approach to sentencing pregnant women and mothers who are sole or primary carers has undergone a transformative shift in the Court of Appeal. After years of piecemeal progress and incremental case law development, the senior judiciary and the sentencing guidelines have established a clear principle: the impact of a sentence on children or a pregnant woman must be a central consideration. Even when the custodial threshold is met, courts are compelled to explore alternatives, including community and

139 *Id.* ¶ 42. In most cases in England and Wales, half of an imposed sentence is served in custody, and the other half is served on license in the community. Criminal Justice Act 2003, c. 44, § 244 (Eng.).

140 *R v. Williamson* [2024] EWCA (Crim) 91 (Eng.).

141 *Id.* ¶ 7.

142 *Id.* ¶ 10.

143 *Id.* ¶ 18.

144 *See id.* ¶ 1.

145 *Id.* ¶ 18.

suspended sentences, to mitigate harm. Deterrence, while significant, cannot overshadow the profound and far-reaching consequences for children whose lives are upended by their caregiver's imprisonment.

The six successful appeals in 2024 underscore a judiciary increasingly attentive to these issues, and yet they also highlight persistent gaps in lower courts' application of the law. Too often, judges fail to fully account for the ramifications of imprisonment on dependent children and pregnant women or wrongly prioritize punitive policies over rehabilitative and socially protective outcomes. These missteps underline the need for continued education and reinforcement of the judiciary's obligations. Unfortunately, the government's Sentencing Guidelines (Pre-Sentence Reports) Bill, due to come into force in fall 2025, has removed the requirements for pre-sentence reports in the case of mothers of dependent children, and pregnant women. This is a backward step.

As the prison system struggles with capacity issues and the efficacy of incarceration is questioned, the Independent Sentencing Review published in June 2025, commissioned by the current government, presents an opportunity to solidify and expand these gains. Unfortunately, it does not recommend a statutory presumption against custodial sentences for mothers, pregnant women, and primary carers of young children, paired with mandatory consideration of the effects of custodial sentences on dependent children and maternal health. However, it does state that there should be a move to imprison fewer mothers and pregnant women. Enshrining this goal in legislation would not only ensure consistency but also align sentencing practices with societal values of justice, family preservation, and child welfare.

England and Wales could lead the way in adopting a humane, evidence-based approach to justice—one that prioritizes the well-being of the most vulnerable and sets a global precedent for safeguarding the rights of children and women in the criminal justice system. Whether they will is yet to be seen.