



Bourgaize v Law Officers of the Crown
Royal Court
10th December, 2014

JUDGMENT
49/2014

Appeal against sentence imposed by the Magistrate's Court on 18th September, 2014

IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM THE MAGISTRATE'S COURT

Between

CLAIRE LOUISE BOURGAIZE

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondent

Appeal against Sentence imposed by the Magistrate's Court on 18th September 2014

Before: Richard James McMahon Esq., Deputy Bailiff

**Jurats: S Mowbray, B J Bartie, C H Le Pelley, P S T Girard, T G Snell, N D McCathie,
T J Ferbrache, D A Grut and J G Hooley**

Hearing date: 24th November 2014 (AM only)

Reasons handed down: 10th December 2014

Advocate for the Appellant: Advocate C M Fooks
Advocate for the Respondent: Crown Advocate C G Dunford

Cases and materials referred to in the Judgment:-

The Fraud (Bailiwick of Guernsey) Law, 2009
The Criminal Justice (Community Service Orders) (Bailiwick of Guernsey) Law, 2006
Petherick [2013] EWCA Crim 2214
The Road Traffic Act 1988
Babbé v Law Officers of the Crown (unreported, 2 February 2005)
McDonald v Law Officers of the Crown (unreported, 17 October 1995)
The Human Rights (Bailiwick of Guernsey) Law, 2000
The European Convention on Human Rights

Epstein, *Mothers in prison: The sentencing of mothers and the rights of the child* (2014, Howard League for Penal Reform)

R (Stokes) v Gwent Magistrate's Court [2001] All ER (D) 125 (Jul)

R v Arinze [2010] EWCA Crim 1638

The Criminal Justice (Power to Suspend Sentence) (Bailiwick of Guernsey) Law, 1972

Blackstone's Criminal Practice 2014

The Criminal Justice (Suspended Sentence Supervision Orders) (Bailiwick of Guernsey) Law, 1984

Introduction

1. At the conclusion of the hearing on 24 November 2014, the Court announced that the appeal against sentence of the Appellant, Claire Louise Bourgaize was being allowed to the extent that the concurrent sentences of six months' imprisonment imposed by the Magistrate's Court on 18 September 2014 would be suspended for a period of three years rather than taking effect immediately. The Court indicated that full written reasons for that decision would be provided in due course. This judgment contains those reasons.

Background

2. On 18 September 2014, the Appellant was sentenced to a total of six months' imprisonment by the Magistrate's Court. She immediately instituted this appeal (and was also admitted to bail pending its determination), arguing that the sentences imposed are manifestly excessive and/or wrong in principle. In particular, she submits that the Judge of the Magistrate's Court did not properly prioritise, or balance, the needs of the children and/or harm to them of the Appellant being imprisoned.
3. The sentences of six months' imprisonment were imposed in respect of a number of dishonesty offences to which the appellant had pleaded guilty on 23 June 2014 relating to the taking and cashing of two cheques. Each offence attracted the same sentence, to run concurrently.
4. The person from whom the cheques were taken is Commander Derek Ford, who is 92 years old and blind, although he retains mental capacity and has been described as "astute". The Appellant had been one of Commander Ford's regular carers for a period of approximately two years. The Appellant had had personal problems in recent years and had made Commander Ford aware of them. He had generously assisted her with money. By way of example, on 12 February 2014, he gave a cheque to the Appellant for £1,650, which he said was by way of a loan, although this amount is not the subject of any of the offences.
5. As a result of spotting some missing bank statements, Commander Ford, assisted by friends, went through his chequebook and noticed that one of the stubs had been removed, being cut or razored to the edge of the binding to hide the fact that it was no longer there. The bank informed him that the corresponding cheque had drawn in favour of "C Bourgaize" and had been presented and cleared on 11 March 2014. Because Commander Ford knew he had not written such a cheque, although he recalled the Appellant asking him to sign some paperwork during March, the Police were contacted.
6. When the Appellant was spoken to by the Police, she claimed that the cheque had been written by Commander Ford because she had needed a loan to assist in moving into her new flat. The earlier cheque for £1,650 was explained by her to have been a gift to enable her to buy a motor vehicle. However, the date of acquisition of her car turned out to be in 2013, so her claim that she had used the cheque for £1,650 dating from February 2014 for that purpose was shown to be a lie. Indeed, because she needed to do so because of the benefits she was receiving, she had told the Social Security Department that the money received from Commander Ford in February 2014 was a loan to cover the deposit on her new flat, which was consistent with what Commander Ford had also explained to the Police. The estate agent involved with the flat

transaction confirmed that on 12 March 2014 the Appellant had paid a deposit of £2,400 and rent in advance of £1,600. The Appellant then moved into that new flat on 14 March 2014.

7. Subsequently, upon reviewing a later bank statement, Commander Ford discovered that a further cheque had been written out to Ms Bourgaize on 20 March 2014 and paid into her account 6 days later. He made a further complaint to the Police on 2 May 2014. Suspicion arose because the Appellant had not even mentioned this transaction in her earlier interview. The chequebooks were looked at again and it was noticed that the stub corresponding to this cheque had also been removed, but that this cheque was further through the chequebook, meaning that some blank cheques were still in place before it would in the ordinary course of events be reached. This was why it had been missed previously.
8. The Appellant was re-interviewed on 1 June 2014. Whilst initially maintaining the same stance as previously, she then broke down and confessed that she had actually taken both cheques and had asked Commander Ford to sign documents he was told were references relating to her new flat. She apologised, explaining that she had family problems, adding that she was 'trying to keep her head above water'.
9. For the offence of stealing the first cheque on 8 March 2014 from Commander Ford, the Appellant was sentenced to six months' imprisonment. In respect of the charge under sections 1 and 2 of the Fraud (Bailiwick of Guernsey) Law, 2009 of dishonestly and intending thereby to make a gain for herself making a false representation which was and was known to be untrue in presenting the stolen cheque made out for £4,500 to be paid into her own account on 11 March 2014, the Appellant received six months concurrent. For a second offence of theft of a cheque on 20 March 2014, the sentence was also six months' imprisonment concurrent, and the same sentence was imposed in respect of a second fraud offence by paying into her own account on 26 March 2014 the cheque made out for £3,000.
10. The Appellant's non-attendance to perform service without reasonable explanation had put the Appellant in breach of a sentence of 70 hours Community Service, which had been imposed by the Magistrate's Court on 5 September 2013 as a direct alternative to 2 months' imprisonment in respect of three offences. Her conviction for the four offences relating to Commander Ford also meant she fell to be dealt with pursuant to section 8 of the Criminal Justice (Community Service Orders) (Bailiwick of Guernsey) Law, 2006, as amended. The three offences in question related to supplementary benefit, being one offence of failing to disclose a change in circumstances which related to commencing employment, and two offences of making a false statement. The sentence of community service had been imposed following the Appellant's guilty pleas. The Court referred to the Appellant's financial and family problems. The Appellant had completed 40 of the 70 hours ordered. On 18 September 2014, Judge Robey revoked the Community Service Order without further penalty, so the total sentence on the Appellant remained six months' imprisonment.
11. As is clear from his sentencing remarks, Judge Robey conducted a careful analysis of the aggravating and mitigating factors in the Appellant's case. In relation to the description of the offending given by Advocate Fooks of it being "*terrible, shocking and shameless*", Judge Robey added the adjective "*mean*". He commented that the "*targeting of a vulnerable victim by an offender through a position of trust will always indicate a high level of culpability*". There were elements of sophistication in the manner in which the cheque stubs were removed from the chequebooks. A further significant aggravating factor was the fact that the Appellant had appeared before the Court approximately six months before the commission of these offences for benefit fraud offences, when she had been sentenced to community service as a direct alternative to imprisonment. On that occasion, Judge Robey had told her that he might not have been prepared to make a community service order had she had a previous conviction for an offence of dishonesty.

12. In terms of mitigating factors, the Appellant had not sought to implicate anyone else, had made early admissions and had not taken the money with a view to obtaining luxuries for herself, but rather to make ends meet. There was also very strong personal mitigation relating to the position of the Appellant's children which made the sentencing exercise one of those in which Article 8 of the European Convention on Human Rights was clearly engaged. The Court indicated it had taken into account the nine points drawn from the English case of *Petherick* [2013] EWCA Crim 2214.
13. The way Judge Robey reached his sentence was as follows:

"I start with a concurrent, that means the sentences all run together, starting point of 15 months' imprisonment. By starting point I mean the sentence I would have imposed if you had pleaded not guilty to all offences and you had been convicted after trial. Despite my remarks with regard to perhaps not deserving full credit for the guilty pleas I am prepared to give the full usual one third discount from that in this case and that will reduce the sentence to one of 10 months. I also take into [account] the effect of prolonged imprisonment on your children which does weigh heavily with me and taking that into account I am prepared to reduce the sentence by a further 4 months. That makes a total of six months imprisonment on each offence running concurrently. I revoke the community service order and I don't impose, as perhaps I ought to and would do in other circumstances, an alternative to that community service order. In other words I simply revoke it without any further penalty so the sentence remains at 6 months imprisonment concurrent on each of these offences which will run from today."

Grounds of appeal

14. Advocate Fooks, on behalf of the Appellant, does not take any issue with the starting point for the four offences of 15 months, nor with the full one-third discount for the Appellant's guilty plea. Equally, she makes no objection to the decision to revoke the Community Service Order with no further penalty. In doing so, she implicitly acknowledges that the approach taken by Judge Robey was as generous in the circumstances as it could be when determining the appropriate period of imprisonment to impose.
15. The thrust of the submissions of Advocate Fooks is that the unique circumstances surrounding the Appellant's children's needs are such that the decision to impose an immediate custodial sentence was a disproportionate response and so wrong in principle or manifestly excessive. She invited the Court to suspend the sentences of six months' imprisonment, and in that event, she took no issue with the further reduction of four months from the 10 months reached after applying the discount for the guilty plea, or to impose some other non-custodial sentence. On that last point, during the course of the hearing, Advocate Fooks conceded that the position in which the Appellant found herself was such that there was no realistic non-custodial sentence that could be imposed.
16. During her submissions to the Magistrate's Court, Advocate Fooks questioned whether the imposition of a Community Service Order was an *"unrealistic sentence which, at that time, [the Appellant] wasn't in a position to fulfil with her work commitments and her commitments to the children"*. She also referred to it as a *"brave order"* and an *"unusual order"*. It was, of course, a direct alternative to immediate imprisonment, chosen, no doubt to reflect the seriousness of the offences to which the Appellant had pleaded guilty taking into account her personal circumstances, which were largely the same as when she was sentenced in September. Having tried the option of community service albeit without success, the seriousness of the present offences was recognised as meaning that community service was no longer a realistic choice for the Magistrate's Court. Similarly, whether or not Advocate Fooks had conceded the issue, it is not a realistic choice as an alternative approach to a sentence of imprisonment for this Court. The Appellant's offending called for a custodial sentence and the

questions for the sentence were to determine the appropriate length and also to consider whether or not the sentence should take effect immediately or be suspended.

17. Advocate Fooks places the grounds of appeal squarely on the way in which the principles derived from the *Petherick* case (*supra*), which were accepted by Judge Robey as being applicable to the sentencing exercise on which he was engaging, had been applied by him. She argues that he fell into error when conducting the balancing exercise in the light of the very particular circumstances of the Appellant's family and imposed a sentence that was disproportionate.
18. The principles in question are set out at paragraphs 17 to 25 of the judgment of the English Court of Appeal delivered by the Vice-President, Hughes LJ (as he then was). Because of their potential significance, we set them out in full:

“17. We do think however that we ought to say these brief things by way of general observation. First, the sentencing of a defendant inevitably engages not only her own article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female dependent is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart-rending effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be turned upside down by crime.

18. Second, the right approach in all article 8 cases is to ask three questions: 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? That is carefully set out by Lady Hale in her speech in *HH*. Although she was in the minority as to the outcome in relation to one of the persons sought for extradition, she gave at paragraph [30] this analysis with which there was general agreement. That approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment.

19. Third, long before any question of article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing. That is most conveniently to be extracted from the careful words of Lord Judge, CJ, in *HH* at paragraphs 126 to 130, to which reference should be made if this point is taken. In particular, at paragraphs 128 and 129 he said:

“128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years. Examples include *Franklyn* (1981) 3 Cr App R(S) 65 *Vaughan* (1982) 4 Cr App R(S) 83, *Mills* [2002] 2 Cr App R (S) 229, and more recently *Bishop* [2011] EWCA Crim 1446 and, perhaps most recently in *Kayani*; *Solliman* [2011] EWCA Crim 2871, [2012] 1 Cr App R 197 where, in the context of child abduction, the court identified

‘... a distinct consideration to which full weight must be given. It has long been recognised that the plight of children, particularly very young children, and the impact on them if the person best able to care for them (and in particular if that person is the only person able to do so) is a major feature for consideration in any sentencing decision.’

129. *Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 are entirely consistent. Thus, in the Assault Guideline, taking effect on 13 June 2011, and again in the Drug Offences Guideline, taking effect on 29 February 2012, among other features the defendant’s responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation.”*

20. *Fourth, it follows that a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.*
21. *Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence (see section 142 Criminal Justice Act 2003) and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. Moreover, as Sachs J pointed out in the South African Constitutional Court in N v The State [2007] ZACC 18, in a case in which there was under consideration a specific provision of the Constitution which required the interests of an affected child to be “the paramount consideration”, not only society but also children have a direct interest in society’s climate being one of moral accountability for wrongdoing. It also needs to be remembered that just as a sentence may affect the family life of the defendant and his/her innocent family, so the crime will very often have involved the infringement of other people’s family life. There is a good example afforded by the striking facts of the second defendant Solliman in Kayani and Solliman [2011] EWCA Crim 2871 at paragraph 54. He, by his crime of abduction of children, had utterly destroyed the abducted children’s relationship with their mother and his well-deserved imprisonment was now to punish them again by depriving them of his own care as their otherwise unexceptional remaining parent. This present case is also one in which article 8 rights are affected not only in the defendant and her child but in the deceased and his family.*
22. *Sixth, it will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.*
23. *Seventh, the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver and M v South Africa is again a good example. Even with the express Constitutional provision there mentioned, the South African Constitutional Court approved the result in*

which in one of the cases a sentence of four years was necessary upon a fraudulent mother, despite the fact that she was the sole carer for a number of children who were likely to have to be taken into care during her imprisonment – see paragraphs 43 to 44. Likewise, in HH, the majority of the Supreme Court was satisfied that there was no basis on which the extradition to Italy could be prevented of a father who was in effect the sole carer for three young children, but who had been a party to professional cross border drug smuggling. His extradition of course meant not only his imprisonment, but his imprisonment too far away from the children’s home for there to be more than the most rare of contact.

24. *Eighth, in a case where custody cannot proportionately be avoided, the effect on children or other family members might (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.*

25. *Ninth, those briefly stated principles are we think sufficient to guide sentencing judges and do no more than reflect what has been the practice of the criminal courts since long before arguments were habitually couched in terms of article 8 or human rights generally. We add that we do not think that those principles are affected by the question which is sometimes raised and which has been adverted to in Miss Russell’s written submissions, namely whether article 3 of the United Nation’s Convention on the Rights of Children and the similarly expressed article 24.2 of the European Union Charter of Fundamental Rights, do or do not apply to the sentencing of adults. As to that, on the one hand it is difficult to imagine that the framers of those conventions can have meant to include the sentencing of adults as decisions “concerning children”, any more than they meant to include other decisions, such as, for example, the enforcement of judgment debts against parents or the termination of the employment of parents within that expression. If they did, that would involve a requirement that the effect on a child of such a decision should be “a primary consideration”. Moreover, article 9 of the same convention makes clear that the separation of a child from parent may occur as the result of imprisonment which it clearly contemplates. As Lady Hale observed in ZH (Tanzania) it clearly distinguishes between the separation of a child and parent as a consequence of a decision as to the child’s upbringing on the one hand and separation as a consequence of detention or imprisonment on the other. As against that, there are passages in HH where it appears to have been assumed, though without argument to the contrary, that article 3 at least does apply – see passing references at paragraphs [16], [98], [143] and [155]. The reason why we say that it is not necessary to resolve that question in the sentencing in the Crown Courts is because it is clear from HH that even on the assumption and even if those provisions of those conventions applied, it is the balancing which is required by article 8 in the form that we have endeavoured to set it out which is the effective test for sentencing.”*

19. The offences in Petherick were, of course, quite different from those in the present case. The Appellant was sentenced in the Crown Court to imprisonment for four years and nine months for offences under the Road Traffic Act 1988 of causing death by dangerous driving and driving with excess alcohol. The applicable sentencing guideline for those offences placed them firmly in a range where a reasonably lengthy custodial sentence was inevitable despite the fact that the defendant was the sole carer of a two-year-old child. The appeal was allowed

to the limited extent of substituting a sentence of three years and 10 months. There is no option to suspend a sentence of that length.

20. Whilst acknowledging that Judge Robey indicated that he had taken into account all the nine points in *Petherick* without dealing with each in detail, Advocate Fooks has criticised him for concentrating on the fifth point and describing it as the “*essence*” of the sentencing exercise. She effectively submits that Judge Robey placed too great an emphasis on the need for the sentence to be one of immediate imprisonment without considering further whether, if this were regarded as a sentence of some disparity with other sentences for comparable offending, the very particular circumstances of this Appellant justified a different outcome. What he had said in his sentencing remarks was:

“The interests of the children in this case clearly mitigate against an immediate prison sentence for their mother, however, these are very serious crimes which must be seen to be dealt with by substantial punishment and the message, so far as a deterrent is concerned, has to be given that crimes involving these amounts in breach of such a high level of trust will be dealt with severely. Although I am concerned about the effects upon the children of a prison sentence and I would much rather, if I could, take a course that would avoid those effects I consider I would be failing in my duty to mark the seriousness of the offences with anything other than an immediate prison sentence.”

Advocate Fooks suggests that this shows that Judge Robey had fixed in his mind that only an immediate custodial sentence could be imposed and had taken into account the strong personal mitigation of the Appellant by reducing the period of the sentence as much as he could, rather than considering, as he was required to do, the impact of a sentence of immediate imprisonment by starting with the infringement of the children’s article 8 rights and balancing those rights with *inter alia* the fifth point from *Petherick* about the legitimate aims of sentencing.

21. In making that submission, Advocate Fooks has invited the Court to re-visit the personal mitigation involving the Appellant’s children. This mitigation is of a sensitive nature. Before the Magistrate’s Court, as before this Court, it was recognised that there must be respect for the privacy of those involved so that the details should not be set out for public consumption. Both Courts have had the benefit of seeing helpful and detailed reports from the Probation Service. These relate to the present offences, the earlier offences, and the breach of the Community Service Order. There were brief character references. Various medical reports were provided, as well as a detailed psychological report prepared by Dr Young in respect of the Appellant’s children. The contents of those reports were at the forefront of Judge Robey’s mind and also relied on by Advocate Fooks to support her submissions to this Court.
22. As an example of an appeal against sentence where this Court substituted a probation order for sentences of immediate imprisonment imposed by the Magistrate’s Court, Advocate Fooks referred to *Babbé v Law Officers of the Crown* (unreported, 2 February 2005). The Court noted that it “*will be a most exceptional case*” (its emphasis) before the Court would contemplate such a disposal, especially where some of the offences had been committed after the defendant had been charged with some offences, but there were “*many exceptional mitigating factors*”.
23. Similarly, the case of *McDonald v Law Officers of the Crown* (unreported, 17 October 1995), which had been placed before the Magistrate’s Court by the Crown, involved a young single parent who had pleaded guilty to importing cannabis resin. The Court of Appeal allowed that appeal to the extent of making the sentence of imprisonment for 18 months imposed by the Royal Court a suspended one and adding a suspended sentence supervision order for the two-year period. During the course of delivering the Court’s judgment, having referred to the option of suspending the sentence with a period of supervision, Blom-Cooper JA stated:

“Ought this application to be so treated now? We stress, now, because the applicant has experienced the impact of incarceration sufficient to understand the gravity of the offence for which she has been dealt with by the Royal Court. We think she should be so treated. Our main reason is the effect any continued loss of liberty will seriously impair her ability to get herself back on the right track, and to spare her young daughter the potentially lasting adverse effects on the child’s development.”

24. In summary, Advocate Fooks submitted that in the present case, where the Appellant’s children have such exceptional needs, their article 8 rights should prevail and be regarded as just tipping the scales so that an immediate custodial sentence is avoided as being disproportionate.

Discussion

25. This Court reached the conclusion that Judge Robey had conducted a careful and sensitive sentencing exercise, which could only possibly be faulted at its final step. Having reached the figure of a sentence of six months' imprisonment, with which no issue was, or could be taken, by the Appellant, this Court considers that he did not, as he should have, proceed to address the question of whether to suspend the sentence rather than make it immediate. Having very carefully weighed up the arguments for and against suspending that sentence, this Court has concluded, for the reasons that follow, that the children’s right to enjoy a family life with their mother should not, on this particular occasion, be infringed through the immediate imprisonment of the Appellant.
26. Before turning to Advocate Fooks' submissions in more detail and the Court's approach to the *Petherick* principles, the Court notes that Judge Robey commented that, before him, Advocate Fooks "*quite realistically and quite properly*" had not argued that the offences "*do not deserve an immediate and substantial prison sentence*". That comment appears to this Court to be inconsistent with the submissions made by Advocate Fooks before the Magistrate’s Court, where she argued strongly that any sentence of imprisonment should be suspended, albeit that she recognised that such a course of action would be exceptional. It is possible, therefore, that Judge Robey expressed himself in a manner that implied he might inadvertently have overlooked the strength of the submissions made on behalf of the Appellant that any custodial sentence be suspended.
27. The Court is satisfied that the points made in *Petherick* were all considered in the Magistrate’s Court. Subject to what follows, that guidance from England and Wales can properly be applied by Courts in Guernsey sentencing persons where there will potentially be some infringement of two or more persons’ article 8 rights. In saying that, the Court is conscious that in appropriate cases, of which the present case is a good example, this will mean that more information needs to be provided to the sentencing court than has perhaps historically been the case. This will probably have an impact on the costs associated with reaching Convention-compliant decisions, but that is one of the prices of having enacted the Human Rights (Bailiwick of Guernsey) Law, 2000 bringing the Convention rights into domestic law.
28. In that regard, it is worth recalling that section 6 of the 2000 Law provides that “*It is unlawful for a public authority to act in a way which is incompatible with a Convention right*” (see section 6(1)). By section 6(3)(a), a court is included in the definition of “*public authority*”. Accordingly, whether or not the issue is raised on behalf of a person before the Court, there is an obligation on any Court sentencing an offender where the impact of the sentence under consideration could involve a violation of any of that person’s Convention rights, or indeed of some other person’s rights, to consider whether the outcome being considered could fall the wrong side of the line.

29. Article 8 of the European Convention on Human Rights provides:

“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.”

It is invoked in sentencing exercises where imprisonment is under consideration because incarceration of a family member will have some impact on that person’s enjoyment of his or her right to family life. It will also impact on the enjoyment of that right by other members of the offender’s family. As one of the qualified rights in the European Convention, it is permissible for a public authority, which in these circumstances, is the Court, to interfere with the enjoyment of those rights for a legitimate reason (eg, prevention of disorder or crime) provided that to do so is proportionate.

30. On that last point, this Court is satisfied that the Magistrate’s Court recognised that, were the Appellant to be incarcerated, her children would be housed by their maternal grandmother, by whom they are loved. However, in the particular circumstances of this case, this outcome would not produce the same degree of care as if their mother were free to look after them herself. Accordingly, there would inevitably be an effect of the children’s rights to respect for their family life.
31. Because of the level of recognition of, and reference to, the article 8 rights of those involved, this was clearly a case in which the Magistrate’s Court knew that article 8 was engaged and asked itself the three questions in the second point in *Petherick*. Advocate Fooks accepted that there was no question but that the sentencing exercise turned on the third of those questions and this Court is satisfied that the central question is whether or not the outcome chosen was a proportionate response.
32. As an aside, the Court notes from the sentencing remarks of Judge Robey when dealing with the earlier benefit fraud offences on 5 September 2013 the only reference to the Appellant’s family circumstances was the recognition that it might be “difficult for [her] to perform [an order] in view of [her] childcare responsibilities”. There was no reference to article 8 of the European Convention having been considered or whether a sentence of imprisonment in those circumstances, to which the Community Service Order imposed was a direct alternative, was a proportionate sentence in the first place. With the benefit of hindsight, which this Court now has, although this was not articulated on behalf of the Appellant by Advocate Fooks, it is possible that the appropriateness of the disposal in 2013 could be questioned with the consequence that the present offences committed against Commander Ford should not have been set against the backdrop of a previous decision that the custody threshold has been passed.
33. Whilst Advocate Fooks suggested that *Petherick* has created a new way of looking at things, the approach used in, eg, the *McDonald* case (*supra*) shows that the Courts in Guernsey have, since before the enactment of the 2000 Law, been conscious of the impact of certain sentences on family members. By invoking article 8, it puts the issues very firmly in the realm of balancing those considerations and perhaps articulating them by reference to the respective rights under consideration. However, the outcome reached should be no different.
34. What is different in Guernsey from England and Wales, though, is that our Courts are not obliged by statute to follow the sentencing guidelines imposed upon them, save in those few areas where a higher court has established guideline ranges for particular offences. This creates greater flexibility for sentencers than might be the case in England and Wales and

enables the Court to fit the sentence to the particular circumstances of the defendant before it. For example, the references to the aims of sentencing in the fifth point in *Petherick* have not crystallised into legislation here, but clearly exist as principles to which courts sentencing offenders will generally bear in mind.

35. Another difference between the United Kingdom and Guernsey relates to the material addressed in the ninth point in *Petherick*. The UN Convention on the Rights of the Child has not yet been extended to Guernsey. The European Union Charter of Fundamental Rights appears to fall outside the scope of the Bailiwick's relationship with the European Union. In those circumstances, there is no need even to consider whether those other international instruments affect the decision-making process and the exercise to be undertaken must be to conduct the balancing exercise required by article 8 of the European Convention.
36. In relation to the fourth *Petherick* principle, no one has suggested that the Magistrate's Court did not have sufficient information about the Appellant and her family. There was a considerable amount of information available from which to consider the proportionality of the effect on the Appellant and her family of the disposal under consideration. The extent of the information needed in other cases will depend on the precise situation in which the defendant is placed. When a report prepared by a probation officer is ordered, it should aim to set out as fully as possible the domestic circumstances of the defendant and indicate whether further enquiries or reports might be needed.
37. This Court is satisfied that the sixth *Petherick* principle is not applicable to this case. In her written submissions, Advocate Fooks had suggested that this was a "*culp of custody*" case. However, at the hearing she acknowledged that making no criticism of the starting point of 15 months and the ending point of six months' imprisonment took this case away from the position where the choice was between a sentence of imprisonment and a non-custodial disposal, where the family members' article 8 rights might tip the scales away from what would otherwise be a sentence of imprisonment. (As previously noted, had the sentencing exercise in September 2013 been conducted with the *Petherick* principles in mind, it is possible that it would have been a "*culp of custody*" situation then.)
38. The seventh *Petherick* principle is in some respects the counter-balance to the sixth principle. The sentencing court is always considering first whether or not the custody threshold has been passed. If it is questionable as to whether custody is required (and on that issue we note the comments referred to in the research paper from Rona Epstein, *Mothers in prison: The sentencing of mothers and the rights of the child* (2014), published by the Howard League for Penal Reform from *R (Stokes) v Gwent Magistrate's Court* [2001] All ER (D) 125 (Jul) that "*committal to prison must be a remedy of last resort*" and from *R v Arinze* [2010] EWCA Crim 1638 that "*an offender who is the carer of three young children should be sentenced to imprisonment only if that is absolutely necessary, and secondly, if it is, for the shortest term that is conceivably commensurate with the offence in question*"), the impact of the interference with the article 8 rights of those involved might dictate that the decision should be to opt for a non-custodial sentence in the first place. However, once the Court has decided that the only option is to impose a custodial sentence, meaning that there will be some interference with those article 8 rights, the Court can properly proceed to consider the extent of the interference by adjusting the length of sentence, as appropriate. The seventh principle recognises that there is less scope for this to happen the longer the sentence is likely to be. The eighth principle then serves to emphasise, for the benefit of the courts in England and Wales, that, unlike so many of the other elements of sentencing where the relevant considerations are prescribed, deciding whether to treat the infringement of those article 8 rights as a reason for mitigating the sentence of imprisonment to be imposed must be determined on a case by case basis rather than by reference to any standard discount or range of discounts, such as pertains in relation, eg, to a guilty plea.

39. Where *Petherick* (*supra*) appears to be silent, no doubt because it was not in issue in that case given the length of sentence that had to be imposed come what may, is what the sentencer should do where the period of imprisonment produced is within the range where a suspended sentence, with or without supervision, can be imposed. The eighth principle refers only to adjusting the length of the sentence, but we take the view that the impact of the personal mitigation of a defendant and the effect of immediate custody on the children and other family members involved is something that should also be borne in mind where imposing a suspended sentence is available.

40. Section 1(1) of the Criminal Justice (Power to Suspend Sentence) (Bailiwick of Guernsey) Law, 1972 provides:

“Any Court which passes a sentence of imprisonment for a term not exceeding two years for an offence may, at the time of passing such sentence, order that the sentence shall not take effect unless, during the period of three years from the date of the order or such lesser period as may be specified in the order, the offender commits another offence punishable with imprisonment and thereafter the Court by which the offender is convicted of that subsequent offence orders, under the provisions of the next succeeding section, that the original sentence shall take effect.”

41. The description of the relevant considerations for a sentencing court, albeit by reference to the definitive sentencing guideline in England and Wales, which does not apply in Guernsey, which is set out in para. E6.3 of *Blackstone’s Criminal Practice 2014* offers guidance which the Court considers can properly be applied in Guernsey:

“The definitive sentencing guideline, New Sentences: CJA 2003 ..., provides that, while there are many similarities between the suspended sentence and the community orders, the crucial difference is that the suspended sentence is a prison sentence (or a sentence of detention in a young offender institution) and is only appropriate for an offence that crosses the custody threshold, and for which custody is the only option (para. 2.2.10). As far as the length of the sentence is concerned, before making the decision to suspend, the court must first have decided that a prison sentence (or sentence of detention in a young offender institution) is justified and should also have decided the length of that sentence, which should be the shortest term commensurate with the seriousness of the offence if it were to be imposed immediately. The decision to suspend the sentence should not lead to a longer term being imposed than if the sentence were to take effect immediately (para. 2.2.12). ... In Seferi [2013] 1 Cr App R (S) 350 the Court of Appeal upheld the decision of the judge to impose an immediate custodial sentence on one co-defendant and to suspend sentence on another, in light of personal mitigation relevant to the latter.”

42. Accordingly, the Court takes the view that the approach to sentencing a person in respect of whom article 8 rights are engaged should follow the pattern indicated by adopting the principles set out in *Petherick*, but subject to the gloss that consideration should be given, in a case where such a sentence is available once the appropriate length of a custodial sentence has been determined, as to whether to suspend that sentence rather than making it take effect immediately. Where truly exceptional circumstances are advanced on behalf of a defendant, as they were in this case, it is open to the sentencer to suspend a sentence which would normally attract an immediate custodial sentence. This is the type of disparity between different defendants that is justified rather than unjustified (see the fifth *Petherick* principle).

Conclusion

43. The Court is of the view that the sentence of six months’ imprisonment, concurrent for each offence, reached by Judge Robey gave full effect to the proper considerations in this case. Indeed, had this Court been conducting the sentencing exercise itself, it would not have been

able to be more generous to the Appellant and may have concluded that a slightly longer custodial sentence was justified for what was clearly a serious case of gross breach of trust involving significant aggravating factors. However, Advocate Fooks' plea for the Court to be merciful has found favour and this Court reached the conclusion that the extreme difficulties, including exceptional medical circumstances, faced by this Appellant's family are such that the impact of making that custodial sentence take effect immediately would be a disproportionate response and so the sentence imposed by the Magistrate's Court is manifestly excessive or even wrong in principle.

44. Without descending into any detail because of the sensitive nature of the information to which it has been privy, the Court considers that the situation of the Appellant's family is unlikely to be replicated. Although immediate custody would not result in the Appellant's children having to be cared for at public expenses, the Court noted that any further delay in progressing the work being undertaken with the family members that can only take place if the Appellant is at liberty to support it presents a risk to those children and, as an indirect consequence, increases the risks to the wider community. Whereas Judge Robey felt that it was his duty to mark the seriousness of the offences with an immediate prison sentence, despite being concerned about the effects a prison sentence would have on the children and would have preferred, if he could, to "*take a course that would avoid those effects*", in such a finely balanced case as this, the Court is persuaded that the unique combination of factors in the Appellant's case just tip the scales in favour of suspending the sentence of imprisonment.
45. In doing so, this Court considers that the seriousness of the offences has been marked by imposing a sentence of six months' imprisonment (and adds that it would not have regarded a slightly longer overall sentence as being manifestly excessive) and by making the period of suspension as long as is permitted under the 1972 Law. It has taken into account the content of the report from the probation officer that there is a low likelihood of re-offending and the Appellant is not a risk of harm to the general public. However, the Appellant should be under no illusion that this Court regards her recent descent into committing offences of dishonesty most seriously. The Appellant has been taking decisions that she should not have, however desperate she regards her situation. The property she chose to rent was simply beyond her means. There is, of course, nothing criminal in a person over-stretching themselves, but people's responses to that situation differ. Turning to crime and abusing the trust reposed in the Appellant by Commander Ford was a very serious error, compounded by the fact that she had appeared before the Magistrate's Court just a few months previously and was still undertaking her Community Service Order. It is unacceptable behaviour and the Appellant must address this. If she does appear before a Court for a further imprisonable offence during the three-year suspension period, the most likely outcome is that the suspended sentence will be activated. In effect, this is her last opportunity to sort out her personal circumstances.
46. Having decided to substitute a suspended sentence, the Court chose not to add a suspended sentence supervision order pursuant to the Criminal Justice (Suspended Sentence Supervision Orders) (Bailiwick of Guernsey) Law, 1984. The probation officer has not made such a recommendation because she is satisfied about the steps already taken by the Appellant to address her situation, further; the officer was not convinced the Appellant would comply with the requirements of supervision. Those factors led to the Court's decision.
47. The outcome on the appeal, therefore, is that the appeal is allowed to the extent of varying the sentence imposed so that for each of the four offences the sentence of six months' imprisonment is to be suspended for the period of three years, all sentences to run concurrently.