



## IMPACTS OF PRE-TRIAL DETENTION PROCEDURES ON CHILDREN WITH PARENTS IN CONFLICT WITH THE LAW

*“Mum explained that I had to prepare myself that my father would probably be imprisoned. It was sort of like waiting for something that you know will be unpleasant, but you don’t know how bad it will be.... And it was also as if every time we thought that now we were sure we would be told something, we would have to wait even longer.”*

*– 12-year-old boy from Denmark recounting his experience at age 7. His father was in remand custody for ten months and then sentenced to 14 years.<sup>1</sup>*

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. The procedures associated with pre-trial detention, also known as remand detention, may result in defendants being moved around without family members knowing, and communication with children and families over the phone may be inconsistent, if not entirely prohibited. Children may experience prolonged periods of uncertainty. At the very least, children with parents in pre-trial detention procedures have to cope with separation from their parent, which, when coupled with a lack of information and the current suspension of in-person visits as a result of the COVID-19 pandemic, can result in stress, worry, anxiety and depression of children and young people.

Legal definitions of the pre-trial detention phase, also referred to as preventive or remand detention,<sup>2</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

<sup>1</sup> Scharff-Smith, P. (2014), *When the Innocent Are Punished: The children of imprisoned parents*. London: Palgrave.

<sup>2</sup> In this report, 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.

European Union and Council of Europe.<sup>3</sup> United Nations bodies and the European Court of Human Rights (ECtHR) define pre-trial detention loosely as anyone deprived of liberty who is “suspected of having committed offences,” while the European Commission and Council of Europe include any detention until the end of the appeals process.<sup>4</sup> As defined in Council of Europe (COE) Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, ‘remand in custody’ broadly signifies detention that lasts until a sentence is finalised, including until the conclusion of the final appeals process.<sup>5,6</sup> In this report, pre-trial and remand detention procedures 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. These include all elements that determine whether or not a court case will take place: custodial measures, legal interrogatories, investigative interviews<sup>7</sup> and preparatory hearings.<sup>8</sup> Not all defendants awaiting criminal trial are detained, and some are released on bail. Broadly speaking, detention before trial is over-relied upon as a general practice the world over, with up to one-third of the world’s prison population in pre-trial custody on any given day,<sup>9</sup> and has been cited as a primary reason for global trends of overincarceration and prison overcrowding.<sup>10</sup> Prisoners not serving a final sentence account for 25 per cent of the European prison population<sup>11</sup>. Official estimates of the number of individuals being held in pre-trial detention rarely include those confined in police stations.

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<sup>3</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.

<sup>4</sup> Ibid, 45.

<sup>5</sup> Council of Europe Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted 27 September 2006. See also Children of Prisoners Europe (2019), *Keeping children in mind: Moving from ‘child-blind’ to child-friendly justice during a parent’s criminal sentencing*, 41.

<sup>6</sup> The Council of Europe’s 2019 SPACE I report (Statistiques Pénales Annuelles du Conseil de l’Europe) broadens this definition to “prisoners not serving a final sentence.” According to the Council of Europe’s definition of ‘remand in custody’ (see above) this category should include (a) untried detainees, (b) detainees found guilty but who have not received a final sentence yet, (c) detainees who have not received a final sentence yet, but who have started serving a prison sentence in advance, and (d) sentenced inmates who have appealed or who are within the statutory limit to do so. However, categories (b) and (c) do not exist in all countries, and some countries do not include category (d) under the total number of inmates not serving a final sentence (see page 23 of the 2019 SPACE I report). The 2019 SPACE I report is available at: [https://wp.unil.ch/space/files/2021/02/200405\\_FinalReport\\_SPACE\\_I\\_2019.pdf](https://wp.unil.ch/space/files/2021/02/200405_FinalReport_SPACE_I_2019.pdf)

<sup>7</sup> Kozma, J. & Rachlew, A. (2018, 22-23 March), ‘Combating Torture During Police Custody and Pre-Trial Detention’ [Discussion Paper]. Conference hosted by the Danish Chairmanship of the Committee of Ministers of the Council of Europe. <https://rm.coe.int/0900001680797130>

<sup>8</sup> *Kharchenko v Ukraine*. (10 February 2011) ECtHR <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-103260%22%7D>

<sup>9</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>10</sup> UNHRC (2015), *Human rights implications of overincarceration and overcrowding*, clause 37 states: “The Subcommittee on Prevention of Torture has stated that the excessive use and length of pretrial detention is a major cause of overcrowding, and that the overuse and misuse of pretrial detention needs to be tackled as a matter of priority. [...] In some countries, pretrial detainees reportedly constitute the majority of the prison population, and over 90 per cent of detainees in some settings.”

<sup>11</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)

The period of pre-trial detention tends to be indefinite and can be for an extended amount of time. 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>12</sup> Some defendants spend long periods in police custody, and detention can be prolonged by investigative procedures, with some cases requiring years to process.<sup>13</sup> In addition, pre-trial detention procedures can vary from country to country. In some European countries (e.g., Cyprus, Greece, Romania, Slovenia)<sup>14</sup>, the constitution sets maximum time limits on pre-trial detention. Maximum lengths of pre-trial detention often differ depending on the severity of the crime committed. According to the French Code of Criminal Procedure, the remand detention period can extend to a maximum of four months without aggravating circumstances<sup>15</sup>; German law limits the remand period to six months, unless other measures are justified, with some detainees held for up to three years<sup>16</sup>. Finland, Ireland and Luxembourg have no formal legal limits on the length of remand detention, and rely on other mechanisms for determining pre-trial detention lengths.<sup>17</sup> Yet pre-trial detention may last for extended periods of time even in the case of the countries that have set a maximum limit. In Romania, for example, Article 236 (4) of the Penal Code states that pre-trial detention cannot be longer than 180 days before the trial starts, but a parent can remain in detention up to five years before a first level sentence (Article 239).

There are no EU-wide procedures for assigning pre-trial detainees to a facility close to home or in their home country.<sup>18</sup> 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.

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<sup>12</sup> Schönteich, M., & Varenik, R. O. (2014), *Presumption of guilt: the global overuse of pre-trial detention*, Open Society Foundations, 1.

<sup>13</sup> Condry, R. (2007), 'Families Outside: The Difficulties Faced by Relatives of Serious Offenders,' *Prison Service Journal* 174, no. 3, 4.

<sup>14</sup> Gialuz, M., & Spagnolo, P. (2013). Reasonable Length of Pre-Trial Detention: Rigid or Flexible Time Limits: A Study on Italy from a European Perspective. *Eur. Crim. L. Rev.*, 3, 220.

<sup>15</sup> Unless a defendant has previously been found guilty of committing a crime and imprisoned, in which case an examining judge can decide to extend the sentence. (Articles 145-1, 145-2 and 145-3 of the Code of Criminal Procedure). The ECtHR found France in breach of Article 5(3) of the ECHR for imposing remand detention for a six-year period (*Naudo and Maloum v France* [2011] ECHR 1260).

<sup>16</sup> Van Kalmthout, A. M., Knapen, M. M., & Morgenstern, C. (2009). Pre-trial detention in the European Union. *Nijmegen: Wolf Legal Publishers* and 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation' (2018), Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the European Union, 88.

<sup>17</sup> Van Kalmthout, A. M., Knapen, M. M., & Morgenstern, C. (2009). Pre-trial detention in the European Union. *Nijmegen: Wolf Legal Publishers* and 'Criminal procedural laws across the European Union' (2018).

<sup>18</sup> The European Arrest Warrant has facilitated arrests in another country, but transfers can take several weeks or months.

Numerous international bodies have determined rules and standards for the use of pre-trial detention. Article 5, paragraph 3 of the European Convention on Human Rights states that anyone detained “in accordance with a procedure prescribed by law” shall be “brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” The UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) hold that pre-trial detention should be used as a last resort, “with due regard for the investigation of the alleged offence and for the protection of society and the victim,” and that alternatives to pre-trial detention should be used if possible.<sup>19</sup> The European Committee for the Prevention of Torture (CPT) also urges that remand detention be used only as a measure of last resort, with these measures applying to foreign nationals.<sup>20</sup> COE Recommendation Rec(2006)13 takes this further by stating that remand in custody “shall not be used for punitive reasons.”<sup>21</sup>

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

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>22</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>23</sup>. The EU Fundamental Rights Agency has stated that “Whereas prison conditions are mainly a competence and responsibility of the member states, the Charter of Fundamental Rights requires that, within the scope of EU law, detention conditions do not lead to violations of fundamental rights.” This applies to the child’s fundamental rights. Article 24 of the Charter says:

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<sup>19</sup> Section II, Article 6, ‘Avoidance of pre-trial detention,’

<sup>20</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Remand Detention*, extract from the 26<sup>th</sup> General Report of the CPT, 2017.

<sup>21</sup> Article 3(3).

<sup>22</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>23</sup> As stipulated in the EU Agenda for the Rights of the Child, adopted by the European Commission COM (2011)60.

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

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>24</sup>
2. Child rights are generally not considered during pre-trial procedures: Pre-trial detention procedures in the EU don't systematically take into account the best interests of the child when a parent is arrested and placed in pre-trial custody. Basic common EU standards are lacking.
3. Pre-trial family visits can be highly restrictive or entirely impossible, e.g., on the grounds of witness/evidence protection<sup>25</sup> (*see Section B*). As mentioned, pre-trial detention frequently happens in another country than the suspect's country of residence and/or the country of residence of the child.

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<sup>24</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>25</sup> This is frequently the case despite the European Prison Rules (EPR 99) emphasis that remand detainees should receive additional visits and have greater access to forms of communication than sentenced prisoners. The European Court of Human Rights (ECtHR) has even ruled that it is a seminal part of a detainee's right to respect for family life that prison authorities help them to remain in contact with family members [*Messina v. Italy* (no 2) 28 September 2000 §61]. Total bans on family visits can be justified 'only in exceptional circumstances' [Smit & Snacken, 2011: 237, citing *Lavents v Latvia* 28 November 2002]. Zyl Smit & Snacken also cite *Nowicka v Poland* (3 December 2002), in which the ECtHR ruled that for a remand prisoner who did not present a security threat, restrictions on family visits to one a month was not proportionate to any legitimate purpose (237).

4. A significant number of children are impacted. In many EU countries, one-third or more of all detainees are held in custody before trial.<sup>26</sup> On any given day, more than 200,000 children in EU-27 are adversely affected by the pre-trial detention of a parent.<sup>27</sup> Given that the average period of pre-trial detention in Council of Europe countries is nearly half a year, this means that pre-trial detention of parents will impact some 400,000 children in EU-27 each year.

### Case study 1. 'Child-blind' justice

Mandy was arrested and charged with handling stolen goods. The mother of a four-year old and pregnant with her second child, Mandy had debt issues. Conversely to the recommendations underscoring the importance of considering a defendant's personal situation before sentencing or putting them on remand, the court completely disregarded Mandy's situation. She was put in pre-trial detention before being sentenced to nine weeks in custody. She remembers the court hearing wherein she was remanded: *"they did not take into account my circumstances, I even told the court I had my son at school who didn't know where I was – they said they would let me ring a relative or phone social services, there was no regard for how this might affect my son – none."*

*Source: Lucy Baldwin and Rona Epstein (2017). Short but not sweet: A study on the impact of short custodial sentences on mothers and their children, Leicester, De Montfort University.*

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

Parental detention of any kind, whether pre- or post-trial, can have a significant adverse impact on children. From the moment of arrest, the child can experience upheaval and hardship, with

<sup>26</sup> Schönteich, M., & Varenik, R. O. (2014). *Presumption of guilt: The global overuse of pretrial detention*. Open Society Foundations.

<sup>27</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.

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 performance being hindered.<sup>28</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>29</sup> The result is a paucity of research focusing specifically on the impact on children of a parent's remand detention and the various procedures involved. Available research on pre-trial procedures does show that pre-trial procedures can impact children in the following way:

- Normal life is disrupted (meals, schools, other habitual facets of the day-to-day).
- There may be a pervasive feeling of uncertainty and disorientation in the household. Slow court procedures and case backlogs may mean a parent is detained for an uncertain amount of time, and pre-trial detention may last for months or even years, or be continually extended. Further uncertainty is provoked with respect to the detainee's incarceration or acquittal.
- Maintaining contact and a relationship with their parent is difficult.<sup>30</sup>

A study from the Quaker United Nations Office found that some elements impact female pre-trial detainees more than male detainees, given that women tend to hold greater caring responsibilities than men.<sup>31</sup> The study also highlights the lack of information on what happens when women give birth in pre-trial detention and whether infant children are authorised to remain with their mothers during remand detention. It underscores the higher rate of suicide and self-harm among both male and female pre-trial detainees in comparison to those who are sentenced.<sup>32</sup>

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 that parents and caregivers 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. McEvoy et al. found that a greater number of children of

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<sup>28</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>29</sup> Scharff-Smith, P. (2014), 'Remand Imprisonment: A Stressful Phase of Transition,' in *When the Innocent are Punished* (133-137), Palgrave Macmillan, London.

<sup>30</sup> Robinson, O. (2007), *The impact of parental imprisonment on children*, Quaker United Nations Office, 16.

<sup>31</sup> Townhead, L. (2007), *Pre-trial detention of women and its impact on their children*, Quaker United Nations Office, 5.

<sup>32</sup> *Ibid*, 27.

sentenced prisoners in comparison to those of remand prisoners knew that their parent was being detained: 90 per cent of partners of sentenced prisoners in their sample responded that all or some of their children were aware, versus 59 per cent of pre-trial prisoners' children.<sup>33</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 media.<sup>34</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>35</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 children of detainees' withdrawal, depression or externalised anti-social behaviour.<sup>36</sup>

As psychologist Alain Bouregba sums up: "Lying or partial omission might tempt some parents, but children are going to suffer regardless. Children perceive a whole lot more than what we think. They can understand absence, marginalisation, wrongdoing. That being said, it is not about overdoing it with the truth. What is key is to focus on how the child is perceiving things, and to take how they view the given situation as the starting point. If children are told too much, too fast without listening to what the child has to say, they will no longer be able to talk about it and will withdraw, which is very damaging."<sup>37</sup>

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<sup>33</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.

<sup>34</sup> Woodward, R. (2003). Families of prisoners: Literature review on issues and difficulties. *FaHCSIA Occasional Paper*, (10).

<sup>35</sup> Boss, P. (2007). Ambiguous loss theory: Challenges for scholars and practitioners. *Family relations*, 56(2), 105-110.

<sup>36</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>37</sup> <https://www.psychologies.com/Moi/Epreuves/Deuil/Articles-et-Dossiers/La-galere-des-familles-de-detenus>



In addition, not talking openly to the child about the parent's imprisonment can exacerbate the stigma associated with having a parent in prison. Stigma is a highly toxic phenomenon and can adversely impact children's well-being. A significant number of children can therefore bear the brunt of stigma associated with having a parent in prison when the parent is in fact 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>38</sup> In Cyprus for example, over half of all pre-trial detainees have been ultimately acquitted every year for the past four years; yet their children are still subjected to the trauma of separation, stigma and hardship as a result of their parent's being involved in pre-trial detention procedures.

The uncertainty associated with remand and the possibility of release when the court hearing occurs adds considerably to the stress for children and their carers. Anecdotally, one childcare worker in the prison visits setting could tell from the tenor of voices from outside the visits hall whether she was listening to a remand or convicted visit.

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<sup>38</sup> Schönteich, M., & Varenik, R. O. (2014). *Presumption of guilt: The global overuse of pretrial detention*. Open Society Foundations.

### **Case study 2. The impact of pre-trial detention procedures on a family: a case study in England**

A 29-year-old truck driver lived with his wife, his retired-father-in-law and his eight-year-old son in a council house in England. He was arrested in connection with a robbery and held in pretrial detention after police successfully opposed bail. When the case was scheduled for trial, the police withdrew their objection and bail was granted. After almost four weeks in pretrial detention, the defendant found he had lost his job and the rent on the house where he had lived for seven years was in arrears. He and his family were evicted. The mental strain of the situation caused the defendant's wife to suffer a nervous breakdown and so disturbed his son that he had to be given psychiatric treatment. The defendant found it difficult to get work and could not obtain unemployment benefits because he was awaiting trial and was not, according to the local labor bureau, available for work. Four months after his arrest the defendant was tried and acquitted.

*Source: Open Society Justice Initiative (2011),  
The socioeconomic impact of pretrial detention. New York: Open Society Foundations*

### **B. Pre-trial detention procedures with particular reference to Scandinavia, and impacts on children of very limited contact**

In some cases, pre-trial detention procedures are *more* restrictive than procedures typically used in the detention of convicted prisoners. Peter Scharff-Smith has revealed severe remand conditions in Scandinavian prisons, which runs against conceptions of Nordic prisons as having otherwise humane correctional practices tending towards rehabilitation, as opposed to punitiveness, with open prison plans and extended 'out-of-cell time'. As many as two-thirds of pre-trial detainees in Swedish prisons (where pre-trial detainees make up a quarter of the prison population) and 12-15 per cent of Norwegian remand detainees are subjected to restrictions that include solitary confinement in cells for 22-24 hours per day.<sup>39</sup> Similar practices of solitary

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<sup>39</sup> Scharff-Smith, P. (2017), 4.

confinement are typical during police detention in Sweden and Norway, where periods of custody may last for up to four and ten days, respectively.<sup>40</sup>

Concerning statistics collected in 2014 by the office of Swedish prosecution showed that up to 70 per cent of remand prisoners received ‘restrictions’ including solitary confinement, and that 82 per cent of juvenile detainees were kept in solitary confinement<sup>41</sup>. Scharff-Smith has located the origins of the Scandinavian practice of solitary confinement for pre-trial detainees in draconian 19<sup>th</sup> century imprisonment tactics. These have not been without reform. On average, 40 per cent of pre-trial detainees were placed in solitary confinement in Denmark in the 1970s; in 2014, less than one per cent received such restrictive confinement, except when a court ordered isolation to protect police investigation.<sup>42</sup> In 2015, some 449 individuals in Norway were placed in pre-trial solitary confinement, a number fourteen times higher than that of Denmark (although the latter’s population is ten per cent greater than Norway’s).<sup>43</sup> Official aggregate statistics on solitary confinement in prisons do not account for de facto solitary confinement.

Officially, Scandinavian courts and prison administrations explain the use of solitary confinement of remand detainees as a measure to ‘avoid collusion’ so detainees cannot influence the case.<sup>44</sup> Norway has legitimised the use of solitary confinement for reasons of protecting evidence. But in practice, extended and indeterminate remand detention is carried out, as in the case of Denmark, in ‘isolation prisons’ that lack facilities for communal activities and lack access to meaningful activities or programmes (although unlike pre-trial services in other countries, the presence of drug counselling services in Danish pre-trial detention centres is not uncommon).<sup>45</sup> Contact with the outside world is little to none. Letter writing is permitted, though mail is heavily scrutinised. Telephone contact is prohibited outright.<sup>46</sup> Visits are authorised for up to one hour per week, with the presence of a police or prison officer – prohibiting physical contact – and with most visits taking place during business hours, when children are in school.<sup>47</sup> Based on a survey carried out by the Danish Prison Service in 2011, 41 per cent of remand prisoners never received visits from

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid., 7-8.

<sup>42</sup> Ibid., 9.

<sup>43</sup> Norwegian Forum for Human Rights (2018), *Submission regarding the 8<sup>th</sup> periodic report of Norway to the UN Committee Against Torture*, 7.

<sup>44</sup> Scharff-Smith, P. (2017), 8.

<sup>45</sup> Ibid., 6.

<sup>46</sup> Ibid., 13.

<sup>47</sup> Ibid., 11.

family members; in the average 116 days of remand detention prior to trial, only 14 per cent of detainees had four or more family visits.<sup>48</sup>

In its 26<sup>th</sup> General Report, the Committee for the Prevention of Torture has expressed its concerns on the poor treatment to which pre-trial and remand prisoners are exposed. In particular, it decries the many restrictions imposed upon them: According to the report, it is common practice among member states of the Council of Europe to lock up pre-trial prisoners in their cells for up to 23 hours a day, although such practice goes against the most fundamental rights of the person.<sup>49</sup> Moreover, the fact that some countries do not have adequate facilities to accommodate prisoners on remand, including pre-trial prisoners, can have dramatic consequences. To the socio-economic suffering of pre-trial detainees is added the psychological distress of being isolated from family members, and that of being accommodated in a criminogenic environment, where the presumption of innocence of untried prisoners is easily overlooked.

This is particularly clear when looking at the suicide rates among prisoners not serving a final sentence, as compared to convicted prisoners. In 2018, in the prisons of the member states of the Council of Europe, 23.9 per cent of deaths were due to suicide; 43.2 per cent of which were prisoners not serving a final sentence.<sup>50</sup> This number has to be read bearing in mind that prisoners not serving a final sentence account for 25 per cent of the prison population in Europe.<sup>51</sup> In Austria, where there is no institution for remand prisoners exclusively, suicides of prisoners not serving a final sentence accounted for 83.3 per cent of all suicides in national prisons in 2018.<sup>52</sup> It is therefore more than certain that this population of inmates is more vulnerable than convicted prisoners. Providing them with adequate support is crucial to mitigate the stressful experience of pre-trial detention.

In this regard, supporting the prisoners' family life, especially the relationship with their children, can be decisive. Knowing that an imprisoned parent might not be safe can be a great source of stress and insecurity for a child. As Scharff Smith explains, children of pre-trial detainees “...*find themselves most in need of seeing and experiencing that their father or mother is doing well*”

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<sup>48</sup> Ibid.

<sup>49</sup> CPT, (2016) *op. cit.*, 33. <https://rm.coe.int/168070af7a>

<sup>50</sup> Aebi, M. F., & Tiago, M. M. (2020). *SPACE 1 – 2019 – Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe. Table 28, 109. [https://wp.unil.ch/space/files/2021/02/200405\\_FinalReport\\_SPACE\\_I\\_2019.pdf](https://wp.unil.ch/space/files/2021/02/200405_FinalReport_SPACE_I_2019.pdf)

<sup>51</sup> Walmsley, R. (2020) *World Pre-Trial/Remand Imprisonment List. Fourth Edition*, London, ICPR, 2.

<sup>52</sup> Aebi, M. F., & Tiago, M. M. (2020). *SPACE 1 – 2019 – Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe. Table 28, 108.

[emphasis added].<sup>53</sup> Visits or any other form of contact are crucial. However, it is common that prisoners in pre-trial detention are subjected to restricted contact with the outside world. In the name of discouraging collusion and to prevent the obstruction of the investigation, untried detainees can be more isolated than convicts, especially during the immediate period of time following their being taken into custody. However, supervised visits can be set up in lieu of isolation, which involves the presence of a prison officer during the duration of the visit. These visits are often stressful, and awkward, for children.<sup>54</sup> Kristian was seven when his father was put in pre-trial detention. He remembers his first visit:

“An officer had to stand there and listen to what we talked about. We sat in such a small room and it felt as if you were completely surrounded by people you didn’t know.”<sup>55</sup>

Children of Prisoners Europe (COPE) member Solrosen, based in Gothenburg and Borås, Sweden, has noted that families looking to visit a family member in pre-trial solitary confinement must first coordinate with Solrosen; a Solrosen representative must transfer the family’s visit request to a judge, receive a court order allowing the visit, then arrange a visit within prescribed visiting hours. Outside of the Nordic realm, a representative from the Polish Ombudsman’s Office reported that families can only rarely contact a loved one during pre-trial detention procedures; in-person visits are prohibited, but limited phone contact is allowed. In Spain, ‘incommunicado detention’ describes a process whereby detainees facing serious charges such as terrorism can be held for a maximum 13 days, during which they can be subject to restrictions — a ban on all visits, on communicating with the outside world and on informing their family that they are detained; a judge determines which restrictions will apply to a particular detainee.<sup>56</sup> Although in theory an exceptional measure, the International Commission of Jurists has condemned Spain’s use of prolonged incommunicado detention as representing “torture or cruel and inhuman or degrading treatment.”<sup>57</sup>

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<sup>53</sup> Scharff Smith, P. (2014) *When the Innocent are Punished. The Children of Imprisoned Parents*, Palgrave Studies in Prisons and Criminology, Palgrave MacMillan, 8, 137.

<sup>54</sup> *Ibid*, 10, 162.

<sup>55</sup> *Ibid*, 1, 6.

<sup>56</sup> Rodriguez, EP & Sanchez, CR (2018). *National norms as regard to access of detained persons to the law and to court: Report on Spain*.

<sup>57</sup> International Commission of Jurists, Submission to the Human Rights Committee regarding the consideration of the 5th Periodic Report submitted by Spain, 10 October 2008.

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 relating to children's resilience. Breaking off all contact can represent an obstacle to the child's normal individuation process vis-à-vis the parent. Children tend to compensate for the absence of contact by internalising images that idealise or demonise the parent, ultimately locking the child into immaturity. A total ban on contact with the child's father can generate rebellious behaviours that could ultimately lead to the child acting out when older; repercussions can be heavier if contact is banned between children and a mother in prison, and can include development of severe attachment disorders. It is therefore crucial that children maintain contact with a parent in prison; "[children] come to understand that this marginalisation is associated with the parent, and not with the child-parent relationship between the two. The child can then individuate without harbouring fears of losing the parent or of following in their footsteps," explains Alain Bouregba.<sup>58</sup>

Great attention therefore should be given to the conditions of imprisonment of parents in pre-trial detention. The way a parent-prisoner is treated can severely impact his or her parental role, therefore altering the parent-child relationship. As Scharff-Smith highlights:

“Psychologist Else Christensen explains that the ‘psychological message is that a person in solitary confinement risks losing himself or herself and disappearing into a non-existence. For the children it means that the contact with the parent is difficult and that the possibility of getting care from the parent is severely limited. In this situation, young children react ... by rejecting the parent.’”<sup>59</sup>

Maintaining child-parent contact is thus a crucial safeguard for children already faced with uncertainty about their parent's whereabouts and wellbeing during pre-trial procedures.

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<sup>58</sup> <https://www.psychologies.com/Moi/Epreuves/Deuil/Articles-et-Dossiers/La-galerie-des-familles-de-detenus>

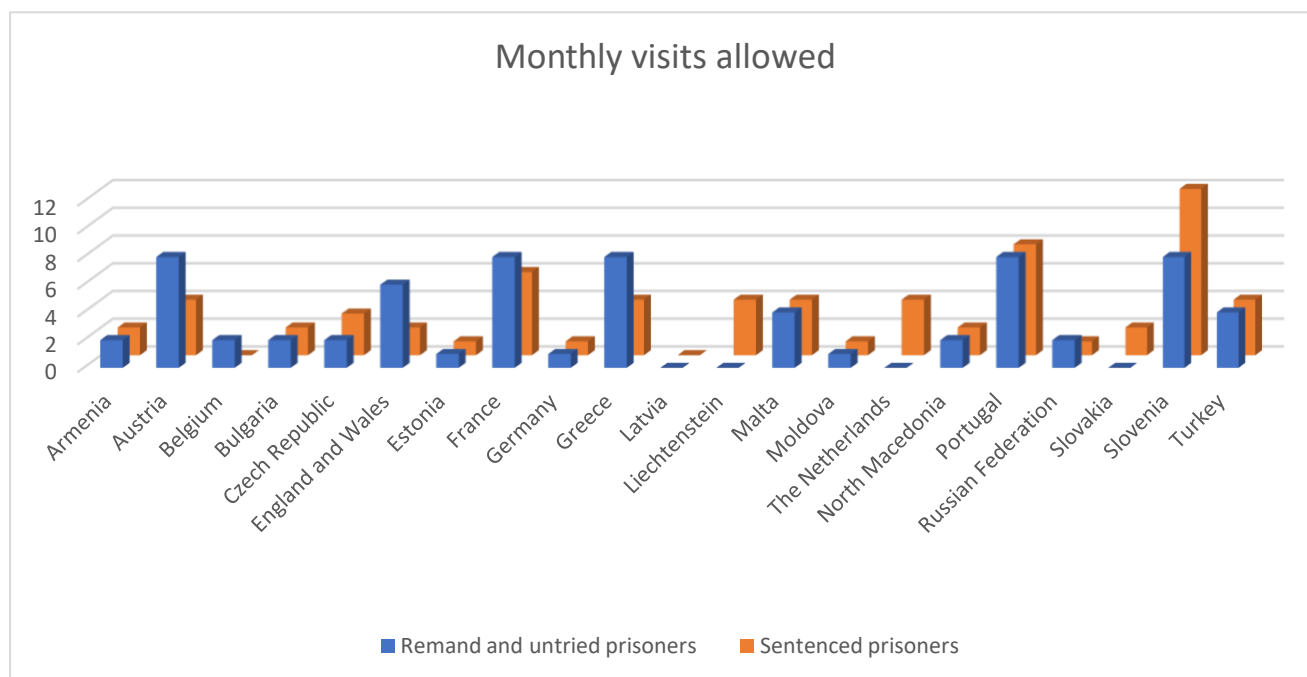
<sup>59</sup> Scharff Smith, P. (2014) *When the Innocent are Punished. The Children of Imprisoned Parents*, Palgrave Studies in Prisons and Criminology, Palgrave MacMillan, 8, 168.

### **Case study 3. “Waiting in uncertainty”**

After his arrest, Kristian’s father was put in pre-trial detention. He appeared before the judge 14 days later, who prolonged his detention by 14 days. Every two weeks, Kristian’s father detention was extended; first by another 14 days, then by 4 weeks at a time. Kristian, who was seven back then, had agreed with his mom not to tell his two younger brothers, who knew nothing, nor the school. Sentencing would determine whether they would tell family and friends. This was a very traumatic period for Kristian: *“My mother did in fact tell me to prepare myself that my father would probably have to go to prison. It was like spending your time waiting for something that you knew was bad, but you did not know how bad it was ... every time we thought, now we will be told something, but all that happened was that we had to wait some more.”* Kristian’s father spent 10 months in prison pending trial – leaving the boy in a stressful mist of uncertainty.

*Source: Scharff Smith, P. (2014) When the Innocent are Punished. The Children of Imprisoned Parents, Palgrave Studies in Prisons and Criminology, Palgrave MacMillan, 8, p. 134.*

## Visiting untried prisoners



This chart compares the visiting rights of prisoners on remand and sentenced prisoners, indicating the number of visits authorised per month in different country contexts.<sup>60</sup> Data in some countries did not allow a comparison between remand prisoners and convicted prisoners. 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>61</sup> In Switzerland, visits to a pre-trial detainee are granted at the discretion of a prosecutor.<sup>62</sup> The number of monthly visits a person receives prior to trial varies by case. The countries in which data did not allow to draw a clear comparison between prison regimes, or did not explicitly mention the visiting rights of pre-trial prisoners, do not figure in this chart.

The uncertainty of pre-trial 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 be visited – and in most countries, families must apply for visits to the prosecutor in charge of the case. In that regard, in Malta it is required to have an

<sup>60</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>61</sup> 'Information Pack for British Prisoners in Sweden,' (2020), British Embassy, Stockholm.

<sup>62</sup> 'Information Pack for British Prisoners in Switzerland,' (2018), British Embassy, Berne.



appointment with the police inspector to obtain a visits permit<sup>63</sup>. In Croatia and Liechtenstein, prosecutors or prison administrators may reject a family's application to visit a loved one at the pre-trial stage<sup>64</sup>. Moreover, regulations internal to each prison also make visits difficult. In Serbia, certain prisons only allow family visits on some days, or even once a month,<sup>65</sup> and in Germany, visits are possible only during pre-determined visiting times.<sup>66</sup> When pre-trial detainees are allowed to receive a family visit, they are commonly supervised, like in Estonia, and often no physical contact is authorised<sup>67</sup>. Children may not always be allowed to visit a parent pending trial, as is the case in Russia<sup>68</sup>. If they are, they may be subject to restrictions: In Belgium, children can visit only once a month a parent held in pre-trial detention, and only upon request.<sup>69</sup> Not knowing when the next visit to an imprisoned mother or father will occur can fuel feelings of helplessness for children. It can be a very traumatic experience for a child, who requires the support and care of parents to grow as a secure and confident individual.

As a result, it is somewhat complicated for children of untried prisoners to stay connected with their parent, especially when pre-trial detention can last for several months, or even years. Visiting someone held in pre-trial detention is time-consuming. 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 contracted. As previously mentioned, it is however crucial that children have access to their imprisoned parent, for their personal wellbeing and development, as well as for their father's or mother's.

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<sup>63</sup> 'Information Pack for British Prisoners in Malta,' (2020), British Embassy, Malta.

<sup>64</sup> 'Information Pack for British Prisoners in Croatia,' (2020), British Embassy, Zagreb; 'Information Pack for British Prisoners in Liechtenstein,' (2018), British Embassy, Berne.

<sup>65</sup> 'Information Pack for British Prisoners in Serbia,' (2016), British Embassy, Belgrade.

<sup>66</sup> 'Prison Conditions in Germany' (2020), European Prison Observatory.

<sup>67</sup> 'Information Pack for British Prisoners in Estonia,' (2020), British Embassy, Tallinn.

<sup>68</sup> 'Information Pack for British Prisoners in Russia,' (2020), British Embassy, Moscow.

<sup>69</sup> 'Information Pack for British Prisoners in Belgium,' (2020), British Embassy, Brussels.

## D. 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>70</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 in which 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, as does the adverse impact of restrictions to contact on children with a parent in conflict with the law. Any decision to deny family visits must require that due consideration be given to the possibility of a defendant’s child(ren) being able to visit, taking into account their age, even if this necessitates someone other than family members accompanying them, as implemented by the Swedish NGO cited above.<sup>71</sup>

Further awareness of the impact of sentencing decisions on 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>72</sup> where the harm inflicted on a child as a result of sentencing decisions for 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.” It has emphasised that alternatives to imprisonment should be considered to safeguard children’s best interests, as does Council of Europe Recommendation (2018)5 concerning children with imprisoned parents.

Children facing separation from parents in criminal courts are treated differently from those facing separation from parents in family courts. Why is action based on these considerations and principles lacking for children of defendants facing separation from their parent? Why this differential treatment, construed by many as discriminatory in and of itself? These issues also need to be addressed when working towards reform, ensuring that pre-trial detention is a measure applied only as a last resort and fostering truly preventive action on behalf of children across Europe.

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<sup>70</sup> *The Socioeconomic Impact of Pretrial Detention* (2010). Open Society Foundations, 12.

<sup>71</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.

<sup>72</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.

## **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.
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. Children'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.

*– Memo drafted by Noah Boden and Liz Ayre, with contributions by Rachel Brett, Kate Philbrick, Martin du Bois and Elia Meschin*



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.

Children of Prisoners Europe (COPE)  
contact@networkcope.eu  
<http://childrenofprisoners.eu/>

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