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MATERNAL IMPRISONMENT ACROSS BORDERS

Wednesday 10 November 2021

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MATERNAL IMPRISONMENT ACROSS BORDERS

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Sentencing and Safeguarding

The separation of mothers and children in the criminal courts of England and Wales

Doughty Street

Webinar

10th November 2021

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The differentiated treatment of children separated from their parents by the state

Family courts

- ‘Best interests of the child’
- Guardian ad Litem
- Legal representation
- Provision of alternative caregivers

Criminal courts

- The child may not be mentioned

Rights Framework

Human Rights Act 1998

- Article 8 the right to family life
- Article 14 the right to enjoyment of rights without discrimination

United Nations Convention on the Rights of the Child 1989

- Article 2 the right to non-discrimination
- Article 3 the right for a child's best interests to be a primary consideration
- Article 12 the right to be heard
- Article 20 the right to special protection and assistance

Impacts of maternal imprisonment on children

A child with an imprisoned mother is likely to suffer more negative effects than a child of an imprisoned father. The threshold at which their absence has an impact is lower than that of fathers.

Even a very short sentence of imprisonment for a mother who is a primary carer can have long lasting negative effects on a child. (Krutshnitt, 2010, Dallaire, 2007, Murray and Farrington, 2008, Murray 2010, Gilham 2012)

Two areas of concern

- Impact of imprisonment on mother/ child relationship
- Impact of imprisonment on child's wellbeing and future outcomes

Physical separation; Change of home and carers; Increased poverty; Disrupted education; Social isolation : stigma and shame: Changes in mother / child relationship affecting future stability; Difficulties in visits; Changed behaviours; 'Confounding Grief'

Longer term impacts

- ‘Turning Points’ (Mears and Siennick, 2016)
- less likely to be in education, training or employment in later life; more likely to have mental health and addiction problems, and are likely to earn less than their counterparts aged 30 (Hirschi, 1969; Fox and Benson, 2000; Green and Scholes, 2004; Murray and Farrington, 2008, Mears and Siennick, 2016)
- children who experienced maternal imprisonment were more likely to die before the age of 65 than their peers (van de Weijer, S.G.A., Smallbone, H.S. & Bouwman, V. J Dev 2018).

Principles established by case law on the sentencing of parents

The criminal sentencing of a parent engages the Article 8 right to respect for family life of both the parent and the child. Any interference by the state with this right must be in response to a pressing social need, in pursuit of a legitimate aim, and in proportion to that aim. The more serious the intervention the more compelling the justification must be - the act of separating a mother from a very young child is very serious

R(on the application of P and Q) v Secretary of State for the Home Department [2001] EWCA Civ 1151 paragraphs 78 and 87

It is the court's duty to make sure that it has all relevant information about dependent children before deciding on an appropriate sentence.

R v Bishop [2011] WL 84407 Court of Appeal

Principles established by case law on the sentencing of parents

The welfare of the child should be at the forefront of the judge's mind.

ZH(Tanzania)(FC) Appellant v Secretary of State for the Home Department [2011] UKSC4 paragraphs 25 and 26

There is no standard or normative adjustment for dependent children, but their best interests are a 'distinct consideration to which full weight must be given'.

R v Petherick [2012] EWCA Crim 2214 paragraph 19

In a case which is on the threshold between a custodial and non-custodial or suspended sentence a child can tip the scales and a proportionate sentence can become disproportionate.

R v Petherick *[2012] EWCA Crim 2214 paragraph 22*

It may be appropriate to suspend a custodial sentence when the person being sentenced is the parent of dependent children

R v Modhwadia [2017] EWCA Crim 501

Sentencing Guidelines

All guidelines from 2011

Factor in mitigation which can be considered:

‘sole or primary carer for dependent relatives’

Imposition of Community and Custodial Sentences: Definitive Guideline 2017

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

Child Cruelty: Definitive Guideline 1st January 2019

“STEP FIVE Parental responsibilities of sole or primary carers

When considering whether to impose custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children in the offender’s care). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but **careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.** Where custody is unavoidable consideration of the impact on the offender’s children may be relevant to the length of the sentence imposed.

‘General Guideline: overarching principles’ 1st October 2019

expanded explanation for ‘sole or primary carer of dependent relative’

- The court should not impose a sentence of imprisonment where the impact on dependants would make a custodial sentence disproportionate to achieving the aims of sentencing
- The court should consider the impact of the sentence length on dependants and whether the sentence can be suspended
- The court should consider the effects on dependants when deciding on the requirements of community sentences
- When the defendant is a pregnant woman the relevant considerations should include the effect of a sentence of imprisonment on the woman's health and any effect of the sentence on the unborn child.
- The court must ensure that it has all relevant information about dependant children before deciding on sentence *(in accordance with the case of R v Bishop [2011])*
- The court should consider whether proper arrangements have been made for dependant children when imposing a custodial sentence, and consider adjourning sentence in such cases in order for proper plans to be in place for children
- The court should ask the National Probation Service to address the defendant’s caring responsibilities and the impact of any sentence on the care of their dependants in a Pre Sentence Report

International rules on the treatment of women prisoners to which the UK is a signatory

Non-custodial sentences are preferable for women with dependent children, (unless the offence is serious or violent or the woman represents a continuing danger). Even then, a custodial sentence should only be given after considering the best interests of the child, and ensuring that appropriate provision has been made for the child

(*United Nations, 'the Bangkok Rules', 2010*)

Research with the judiciary

Transcript Analysis

- Insufficient weight given to child dependents by lower courts

Interviews with Crown Court judges

- Judges do not take a consistent view on the relevance of dependents as a factor in mitigation

- Judicial understanding of the Guidelines and case law which set out the duties of the court in relation to considering dependents in sentencing decisions is limited and at times incorrect

- Common misconceptions hindered a judge's willingness to make appropriate enquiries about children and to properly understand how their mothers' sentence would affect them

- Judges do not request a Pre-Sentence Report as a matter of course when sentencing primary carers

Sentencing Checklist

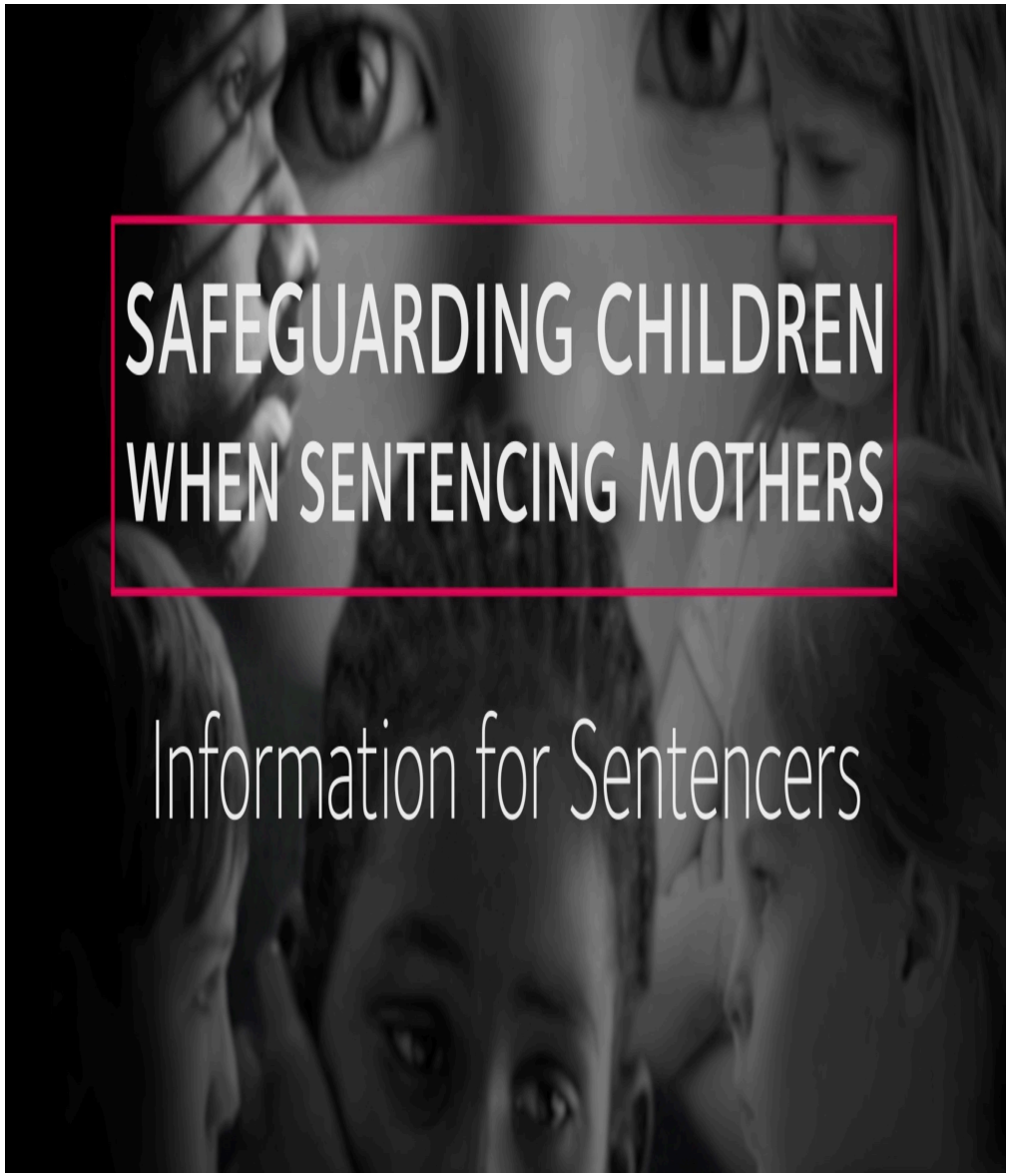
Who will take care of the child if the mother is imprisoned?

- Has this person been asked about taking on the care of the child?
- Do they have space in their home?
- Will they take all the children, or will siblings be separated?
- Do they have the means to support another child?
- Are they in good health?
- Will they lose their employment if they take on child care?
- Do the rest of their family – partner, children also agree to taking in the children?
- Will the child continue at their current school or nursery, or will the change of carer necessitate a change in school due to distance?
- Are there school places in the area they are moving too?
- Is the child or children at a crucial stage taking public examinations (age 14 -18)?
- Do the children have particular health or emotional needs?
- Will the alternative carer be able to adequately meet those needs?
- Is the mother pregnant?
- Will the child be able to visit their mother if she is imprisoned

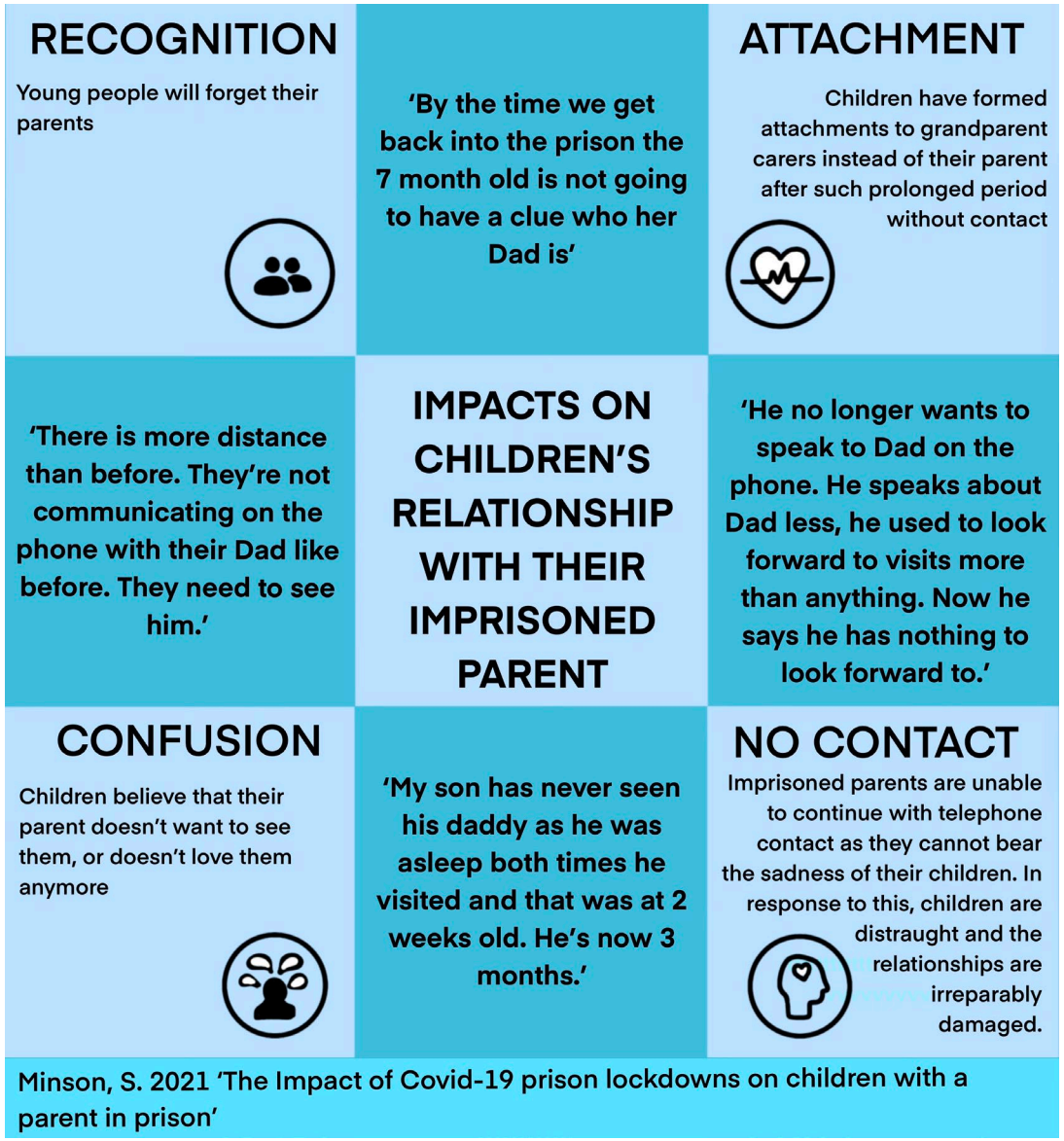
The original question: Is there Article 2 discrimination?

Procedurally?

Practically?



COVID Addendum - consequences for children when they lose contact with a detained parent



https://www.law.ox.ac.uk/sites/files/oxlaw/the_impact_of_covid-19_prison_lockdowns_on_children_with_a_parent_in_prison.pdf

If you want more information

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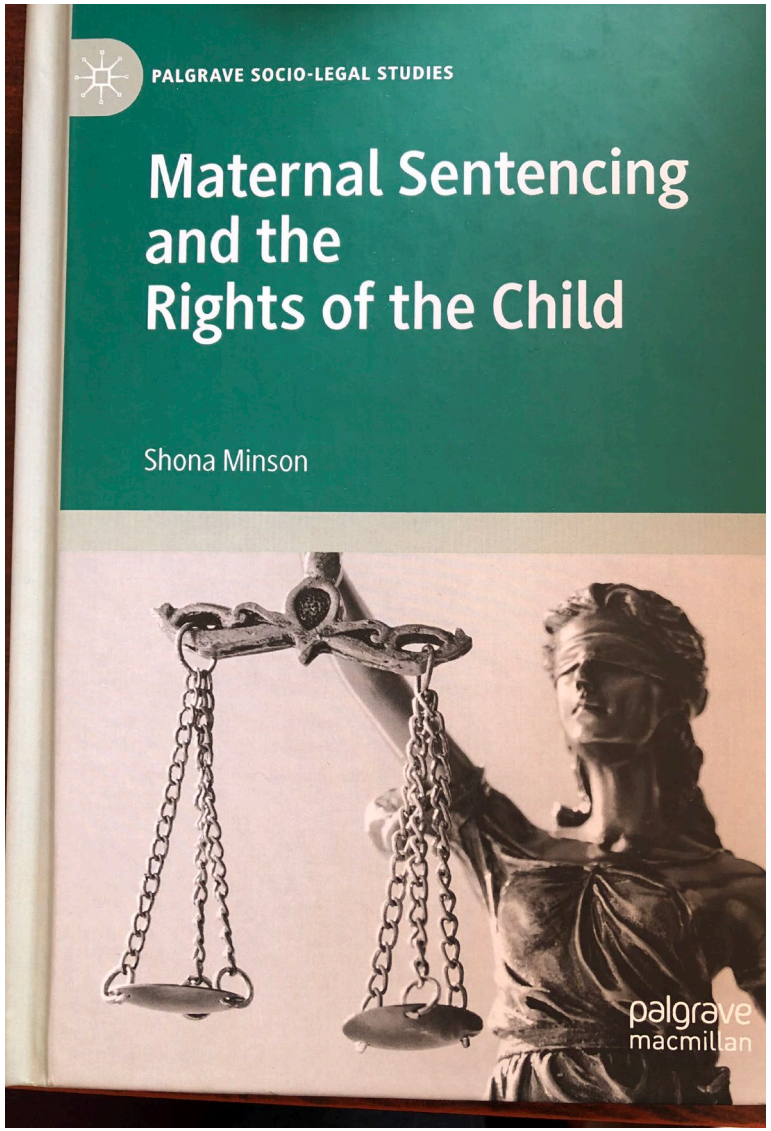

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Safeguarding the best interests of dependent children in extradition courts

Doughty Street Webinar: 10 November 20

Ben Cooper QC

Outline

1. The sea change in the approach of the courts before and after HH v Italy;
2. The guiding principles of HH;
3. The subsequent inconsistent approach of the courts; and
4. How to best prepare the court to safeguard the best interests of the child in the extradition courts.

Before *HH…*

"The defence are saying that because the defendant has a child, we should approach it differently - but that can't be right! Merely having a child would give the defendant an unfair advantage."

The old approach – exceptionality test

- The House of Lords in Norris at §56:

  The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves.

- The approach of the courts to dependent children and evidence addressing their interests is well illustrated by the finding in the judgment of the former CM (Riddle) In the case of FK (heard with HH in the SC) :

  With respect to Dr Armstrong's considerable expertise, I wonder whether I needed an expert report to tell me that a family, and particularly young children, may well be devastated if the mother of the children is removed for whatever reason. As Mr Cadman points out, there is nothing in the lengthy report to suggest that the effect on the family would be anything other than that inherent in the removal of one parent as a result of extradition proceedings. I agree with his assertion that there is nothing exceptional in this case to meet the very a high threshold test set by *Norris v the Government of the United States of America* [2010] 2WLR 572.

The legal landscape pre HH: the requirement to establish "a wholly exceptional case"

- The exceptionality test was applied prior to 2012. Article 8 argument was considered to be almost unarguable in the extradition courts.
- *Bermingham* § 118: Laws LJ said that the execution of a properly constituted extradition could be resisted on article 8 grounds only where a "**wholly exceptional case**" is shown "to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim".
- The *exceptionality* test was then challenged in *Jaso v Central Criminal Court, Madrid*: [2007] EWHC 2983 (Admin)
- In *Huang,* an immigration case, the House of Lords said that a fair balance must be struck between the rights of the individual and the interests of the community. There was no test of exceptionality,
- Dyson LJ in *Jaso* recognised the exceptionality test was wrong and applied the formulation of Article 8 since clarified in the immigration context:
- The difficulty of succeeding on Article 8 was recognised to be a "consequence not a precondition, of the statutory exercise".
- "The same applies in relation to extradition. What is required is that the court should decide whether the interference with a person's right to respect for his private or (as the case may be) family life which would result from his or her extradition is proportionate to the legitimate aim of honouring extradition treaties with other states. It is clear that great weight should be accorded to the legitimate aim of honouring extradition treaties made with other states. Thus, although it is wrong to apply an exceptionality test, in an extradition case **there will have to be striking and unusual facts** to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights."

HH v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338

- Parents, HH and PH had been arrested in Italy on suspicion of drug trafficking cannabis. Fled to UK and convicted in absence. 14 year and 8 year sentences imposed. 3 children.
- FK was accused of various dishonesty offences alleged to have occurred in 2000 and 2001. She had left Poland for the UK in 2002. EAWs issued in 2006 and 2007. F had 5 children, aged 3 upwards.

HH: Certified question

"Where, in proceedings under the Extradition Act 2003 , the article 8 rights of children of the defendant or defendants are arguably engaged, how should their interests be safeguarded, and to what extent, if at all, is it necessary to modify the approach of the Supreme Court in ***Norris v Government of the United States of America*** (No 2) in light of ***ZH (Tanzania)*** ?"

HH: Judgment

- The court held:
- The question is always "whether the interference with the private and family lives of the extraditee and the other members his family are outweighed by the public interest in extradition". [8]
- The child's interest must be a primary consideration. The court will need information about the child and may need to consider mechanisms to ameliorate the impact of separation. [33, 98, 116 - 132, 143 - 146, 153, 156]
- Exceptionality is a prediction not a test. [8]
- In assessing the proportionality of the interference relevant factors will be the 'constant and weighty public interest in extradition'; the gravity of the offence; delay; UK should not become a 'safe haven' for fugitives, like sentencing. [8 9, 46, 47, 132]

HH - Outcome

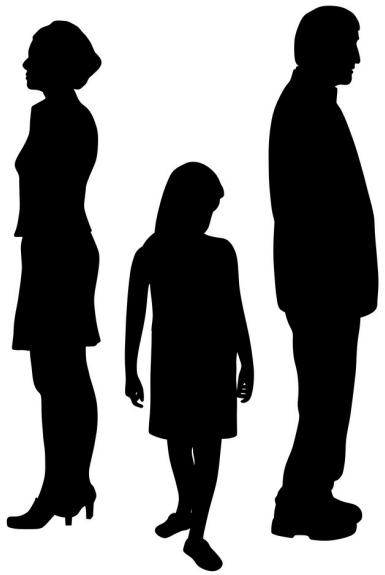
On the facts of FK the court held unanimously that:

- The effects of F's extradition on her youngest children would be exceptionally severe.
- The offences were not trivial, but were of no great gravity.
- When assessing the public interest, the court could take notice of the fact that the Polish authorities exercised no discretion when deciding whether to seek extradition.
- There had been considerable delay which diminished the public interest.
- The public interest in extraditing FK was not such as to justify the inevitable severe harm to the interests of the youngest children in doing so [44-48]
- HH and PH: Impact on children outweighed by the public interest in extradition. Professional criminals.
  - Lady Hale dissenting: The effect on the children of extraditing both H and P in the instant proceedings would be so severe that proportionality required consideration of whether it could be mitigated – P [F] could be discharged and fresh proceedings brought later

HH: Basic approach re children cases

In cases justifying "further investigation", the Court "will have to have" information about:

- Likely effect on child(ren); care arrangements following extradition; measures to limit effects of separation; and availability of alternatives.



Lady Hale in ***HH*** at paragraph 86:

- *"The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain information necessary in order to have regard to the best interests of the children as a primary consideration and to take steps accordingly."*

HH: Basic approach re children cases

- Supreme Court had:
  - Detailed expert evidence addressing the children and family bonds;
  - Representation by Official Solicitor for HH/PH.
- Lady Hale notes Court *may* wish to refer to Local Children's Services given statutory duty to assess a child in need (s17(10) Children Act 1989) and possible need to accommodate (s20 Children Act 1989) (para 84).
- Child's views needed: Article 12 UNCRC (para 85):
  - Right to be heard general principle, but not absolute requirement to hear in court;

Defining Article 3 of the UNHRC: the child's interests to be a primary consideration

- **Guidance on Convention on the Rights of the Child: CommRC: General Comment 14 29 May 2013, CRC/C/GC/14**
- [The] "authoritative guidance was to be found in para 6 of **General Comment No 14 (2013) of the UN Committee on the Rights of the Child.** [The] … concept had three dimensions:
  - (a) a **substantive right** of the child to have his or her best interests assessed as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake;
  - (b) an **interpretative principle**, irrelevant to the present appeals; and importantly;
  - (c) a **rule of procedure** that, whenever a decision is to be made that will affect an identified group of children, the decision-making process must include an evaluation of the possible impact of the decision on them.[68]
- [The] "Government cannot deny that the committee's analysis is authoritative guidance in relation to the dimensions of the concept in article 3.1 . [69]"

Lord Wilson, ***R (DA) v SSDWP*** [2019] UKSC 21, 15 May 2019

The post HH backlash

- *JP v Czech Republic* – first post HH appeal heard by LCJ who had his own ideas on how to interpret HH. Arguably stronger Article 8 case of a primary carer of very young children but court content for father to care for them over a 10 month sentence in Czech.
- But after a failure to remove JP on time the case went back to the Magistrates Court – to Former CM Arbuthnot who was undaunted by judgment of LCJ and reconsidered Article 8 and the proportionality of surrender when assessing whether the CPS had shown reasonable cause for delay in removal. JP's children's Article 8 interests prevailed.

Preparing the case:

Evidence about the child:

- Detailed proofs from all the family
- All existing evidence from schools and doctors
- Defence expert reports from child psychologists – take charge of focus and content
- Court directs relevant Local Authority to provide evidence about the child, with varying success.
- Section 7 Children Act 1989 regarding "welfare reports":

  "(1) A court considering any question with respect to a child under this Act may—

  (a) ask an officer of the Service ⋯ ; or (b) ask a local authority to arrange for [an officer] …

  to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report. …

  (5) It shall be the duty of the authority or officer of the Service … to comply with any request for a report under this section."

Preparing the case: Focus on the detail of the Parent / child attachment

- ***HH:*** "No-one seriously disputes that the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating. " Lady Hale [1]

Attachment theory

- The central tenet is that an individual's later emotional and relational well-being is highly dependent on the relationship with their primary carers during childhood.

- Attachment disruptions are strongly associated with later mental health and relational problems in adulthood according to the research literature (e.g. Dozier *et al,* 2008).
- Examples of attachment disruptions include physical separation by marital breakdown, migration, bereavement, imprisonment, etc
- They also include breakdowns in the parent-child relationship where the parent remains present: parental mental health problems, drug abuse, learning disability, child abuse

Definitive research re: impact

- **Murray and Farrington (2008)**

We conclude that parental imprisonment is a strong risk factor (and possible cause) for a range of adverse outcomes for children, including antisocial behavior, offending, mental health problems, drug abuse, school failure, and unemployment.

Parental imprisonment might cause these outcomes through several processes: the trauma of parent-child separation, children being made aware of their parent's criminality, family poverty caused by the imprisonment, strained parenting by remaining caregivers, stigma, and stresses involved in maintaining contact with the imprisoned parent (page 135).

Demonstrating 'Exceptionally serious' harm: what to look out for

- Separations which occur between the ages of about six months and five years
- Where the requested person is a primary carer;
- A history of multiple separations;
- Instability, especially where the family is financially dependent on the requested person (they may lose their home or a change in school/country is necessary);
- A child who has existing difficulties (learning disability, autism, ADHD, mental health problems, social and behavioural difficulties);
- The remaining carer having mental health problems (nearly all will develop depression following the arrest and post-extradition);
- If the remaining carer has a history of domestic abuse;
- Where there is no remaining carer and foster care is likely

Post HH trends:
Post extradition: A 'cogent plan'

- Defendants sometimes criticised for not having a plan for alternative care arrangements; but
- Courts recognise that (barring false exaggeration), stressing difficulties of arrangements is "natural" (***A&B v Hungary*** [25]) – e.g. ***AB v Poland*** [2014] EWHC 1560.

- Local authority and expert evidence helpfully forces clarity and will be independent; so
- Important to corroborate & empower defendant with third party material – e.g. School, GP, support worker, family friend etc.

Post HH trends: "Everyone" responsible

- **Cogent Plan for the child – who is responsible?**
- Not just defence responsible for obtaining relevant evidence, especially about steps that can be taken to mitigate impact on child.
- Clear conclusion of the court in HH that the burden falls broadly:
- [86] […] *The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly.*

- E.g. Moses LJ in ***A & B v Hungary*** [2013] EWHC 3132 (Admin), para 16, 27, 31 - 32:

  "…, … there may come a time when a requesting state may need to put forward material or assurance, or indeed evidence, as to how the effect on the child is to be ameliorated. The requesting state might itself refer the matter to a relevant local authority or come forward with some other suggestion. It is no criticism of the Republic of Hungary, but the fact remains that in this case no positive suggestion has been put forward, still less any material or evidence."

Testing assurances with local foreign experts

- ZZ v Poland – High Court ordered extradition of a pregnant mother with a young infant on the basis that she could remain with her children in prison in a mother and baby unit.
- Polish authorities and court overlooked the fact the unit was full and could not guarantee a place.
- Evidence from a Polish lawyer established that the first infant child would be too old to be eligible for the unit and no plan was in place for his care in Poland.
- High Court recognised it was wrong to have rejected the Article 8 challenge and reopened and then allowed the appeal on the basis that the evidence from Poland was unreliable and inadequate.

Concurrent care proceedings

(R)T v Poland [2017] EWHC 1978 (Admin):

No inflexible rule about whether family or extradition Court should take precedence [47 – 56];

- May be a tactical advantage in care proceedings going first where the specialist family court judge may decide the father is an unsuitable alternative carer and thereby effectively tie the hands of the extradition court on the facts thereby leading to only one outcome on Article 8 in favour of keeping the RP with their child.

Better evidence on appeal

Article 8 appeals allowed on the basis of **fresh evidence**, usually necessitated by long appeal delays (with a need to update) and limited Local Authority input:

- ***JB v Lithuania*** [2018] EWHC 434 (Admin) where Sir Wyn Williams preferred Dr Pettle's report over a Local Authority assessment that was paper-based only;

  AS v Poland [2018] EWHC 66 (Admin) per Turner J – E.g. mother not reliable about father due to domestic abuse; and

May 2019

- ***M v Poland*** [2019] EWHC 1342 (Admin): Holman J unimpressed with a cursory report, at para 23:

"That appears to be the sum total of the so-called "full assessment" that the local authority had in fact conducted into the position of the grandparents and their capacity to care for the children. It appears to have been based on a single telephone call … the local authority themselves in fact made plain that if the children went into their care they would want "to complete an assessment" of the paternal grandparents to ensure that they would be looked after without any risk to them."

Oct 2019 High Court reviews fresh evidence favourably

- ***BY v Cyprus*** [2019] EWHC 2637 (Admin)
- Extradition refused despite serious fraud allegation
- Complex needs of 5 Children & poor mental health of ex-partner
- First instance expert and Local Authority evidence apparently 'biased and inaccurate' & finding of exaggeration (2018) – expert should not have been rejected (§52)
- The fresh evidence of Child Arrangements Order supported greater role of Appellant for children

Sole providers and poverty

- High Court has in some cases halted the extradition not only of sole carers of but now also of sole providers for children (see *Fabczak v Poland*, Blake J, Unreported October 2014)

- Report of the UN Special Rapporteur on extreme poverty and human rights: Visit to the United Kingdom of Great Britain and Northern Ireland: 23 April 2019, 23 April 2019

- 'Relative child poverty rates are expected to increase by 7 per cent between 2015 and 2021 and overall child poverty rates to reach close to 40 per cent. For almost one in every two children to be poor in twenty-first century Britain would not just be a disgrace, but a social calamity and an economic disaster rolled into one.' [UNSR]

- "Living in poverty has a serious impact on children's lives, negatively affecting their educational attainment, health, and happiness as well as having long term adverse consequences into adulthood … Even a few years of poverty can have negative consequences for a child's development and is especially harmful from the ages of birth to five." [At 34; Professor Atkinson, the former Children's Commissioner for England, ***R(DA) v DWP***]

Article 8 protection has flourished on a case by case fact specific basis

Article 8 now successfully invoked in a range of cases where the focus on the best interests of dependent children outweighs the public interest in extradition.

- Provides one of the most valuable protections against extradition, where children are involved.

- Most of the significant judgments upholding Article 8 rights are not published as the fact specific findings are not appealable.

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Deporting foreign criminals

Camila Zapata Besso

Section 117C(5) NIAA 2002 (Exception 2: children)

Where a foreign criminal ("C") is sentenced to more than 12 months but less than four years, the public interest requires their deportation unless they have:

> "*a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh*."

KO (Nigeria) v SSHD [2018] 1 WLR 5273: m

- Per Lord Carnwath: Structure and purpose of the statute is to codify how the Article 8 balance should be struck, creating certainty [§§12-15].
- "Unduly harsh" was plainly a higher threshold than "reasonableness": "*one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*" [§23].
- The public interest is already built into the statute consistently with principles on "best interests of children", including that children are not responsible for the conduct of a parent (*Zoumbas*) [§§12-23].
- Parental misconduct of less than 4 years ("medium offending") was only relevant as a gateway to considering Exception 2, which does not require a "balancing of levels of severity of the parent's offence" [§§23-24].
- The child's best interests remain a primary consideration (*ZH (Tanzania) v SSHD* [2011] UKSC 4 applied).

HA (Iraq) v SSHD [2020] EWCA Civ 1176

Underhill LJ clarified the meaning of "unduly harsh" from §39 onwards, as touched on in *KO (Nigeria)* at §23, observing that Lord Carnwath's focus in that case was not primarily on how to define the threshold and his statement that the degree of harshness will go *"beyond what would necessarily be involved for any child faced with the deportation of a parent"* should **not** be read literally:

- "*it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an* ***enhanced degree*** *of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category*" [§44].

HA (Iraq) v SSHD [2020] EWCA Civ 1176 (continued)

- *"The **essential point** is that the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability"* [§51].
- "*However, while recognising the "elevated" nature of the statutory test, **it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances"** in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, … if that were so the position of medium offenders and their families would be no better than that of serious offenders. […] The statutory intention is evidently that **the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal … and the (very high) level applying to serious offenders**"* [§52].

HA (Iraq) v SSHD [2020] EWCA Civ 1176 (continued)

- Underhill LJ confirmed that the best interests of the child are built into the statutory test, and it "*was not necessary … to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child*" [§55].
- "*There is no reason in principle why cases of "undue" harshness may not occur quite commonly. … How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and* ***it is not possible to identify a baseline of "ordinariness***"" [§56].
- Section 117B(6) is not an exhaustive statement of the effect of Article 8: the exceptions are "*designed to provide a shortcut for appellants in particular cases, and it is not compulsory to take that shortcut if proceeding directly to the proportionality assessment required by article 8 produces a clear answer in the appellant's favour.*"

AA (Nigeria) v SSHD [2020] EWCA Civ 1296

"As explained in HA (Iraq) at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness"" [§12].

KB (Jamaica) v SSHD [2020] EWCA Civ 1385

- Court of Appeal followed *HA (Iraq)* and *AA (Nigeria)*.
- There was expert evidence that the KB's deportation would cause "significant trauma" to his children, for whom he was a good role model and whose presence was essential to the functioning of the family. The Court of Appeal held that the effect of his deportation on his children met the "unduly harsh" test.
- See also Court's enjoinder regarding the Upper Tribunal's erroneous approach, with reference to *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095.

TD (Albania) v SSHD [2021] EWCA Civ 619

Recognised that the CoA in HA (Iraq) had "*warn[ed] of the danger of substituting for the statutory test a generalised comparison between [the qualifying person's] situation and a baseline of notional ordinariness.*"

Beware of 2019 CoA judgments!

- *Secretary of State for the Home Department v JG (Jamaica)* [2019] EWCA Civ 982;
- *Secretary of State for the Home Department v PF (Nigeria)* [2019] EWCA Civ 1139;
- *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213;
- *CI (Nigeria) Secretary of State for the Home Department* [2019] EWCA Civ 2027;
- *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051.

Counsel for the SSHD in *HA (Iraq)* relied on these, and whilst Underhill LJ stated that these "*mostly turned on issues peculiar to the particular case and none has called for the kind of analysis required by the grounds of appeal argued before us*", he nonetheless found "*nothing in any of them inconsistent with what I have said above*" [§63].

Section 117C(6) NIAA 2002: sentence of more than 4 years ("serious offenders")

"*In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions I and 2.*"

NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662

- For a serious offender, consider whether they come under Exception 1 or 2, then look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the very significant obstacles test [37].
- s117B(6) also applies to medium offenders who do not come under the Exceptions [36].
- In considering whether there are very compelling circumstances over and above those described in sections 117C(4) and (5), the Tribunal "*must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation*" [32].
- It inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient [33], nor will desirability of children being with both parents [34].
- Strasbourg jurisprudence (e.g. *Uner v Netherlands* and *Maslov v Austria*) is still relevant to the proportionality assessment [38].

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Immigration removal: the ‘reasonableness’ test

Section 117B(6): Article 8 – public interest considerations applicable in all cases

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

KO (Nigeria)

In *KO (Nigeria) v SSHD* [2018] UKSC 53 Lord Carnwath held the parent's conduct is irrelevant to "reasonableness" [16]-[17] except to the extent that it has led to their not having leave to remain it will still have been "indirectly" material to the reasonableness question because:

(a) the reasonableness question has to be considered on the "hypothesis" that the parents will have to leave (that is the so-called "real world" point), and

(b) "*it will normally be reasonable for a child to be with* [their parents]".

Secretary of State for the Home Department v AB (Jamaica) [2019] EWCA Civ 661

- Considered the meaning of section 117B (6) in the light of *KO (Nigeria)*.
- *"Reasonable to expect" is not just a prediction of a future occurrence. It carries normative force* (per Singh LJ [73]).
- It is a "*composite phrase, commonly used in ordinary English, in which the real work is done by the word "reasonable" rather than by the word "expect", which simply reflects the fact that the child would have to leave in order to maintain the relevant relationship with the parent*" (per Underhill LJ at [116]).

Runa v Secretary of State for the Home Department [2020] EWCA Civ 514

Similarly to *HA (Iraq)* makes clear that if section 117B(6) is not satisfied a proportionality assessment is still required. It is "*a benevolent provision*", which has the effect, in a case where it applies, that the public interest is treated definitively as not requiring the parent's removal: it "*can only operate in one way, potentially in favour of an appellant but never adversely to an appellant*" (per Singh LJ at [32]).

NA (Bangladesh) v SSHD [2021] EWCA Civ 953

- Confirms that even where the child's best interests are to stay, it may still not be unreasonable to require them to leave (applying *Zoumbas* and *MA (Pakistan)*) [13].
- Considers situation where both parents are facing removal:

  "*The upshot is that the effect of Lord Carnwath's reasoning in KO (Nigeria) is that, even on the narrower approach, in a case falling under the seven-year provision where neither parent has leave to remain the starting-point for a decision-maker is the common-sense proposition that it will be reasonable to expect the qualifying child to leave the UK with their parents.*" [28]

  "*…it remains necessary in every case to evaluate all the circumstances in order to establish whether it would be reasonable to expect the child to leave the UK, with his or her parents. If the conclusion of the evaluation is that this would not be reasonable, then the "hypothesis" that the parents will be leaving has to be abandoned and the family as a whole will be entitled to leave to remain.*" [30]

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Parents separated from children by immigration detention

Best interests of the child is a relevant consideration in detention context

The section 55 duty is relevant to the question of the lawfulness of immigration detention. It was considered in the case of *R (MXL & Ors) v SSHD* [2010] EWHC 2397 (Admin). Blake J stated:

- "*Further it is difficult to understand in the light of: i. the previous history, ii. the material deployed by the claimant for this application, and iii. the coming into force of s.55 Borders Citizenship and Immigration Act 2009, that there is no reference in the bail summary either to the interests of the children in being able to be with their mother or to the impact that the children would have on the claimant in cooperating in the appeal and with the conditions of bail. Section 55 had come into force on 2 November with the consequence that there was a statutory duty to make arrangements to ensure that regard was had "to the need to safeguard and promote the welfare of children*" [62]
- "*In particular the failure to consider the impact of continued detention on the welfare of the children is a serious flaw*" [74]
- "*… the failure of the decision maker or the IJ to take account of a consideration of the first importance in a case that obviously had serious implications for the welfare of the children is unlawful.*"[85]

Feel free to contact me

- **Website:** https://www.doughtystreet.co.uk/barristers/camila-zapata-besso
- **Email:** C.Zapata-Besso@doughtystreet.co.uk
- Via the **immigration clerks** at Doughty Street Chambers

@CamilaZBesso

Social Workers Without Borders work in the context of deportation cases

Maternal Imprisonment Across Borders, Doughty Street Chambers, November 2021

Naomi Jackson

What we do:

- SWWB was formed in 2016 when a group of social workers went to Calais and realised their was a need for social workers to provide Best Interest Assessments to support unaccompanied children's applications to enter the UK.
- In 2017 we registered as a charity and shifted our focus to providing independent expert evidence for people in the UK who are harmed or disadvantaged by the Home Office's inhumane immigration policies.
- We are a national network of social workers and social work students.
- Where a person does not have legal aid we provide reports on a pro bono basis
- The vast majority of the assessments we complete are Best Interest Assessments for children and about 25% of our cases concern the deportation of a parent.
- www.socialworkerswithoutborders.org

Unduly Harsh Test

- **KO (Nigeria) judgement in the Supreme Court:**

Required some exceptional circumstances, such as illness or disability, to evidence ‘unduly harsh’ test has been met.

- **HA and RA (Iraq) judgement in court of appeal:**

Acknowledged that it might not be that exceptional or unusual for parental deportation to be ‘unduly harsh’ on the child, but still need a good child rights argument to show that the impact on the child reaches a certain threshold;

-increased focus on the impact of emotional harm

-recognition that children are unique and impact needs to be assessed on a case-by-case basis, specific to each child.

- Social work assessments are particularly useful piece of evidence in light of HA and RA (Iraq).

How we approach Best Interest Assessments

(and what kind of evidence we find useful in the bundle).

Triangulation of information

- The more our assessment is able to draw on other sources of evidence to corroborate what the family tell us the more credible our report is.
- Where possible Best Interest Assessments should take a multi-disciplinary approach and include the views of other professionals who know the child/family. Evidence from health and education professionals can be really helpful.
- The family need to provide consent for the social worker to be able to contact other agencies/professionals and gather information about the child/family.

Risks, harm, disadvantage

- **Past** – information about past adversity can be important even if not a currently presenting factor. How children coped with previous experiences can be indicative of how they would respond to loss of a parental figure. Past traumatic experiences can increase children's future vulnerability. Children who have experienced past harm need to have a preventative approach to safeguard their mental health.
- **Present** – in keeping with KO (Nigeria) threshold, extenuating circumstances are compelling evidence.
- **Future** – prediction of future likelihood of suffering harm or disadvantage need to be evidence-based. https://www.biduk.org/pages/62-bid-research-reports
- **Delay** – safeguarding means not delaying in making the right decision for children. Because children are developing, with critical aspects of development happening at key periods, time has a greater significance for children than adults.

The UNCRC guiding principles: Non-discrimination (Article 2)

- We often draw on our knowledge and experience of family law to help us articulate what safeguarding and promoting welfare is. We are really interested in this cross-pollination and are working on a piece of academic research with the European Children's Rights Unit at Liverpool University, that looks at how children's best interest is interpreted in family law and criminal law and can be applied to deportation cases.
- If you are a legal professional who has worked on cases that concern the deportation of a parent, please get in contact with us and we can share more information about our research. Naomi@socialworkerswithoutborders.org

The UNCRC guiding principles: The best interest principle (Article 3)

- The child's rights and needs must be assessed and it is the culmination and interplay of factors that determine what is the best interest of each unique child.
- UNCRC General Comment 14 "*It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the child…with full respect for the rights contained in the Convention…".*

The UNCRC guiding principles: The child's right to development (Article 6)

- Social work assessments are grounded in child development theory, giving careful consideration to the age and stage of the child.
- Children's development is inseparable from the quality of care and relationships that they have. How does the potential loss of a primary carer impact children?
- Development is forward-looking. What does the child need to thrive?
- It is helpful to have evidence about what is in place to support the child's development: school, clubs, community. What good things are happening in the child's life? What opportunities to learn, grow, play do they have? What role does the parent play in supporting development and access to opportunity?

The UNCRC guiding principles: The child's right to be heard (Article 12).

- For children who are able to verbalise their views it can be helpful to work with a professional to have a safe space to share their views and use child-friendly approaches to this work.
- For babies, little children and some children with a disability, we need to use our expertise in infant observation and child development to ensure children have their needs heard in proceedings.

The right to a family life

- The child's fundamental need for care (Article 9, Article 18, Article 20 + ECHR Article 8).
- Children are unique in their need for loving, caring relationships to ensure their healthy development and survival.
- Children need touch and physical affection to support their ability to regulate their emotions. Play is 'the language of children' and the vehicle through which most of their learning and development will happen. For this reason, it is ridiculous to suggest that children can get what they need for their healthy development and wellbeing through remote relationships with their carers.
- The social work assessment is able to capture the dynamic nature of families and observe and describe the 'feedback loops' in the parent-child dyad.

The power of empathy

- A sense of empathy is important for humane decision making. Decision making isn't entirely rational, there is an affective component.
- It's really important that the decision maker has a sense of knowing the child and their family and having a degree of compassion for them.
- Observations of 'normal' family interactions can be a powerful way to bring people alive on the page.

Referrals

- Please email swwbcases@protonmail.com to request our referral form.

Thank you!

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QUESTIONS?

@DoughtyStreet/@DoughtyStPublic/@DoughtyStCrime
#ChildRightsDSC