



General Assembly

Distr.
GENERAL

A/HRC/7/NGO/31
22 February 2008

ENGLISH, FRENCH AND
SPANISH

HUMAN RIGHTS COUNCIL
Seventh session
Agenda item 3

PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

Joint written statement* submitted by Friends World Committee for Consultation (Quakers) (FWCC), a non-governmental organization in general consultative status, and International Catholic Child Bureau (ICCB), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[20 February 2008]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Rights of the Child

Children of Prisoners: Not Seen. Not Heard. Not Guilty.

The Problem

Nobody knows how many children are separated from a parent by imprisonment each year, because few countries require the authorities to collect information about the children of arrested or imprisoned adults. At the same time, some mothers do not wish to provide this information to the authorities since they fear – with justification – that the children will be taken into State care and they may not be able to reunite the family on their release, thus children may be left to fend for themselves, or to the vigilance and kindness of neighbours or extended family. Most incarcerated women, in some countries up to 80%, are the sole or main carer of minor children. Although women are normally only 2-9% of a country's prisoners¹, they constitute the most rapidly increasing part of the prison population.

The impact of parental imprisonment on children is only just beginning to be the subject of attention. These are important issues about which too little is known, and all States are encouraged to research and report on them in order to identify best practice in this area which affects more children in all countries than is generally recognised. Two recent reports from the UK illustrate the issues and concerns.

In the UK every year more children are separated from a parent by prison than by divorce.² Around 18,000 children are separated from their mothers by imprisonment each year.³ For 85% of mothers prison was the first time they had been separated from their children for any significant length of time.⁴

In the light of this information, in January 2008 the Children's Commissioner for England⁵ identified the need for more research into:

- different models of provision for mothers with babies;
- the implications for criminal justice policy of the emerging evidence on the importance of attachment for infant development;
- the effects of custodial environments on children; and
- the impacts of separation from mothers at particular intervals to see what is best practice for mothers and babies.

In February 2008, Scotland's Commissioner for Children and Young People⁶ pointed out, "Decisions to imprison a parent only rarely take account of the potential impact on children" and recommended that law, policy and practice in relation to criminal justice and imprisonment should be amended to take account of the rights of children affected by the imprisonment of a parent or carer.

¹ R. Walmsley, *World Female Imprisonment List 2006*, International Centre for Prison Studies, www.prisonstudies.org

² APF – Action for Prisoners' Families, CLINKS, Prison Advice & Care Trust and the Prison Reform Trust

³ Bromley Briefings Prison Factfile, November 2006, Prison Reform Trust, p. 16

⁴ Home Office Research Study, 162 (1997), *Imprisoned Women and Mothers*, Home Office: London

⁵ Prison Mother and Baby Units – Do They Meet the Best Interests of the Child? (11 Million, January 2008)

⁶ Scotland's Commissioner for Children and Young People: *Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland* (February 2008)

Alternatives to custody

Some countries have recognized that imprisonment is not the most effective way of addressing some crime. Thailand used to rely heavily on imprisonment. Two thirds had been convicted of drug charges and the majority of these inmates were also drug addicts. With the implementation of successful drug addicts' pre-trial diversion and early release programmes involving strong community participation; the increasing and innovative uses of probation and community-based treatment programmes; and restorative justice initiatives, the prison population has been reduced dramatically.⁷

Where alternatives to custody or imprisonment are provided, these may not be accessible to those with child care responsibilities, for example, bail hostels, drug treatment and rehabilitation programmes and community service placements may not have child care facilities, thus leading to unnecessary incarceration of mothers. On the other hand, some forms of alternative may not be in the child's best interests, for example, home detention of a carer might lead a child to spend more time away from home, or indeed to leave altogether, if the carer is abusive or violent.

The use of restorative justice processes, including family group conferencing and circle sentencing, could be beneficial in ascertaining and addressing the needs of children.⁸

International law

The Convention on the Rights of the Child requires that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' (Article 3(1))

In addition to the general principle of the best interests of the child in Article 3, the Convention reiterates the 'best interests' principle specifically in relation to separation of children from parents and contact with them (Article 9), parental responsibilities for the upbringing of their children (Article 18), and removal of children from the family environment (Article 20).

The Committee on the Rights of the Child has identified two separate 'best interests' obligations. First, in all actions affecting children in general or particular groups of children, their best interests must be considered. This requires child impact assessments and evaluations in relation to current and proposed laws, policies, practices and budget allocations at all levels of government.⁹ The obligation is to actively and overtly consider the issue of the best interests of the child, not that this will automatically override all other considerations. Secondly, the consideration of the best interests of the individual child in the specific circumstances. The obligation here is to demonstrate that the need to separate a

⁷ For more information, see, e.g., Kittipong Kittayarak, *Diversion Programs for Drug Addicts, Restorative Justice and New Community-based Treatment Measures in Thailand*, a paper submitted to the nineteenth International Conference of the International Society for the Reform of Criminal Law held at Edinburgh, Scotland, 26-30 June 2005 (<http://www.isrcl.org/Papers/2005/kittayarak.pdf>). See also the website of the Department of Corrections at www.correction.go.th.

⁸ For more information, see *UN Handbook on Restorative Justice Programmes* (UNODC, Vienna, 2006)

⁹ See Committee on the Rights of the Child General Comment No. 5 on General measures of implementation for the Convention on the Rights of the Child

child from the family is in the best interests of the child (otherwise the action is not permissible).

The African Charter on the Rights and Welfare of the Child (1990), Article 30(1) provides: 'States Parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

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

Although the Convention on the Rights of the Child does not directly refer to the issue of detention or imprisonment of a child's parent, the Committee on the Rights of the Child has started addressing the issue of not separating children from parents (in particular, mothers) by imprisoning the parent, but seeking all alternatives to pre-trial detention and imprisonment (Articles 9 and 3).¹⁰ At the same time, the Committee has recognised that some babies and young children may be better off accompanying their mother into prison rather than being separated from her, but this presupposes reasonable conditions in the prison, and still raises the issue of to what age, or in what circumstances, children should stay in prison. In either case, how the child is cared for by the mother, how the mother is supported by the institution and how the child maintains contact with parents and siblings – whether in prison or not - are issues of the utmost importance.

In its Concluding Observations the Committee has recommended that States 'develop and implement clear guidelines on the placement of children with their parent in prison (eg the age of the children, the length of stay, contact with the outside world and movement in and outside the prison) in instances where this is considered to be in the best interests of the child, and ensure that the living conditions, including health care, in prisons are adequate for the child's development, ... [and] develop and implement adequate alternative care for children who are removed from prison, and such care is regularly supervised and allows the child to maintain personal relations and direct contact with its parent remaining in prison.'¹¹

National Interpretation

In September 2007, the South African Constitutional Court made a landmark ruling in relation to Section 28(2) of the South African Constitution, which provides that '[a] child's best interests are of paramount importance in every matter concerning the child.' The Constitutional Court held that this provision creates enforceable legal rules. In the case of

¹⁰ A provision to this effect is included in the draft UN Guidelines on Children without Parental Care prepared following the Committee on the Rights of the Child's 2005 Day of General Discussion.

¹¹ Mexico CRC/C/MEX/CO/3 (2006), para. 40

S v M (CCT53/06)¹², the Constitutional Court addressed, for the first time, the precise question of the application of this provision by a court when sentencing the primary caregiver of minor children: earlier cases had considered the application of ‘best interests of the child’ in relation to juvenile offenders. The Court demonstrated how such a provision can be applied, and set out guidelines to ‘promote uniformity of principle, consistency of treatment and individualisation of outcome’:

1. The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
3. If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
5. Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.¹³

In Kyrgyzstan, the law provides that pregnant women and mothers of children under 14 years are only sent to prison for serious offences. The sentence is suspended and usually not enforced if the mother is judged to be taking good care of her child.¹⁴

Conclusion

It is clear that neither separating babies and children from their mothers, nor housing babies and children in prison is usually in the best interests of the child. Thus, States should consider all alternatives to custody pending trial and to sentencing to prison for pregnant women, mothers of babies and children (and indeed fathers in the case where the father is the parent with caring responsibilities for the child or children). In order to do this, the justice system needs to have processes which routinely check whether such caring responsibilities exist, including in relation to foreign nationals.

Where, nevertheless, babies and children may accompany a parent into prison ensure that the best interests of the child are considered both in the initial decision and in deciding on subsequent removal. If there is an age limit beyond which the child cannot remain in prison, this should be applied flexibly taking into account the specific situation of the child, for example, whether the imprisoned parent will be completing the sentence soon.

ICCB and FWCC (Quakers) urge the UN Human Rights Council to call on all States:

1. To give greater attention to the impact of parental detention and imprisonment on children;

¹² South Africa: Constitutional Court, *S v M* (CCT53/06) [2007] ZACC 18 (26 September 2007)

¹³ South Africa: Constitutional Court, *S v M* (CCT53/06) [2007] ZACC 18 (26 September 2007), para. 36

¹⁴ Kyrgyzstan case study for Quaker UN Office, Geneva

2. Not to detain or imprison pregnant women except as a measure of last resort and after considering all non-custodial alternative measures;
3. To give priority to non-custodial measures, including in particular restorative justice processes, family group conferencing and circle sentencing, as well as community orders, probation and suspended sentences, when faced with decisions in relation to a child's sole or main carer;
4. To consider the best interests of the child in all pre-trial and sentencing proceedings in relation to the sole or main carer of babies and children;
5. To undertake research and report on experience of addressing these issues, both best practice and problems encountered, in relation to the needs, physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment.

- - - - -