



## **Impacts of pre-trial detention procedures on children with parents in conflict with the law**

From the moment of a parent's arrest to the passing of a final sentence, the pre-trial detention phase and its various procedures is a mutable, unsettling period for children, during which children's rights frequently go unconsidered. Children may experience prolonged periods of uncertainty due to parents being moved around without family members knowing, and communication with children and families over the phone may be inconsistent, if not entirely prohibited. This lack of information coupled with the current suspension of in-person visits as a result of the COVID-19 pandemic, can result in stress, worry, anxiety and depression in children and young people.

Legal definitions of the pre-trial detention phase, also referred to as preventive or remand detention,<sup>1</sup> differ according to the presiding legislative body and depending on national context, which has posed problems for the application of minimum standards for member states of the European Union and Council of Europe.<sup>2</sup> Keeping with the European Commission and Council of Europe's definition of pre-trial detention this brief will consider pre-trial and remand detention procedures to include all stages in preparation of and preceding trial, from the moment a defendant is taken into police custody to the passing of a final sentence at the end of the appeals process. Pre-trial detention procedures can vary widely country to country, and there are no EU-wide procedures for assigning pre-trial detainees to a facility close to home or even in their home country.<sup>1</sup> This means that family visits may be impossible or unaffordable for children from less-privileged backgrounds, breaching children's right

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<sup>1</sup> In this brief, the terms 'remand detention,' detention 'on remand' and 'remand in custody' are used interchangeably with 'pre-trial detention'. A 'remand detainee' or 'remand prisoner' refers to someone detained during pre-trial procedures. The 'remand period' describes the interval during which a detainee is held in custody according to criminal justice procedures, from the moment a defendant is taken into police custody to the passing of a final sentence at the end of the appeals process.

<sup>2</sup> Coventry, T. (2017), 'Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU,' *New Journal of European Criminal Law* 8(1), 43–63.

to remain in regular contact with their parent when separated from them. Likewise, there is no common benchmark for the use of non-custodial pre-trial measures or procedures when this will benefit the best interests of the child. Broadly speaking, detention before trial is over-relied upon as a general practice, tending towards indefinite and extended periods in custody, with up to one-third of the world's prison population in pre-trial custody on any given day.<sup>3</sup> A 2014 report by the Open Society Foundations found that the average period of pre-trial detention in Council of Europe countries is nearly half a year.<sup>4</sup> It has also been found that prisoners not serving a final sentence account for 25 percent of the European prison population<sup>5</sup>.

There are no EU-wide procedures for assigning pre-trial detainees to a facility close to home or in their home country. This means that family visits may be impossible or unaffordable for children from less-privileged backgrounds, breaching children's right to remain in regular contact with their parent when separated from them. Likewise, there is no common benchmark for the use of non-custodial pre-trial measures or procedures when this will benefit the best interests of the child. The UN Standard Minimum Rules for Non-Custodial measures (the Tokyo rules), the European Convention on Human Rights (Article 5, paragraph 3), The European Committee for the Prevention of Torture (CPT), and the COE Recommendation Rec(2006)13 all mention that pre-trial detention should be minimised or used as a last resort. In cases where pre-trial detainees are also parents or primary caregivers, the UN Committee on the Rights of the Child has urged the use of non-custodial sentences in lieu of custodial sentences and emphasised that case-by-case evaluations be used to determine the "likely impacts of different sentences on the best interests of the affected child(ren)."<sup>6</sup> European Union policies and actions with regards to children's rights are guided by the 1989 UN Convention on the Rights of the Child (UNCRC)<sup>7</sup>. The EU Fundamental Rights Agency has stated that "The Charter of Fundamental Rights requires that, within the scope of EU law, detention conditions do not lead to violations of fundamental rights" including the fundamental rights of the child. Article 24 of the Charter says:

**1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views**

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<sup>3</sup> Heard, C. & Fair, H. (2019), *Pre-trial detention and its over-use: Evidence from ten countries*, Institute for Crime & Justice Policy Research, vii.

<sup>4</sup> Schönteich, M., & Varenik, R. O. (2014), *Presumption of guilt: the global overuse of pre-trial detention*, Open Society Foundations, 1.

<sup>5</sup> Walmsley, R. (2020) *World Pre-Trial/Remand Imprisonment List. Fourth Edition*, London, ICPR, 2. [https://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_pre-trial\\_list\\_4th\\_edn\\_final.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf)

<sup>6</sup> UN Committee on the Rights of the Child (2011), *Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents"*, para. 30.

<sup>7</sup> As stipulated in the EU Agenda for the Rights of the Child, adopted by the European Commission COM (2011)60.

- freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.**
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**
  - 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his/her parents, unless that is contrary to his/her interests.**

### **Pre-trial detention procedures *vis-à-vis* children's rights**

Greater focus on pre-trial procedures and how they impact children when a parent is in conflict with the law is required, as this report shows, for reasons including the following:

1. This is a fundamental rights issue, which applies to both the defendant and the child of the defendant.<sup>8</sup>
2. Basic pre-trial detention procedures in the EU are lacking, and don't systematically take into account the best interests of the child when a parent is arrested and placed in pre-trial custody.
3. Pre-trial family visits can be highly restrictive or entirely impossible.
4. On any given day, a significant number of children are impacted; more than 200,000 children in EU-27 are adversely affected by the pre-trial detention of a parent.<sup>9</sup>

#### **A. Effects of pre-trial detention on children including not informing children of the detention**

From the moment of arrest, the child can experience upheaval and hardship, with the loss of the parent, break-up of the family, adverse impact on the family's economic situation, higher risk of suffering anxiety and depression and school

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<sup>8</sup> Zyl Smit, D., & Snacken, S. (2011). Principles of European prison law and policy; Codd, H. (2013). *In the shadow of prison: Families, imprisonment and criminal justice*.

<sup>9</sup> Extrapolation based on a demographic 'parenting rate' of 1.3 offspring per prisoner derived from the results of a 1999 study conducted by France's national statistics institute INSEE as part of a national census, which included 1,700 male prisoners. The number of children impacted by a parent's pre-trial detention is based on the Open Society Foundations finding that one-third of prisoners worldwide are detained on remand.

performance being hindered.<sup>10</sup> The bulk of empirical research on children with parents in conflict with the law does not distinguish between the pre-trial phase and incarceration after sentencing.<sup>11</sup> The result is a paucity of research focusing specifically on the impact to children when a parent is facing the various phases of remand detention. However, available research on pre-trial procedures does show that pre-trial procedures can impact children in the following ways:

- Normal life is disrupted (meals, schools, other habitual facets of the day-to-day).
- Maintaining contact and a relationship with their parent is difficult.<sup>12</sup>
- Pervasive feelings of uncertainty and disorientation in the household. Especially in cases with slow court procedures and case backlogs this may mean a parent is detained for an uncertain amount of time. Uncertainty is often present even after incarceration or acquittal is determined.

Significantly, research has demonstrated that there is a greater incidence of failing to explain to children the true reason for a parent's absence during pre-trial detention procedures. This may be for numerous reasons, including parents and caregivers who are themselves coping with the lifestyle upheaval associated with pre-trial detention, that they are seeking to protect children, and that they imagine a brief remand period or one that will not necessarily lead to the parent's conviction and post-trial imprisonment. Research done by McEvoy et al. found 90 per cent of partners of sentenced prisoners in their sample responded that all or some of their children were aware of why their parent was absent, versus 59 per cent of pre-trial prisoners' children.<sup>13</sup>

Not telling children the truth can have far-reaching adverse impacts on children and disregards their right to be heard in decisions affecting them (Article 12, paragraph 2 of the UNCRC). According to one review of the literature on issues and difficulties for the families of prisoners, possible repercussions of deceiving children include inhibiting their ability to work through emotional issues linked to the parent's absence; a tendency to demonise the parent and the prison world, with a heightened focus on the parent's 'terrible' crime; externalisation of children's behaviour in destructive or delinquent acts; and loss of faith in authority if the child learns of the parent's imprisonment from a third party such as a peer at school or through the

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<sup>10</sup> *Children of Prisoners: Interventions and mitigations to strengthen mental health* [COPING Project] (2013), eds. Jones, A. D. and Wainaina-Woźna, A. E., University of Huddersfield, UK.

<sup>11</sup> Scharff-Smith, P. (2014), 'Remand Imprisonment: A Stressful Phase of Transition,' in *When the Innocent are Punished* (133-137), Palgrave Macmillan, London.

<sup>12</sup> Robinson, O. (2007), *The impact of parental imprisonment on children*, Quaker United Nations Office, 16.

<sup>13</sup> McEvoy, K., O'Mahony, D., Horner, C., and Lyner, O. (1999), 'The home front: The families of politically motivated prisoners in Northern Ireland,' *British Journal of Criminology*, 39(2), 175-197.

media.<sup>14</sup> The child also experiences a loss of trust in their bond with their parents. Not telling the truth, and consequently covering it up within the family, is also associated with a phenomenon known as ambiguous loss. Ambiguous loss has been identified as one of the most stressful kinds of loss,<sup>15</sup> with children being excluded from the process of grieving the loss of the parent, which opens up opportunities for acceptance and closure. Ambiguous loss, stigma and uncertainty have been cited as factors in withdrawal, depression or externalised anti-social behaviour amongst children with imprisoned parents.<sup>16</sup>

In addition, not talking openly to the child about the parent's imprisonment can exacerbate the stigma associated with having a parent in prison. Children can face stigma associated with having a parent in prison even when the parent is found to be not guilty. A 2014 report by the Open Society Foundations indicates that one in three people in prison has not been found guilty of a crime.<sup>17</sup>

In terms of its impact on children, pre-trial detention restrictions that result in a total ban on contact between a child and their parent in prison can be detrimental to the child's psychological development. Research findings from the EU-funded transnational study *Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health* (COPING) identified the importance of children sustaining and maintaining relationships with imprisoned parents, both fathers and mothers, as a crucial factor contributing to children's resilience.

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<sup>14</sup> Woodward, R. (2003). Families of prisoners: Literature review on issues and difficulties. *FaHCSIA Occasional Paper*, (10).

<sup>15</sup> Boss, P. (2007). Ambiguous loss theory: Challenges for scholars and practitioners. *Family relations*, 56(2), 105-110.

<sup>16</sup> Bocknek, E. L., Sanderson, J., & Britner, P. A. (2009). Ambiguous loss and posttraumatic stress in school-age children of prisoners. *Journal of Child and Family Studies*, 18(3), 323-333.

<sup>17</sup> Schönteich, M., & Varenik, R. O. (2014). *Presumption of guilt: The global overuse of pretrial detention*. Open Society Foundations.



## B. Visiting untried prisoners

Based on the available data shown above, a comparison between the visiting rights of prisoners on remand and sentenced prisoners is indicated by the number of visits authorised per month in different country contexts<sup>18</sup>.

- In Sweden and the Netherlands, visiting rights are granted depending on the conditions of detention, the gravity of the crime, and the rules of the penitentiary institution in which the person is detained.<sup>19</sup>
- In Switzerland, visits for pre-trial detainees are granted at the discretion of a prosecutor.<sup>20</sup>

The uncertainty of pretrial procedures is reflected in requirements in most countries for remand detainees and their families to obtain approval for visits. Indeed, ongoing investigations do not always allow prisoners pending trial to receive visits – and in most countries, families must apply for visits to the prosecutor in charge of the case.

- In Malta it is required to have an appointment with the police inspector to obtain a visitor's permit<sup>21</sup>.

<sup>18</sup> Data does not allow the chart to include all forty-seven Council of Europe's member states, as many of them indicated the authorised monthly visits in hours; In Luxembourg, for instance, every prisoner is entitled to seven hours of visits per month, with visiting permits issued to untried detainees ('Information Pack for British Prisoners in Luxembourg,' (2020), British Embassy, Luxembourg).

<sup>19</sup> 'Information Pack for British Prisoners in Sweden,' (2020), British Embassy, Stockholm.

<sup>20</sup> 'Information Pack for British Prisoners in Switzerland,' (2018), British Embassy, Berne.

<sup>21</sup> 'Information Pack for British Prisoners in Malta,' (2020), British Embassy, Malta.

- In Croatia and Liechtenstein, prosecutors or prison administrators are able to reject a family's application to visit a family member in prison at the pre-trial stage<sup>22</sup>.

Moreover, regulations internal to each prison also make visits difficult. Children may not always be allowed to visit a parent pending trial, as is the case in Russia<sup>23</sup>, and even if visits are permitted they may be subject to specific restrictions:

- In Germany, visits are possible only during pre-determined visiting times.<sup>24</sup> When pre-trial detainees are allowed to receive a family visit, they are commonly supervised, as in Estonia, and often no physical contact is authorised<sup>25</sup>.

As a result, in certain national contexts visitation is not only made complicated, and held under more hostile regulations, but is also time-consuming for families of untried prisoners trying to stay connected. From the application process to the obtention of a permit (that must be renewed, in most cases, each time families want to visit), to the time spent in transports, to the prison security checks, the actual visiting time is reduced, despite the crucial nature of these visits for the personal wellbeing and development of children.

### **C. Conclusion**

Defendants detained before trial have a higher risk of being sentenced to prison in contrast to defendants who are released prior to trial.<sup>26</sup> The collateral consequences associated with being subjected to pre-trial detention – loss of job, health, home, family and community ties – can negatively impact the way the defendant is seen in court and therefore their eligibility for a non-custodial sentence. This needs to be highlighted and redressed as work to reform the overuse of pre-trial detention is carried out.

Furthermore, awareness of the impact of sentencing decisions, and restrictions to contact for children when a primary carer is at risk of imprisonment also needs to be raised to challenge and eliminate one aspect of what has been called 'child blind justice',<sup>27</sup> where the harm inflicted on a child as a result of sentencing decisions for

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<sup>22</sup> 'Information Pack for British Prisoners in Croatia,' (2020), British Embassy, Zagreb; 'Information Pack for British Prisoners in Liechtenstein,' (2018), British Embassy, Berne.

<sup>23</sup> 'Information Pack for British Prisoners in Russia,' (2020), British Embassy, Moscow.

<sup>24</sup> 'Prison Conditions in Germany' (2020), European Prison Observatory.

<sup>25</sup> 'Information Pack for British Prisoners in Estonia,' (2020), British Embassy, Tallinn.

<sup>26</sup> *The Socioeconomic Impact of Pretrial Detention* (2010). Open Society Foundations, 12.

<sup>27</sup> The term 'child-blind justice' was first used by Adele Jones in a paper of the same name presented at the March 2017 conference of the International Coalition of Children with Incarcerated Parents (INCCIP) in Rotorua, NZ.

primary carers is neither foreseen, acknowledged nor remedied by the system. The UN Committee on the Rights of the Child states that the best interests of a defendant's child shall be "carefully weighed and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child."

## **E. COPE's key asks**

1. Any decision to exclude family visits for prisoners must require consideration of the possibility of children being able to visit, and the right of the child to have direct contact with their parent, taking their age into account, even if this necessitates someone other than family members accompanying them, as implemented by the Swedish NGO cited above.<sup>28</sup>
2. The use of alternatives to remand detention must be promoted, as does access to these alternatives free of charge (e.g., electronic tagging), to avoid potential discriminatory effects on defendants and their children.
3. As also emphasised by The UN Committee on the Rights of the Child, and Council of Europe Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, the child's best interests and rights need to be considered throughout all pre-trial detention procedures (e.g., child-parent contact, proximity of parent to home, active communication and information channels concerning the parent's situation) and formal mechanisms should be put in place to ensure these considerations.

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<sup>28</sup> As proposed by Rachel Brett as part of the Coping study (*Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health*) during a personal discussion with Madelein Lofgren of Swedish NGO BUFFF.





Children of Prisoners Europe (COPE) is a pan-European network of non-profit organisations working on behalf of children separated from an imprisoned parent. The network encourages innovative perspectives and practices to ensure that children with an imprisoned parent fully enjoy their rights under the United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, and that action is taken to enable their well-being and development.

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