



Mister Warden, When Can I See My Dad Again?

Children's Contact With Their Imprisoned Parent

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Introduction

“Mister Warden, when can I see my dad again”? The question that we put as a heading of our report refers to the problem of setting a contact between a child and his or her incarcerated parent.

Article 8 of The Convention for the Protection of Human Rights and Fundamental Freedoms and article 33 of The Charter of Fundamental Rights of the European Union enshrines the protection of the right to family life. Common principle in the European Union states that every child has a right of contact with his or her parents to the extent which is in his or her best interest. But what is in the best interest of the child if one of the parents is arrested? And what aspects need to be considered, when a judge is deciding about the contact?

The aim of our report is to summarize criteria that each judge solving this issue should carefully consider then to analyse different weight and importance of these criteria in the decision-making process. As a conclusion we make a sort of a guideline for judges to help them reach a judgment which will be truly in the best interest of a child. It is crucial to point out that the starting and the most important point of the whole decision-making process in such situations is the abovementioned best interest of a child. Even though this principle is well known when deciding about the contact between a parent and his or her child there seem to be a very strong tendency when deciding about the contact of an incarcerated parent to subconsciously or even bluntly punish this parent again by restricting the contact with his or her child. The very limited or even non-existent contact is often perceived as an inherent and justified part of the punishment itself. In that sense an incarcerated parent is regarded as someone, who by committing the criminal act, voluntarily deprived himself or herself of a right to see his or her child, forgetting completely about the best interest of this child¹.

How strong is this tendency, is illustrated by one case of European Court of Human Rights (hereinafter “ECHR”). Although it was rather exceptional argumentation², even ECHR stated in a case of an incarcerated mother complaining about the limited contact with her new born

¹ The children of prisoners are even sometimes referred to as the ‘orphans of justice’, the ‘forgotten victims’ of crime and the ‘Cinderella of penology’ – see J. Murray. *Effects of Imprisonment on Families and Children of Prisoners* In *The Effects of Imprisonment*, 2005, A. Liebling and S. Maruna, accessible from: https://www.researchgate.net/publication/254316808_The_effects_of_imprisonment_on_families_and_children_of_prisoners

² For other approach see from recent cases for example T. V. THE CZECH REPUBLIC, application n. 19315/11, judgment from 17th July 2014, or ASSUNÇÃO CHAVES V. PORTUGAL, application n. 61226/08, judgment from 31st January 2012, both accessible from the database of ECHR (<https://www.echr.coe.int/Pages/home.aspx?p=home&c=>)

son that *she was fully aware of the fact that she was pregnant when she embarked upon the criminal activity that led to her detention. Her detention in a closed prison with particular security arrangements had been made necessary by her own conduct [...]. Understandably, this state of affairs would have implications for her son.* For the limited phone contact the ECHR went on that in the case in question it *did not exceed what follows from ordinary and reasonable requirements of imprisonment*³. This line of argumentation that the Court further developed in his decision is fully concentrated on the incarcerated parent completely leaving out the best interest of the child. It is however the child (and his or her best interest) who should be in the forefront of the judge's arguments when setting a contact with his or her incarcerated parent⁴.

This is unfortunately not always the case and when deciding about the contact of an incarcerated parent with his or her child there are other factors and aspects that come into play with various importance in the decision-making. Some of these factors are maybe not *prima facie* obvious or they actually differ from the usual set of criteria that are taken into account in cases related to contacts between parents and children. All of this lead us to the idea of making a practical judge's guideline. The criteria can be divided into four main categories that are (i) circumstances on a child's side, (ii) nature of a criminal act, (iii) prison conditions and (iv) the extent of a contact. These criteria are discussed in following chapters.

1. Circumstances on a child's side

When a judge is deciding about contact of a child with his or her imprisoned parent, circumstances on a child's side should be taken into account primarily. There is no legal regulation that gives us instructions on what these circumstances are. Czech Civil Code⁵ says that: *“A child who is in the custody of only one parent has the right to contact with the other parent to the extent that it is in the interest of the child.”* According to article 9 para 3 of Convention on the Rights of the Child, parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Article 4 para 2

³ Case KLEUVER v. NORWAY, application n. 45837/99, decision from 30th April 2002, accessible from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-22377%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-22377%22]})

⁴ As some authors aptly commentated: *the son has no responsibility whatsoever for the fact that his mother was on remand at the time of his birth [...]. He is however the one who has to suffer from the separation from his mother* – see Stephanie Lagoutte in Peter Scharff Smith: *When the Innocent are Punished: The Children of Imprisoned Parents*, Springer: 2014, p. 298.

⁵ § 888 of Act No. 89/2012 Coll., Civil Code of the Czech Republic.

of Convention on contact concerning children says that such contact may be restricted or excluded only where necessary in the best interests of the child⁶. So, the main guideline should be the best interest of a child. An interpretation of the best interest of the child can be found in General comment No. 14⁷ which advise: *“It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.”*

In this chapter, we identify criteria that are related to a child and should be considered by a judge while deciding a case of establishing regular contact with imprisoned parent.

The **quality of relationship** between a child and imprisoned parent should be considered primarily. This approach is recommended by Committee on the Rights of the Children, which declared that the quality of the relationship and the need to retain it must be taken into consideration in decisions on the frequency and length of visits and other contact.⁸ Knowledge about this topic can be given by expert report, previous judgments connected with particular child or report made by Social service agency.

The relationship question is closely related to another important circumstance. A judge should find out how **custody of a child** has been secured before parent's incarceration. To understand the impact of parental incarceration, it is important to determine the nature of a family living arrangements prior to incarceration.⁹ It is a big difference if a child has been in imprisoned parent's custody prior the incarceration or in custody of someone else (second parent, grandparents, other person, foster) or an institution. If a child didn't live with imprisoned parent, it is necessary to find out what was the reason for this and how often their contact has taken place. The quality of their contact is also important. If a child has been in custody of someone else than imprisoned parent or didn't meet this parent because of his or her lack of interest, the necessity of contact in prison is much lesser.

⁶ In the context of contact between the imprisoned father and his daughter, European Court of Human Rights (hereinafter as ECHR) has interpreted the concept of the best interest of the child in case T. v. THE CZECH REPUBLIC⁶. ECHR stated that interruptions in family relationships can lead to entirely exceptional circumstances. It is necessary to do everything in order to maintain personal relationships as well as to do everything for family renewal when the right moment comes.

⁷ General comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para 1), The best interest of the child.

⁸ General comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para 1), (c) Preservation of the family environment and maintaining relations.

⁹ PARKE Ross, CLARKE-STEWARD K. Alison. Effect of Parental Incarceration on Young Children. Available from <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>, p. 2.

Another important circumstance is, whether the imprisoned parent has full **parental responsibility** as the right to contact with a child is usually a part of it.¹⁰

An important thing for consideration is **child's mental state**. According to French Court Cassation, this question should be proved by psychiatric expert report.¹¹ In general it should be said that parent's incarceration almost always means a mental burden for the child unfortunately. Experts agree that parent's incarceration can cause post-traumatic disorder to a child. Mental problems can be aggravated by secondary stigma, bullying, victimization and social isolation as a result of their association with the prisoner. This can lead to conduct problems or problems at school.¹² According to the quality of child-imprisoned parent's relationship, some studies have shown that good quality contact and open communication with imprisoned parent are important for child's resilience. However, disrupted contact, confusion about the situation can impact negatively on children.¹³ Visiting parent in prison can reassure a child that a parent is safe and well.¹⁴

Another linked question is, how can be the child influenced by the **form of custody** after parent's imprisonment. The best situation is when the child stays with second parent, mostly a mother. In case of mother's incarceration, grandparents take care of children in most cases (instead of fathers).¹⁵ The most burdensome situation arises when a child has to go to new and unknown environment – to foster family or even worse to institutional care. Beginnings in foster family can be hard but this kind of custody can provide feeling of safety, which is the most necessary need for a child. According to this, institutional care can even cause damage to a child.¹⁶ If a child doesn't have any other close relatives who care about him or her, a necessity of maintaining contact with imprisoned parent is very important. Unfortunately, there can be serious obstacles in the way (bad child's mental state as a result of whole situation, parent's lack of interest, financial and logistic problems, etc.).

¹⁰ For example art. 858 of Act No. 89/2012 Coll., Civil Code of Czech Republic.

¹¹ Decision of Court Cassation, nr. 06-12655, March 13 2007.

¹² SHARRATT Kathryn. Children's Experiences of Contact with Imprisoned Parents: A Comparison between Four European Countries. Available from <http://eprints.hud.ac.uk/id/eprint/19764/1/SharrattChildrens.pdf>

¹³ Children of Imprisoned Parents, European Perspectives on Good Practice, Eurochips, available from <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, p. 44

¹⁴ SHARRATT Kathryn. Children's Experiences of Contact with Imprisoned Parents: A Comparison between Four European Countries. Available from <http://eprints.hud.ac.uk/id/eprint/19764/1/SharrattChildrens.pdf>, p. 10

¹⁵ Children of Imprisoned Parents, European Perspectives on Good Practice, Eurochips, available from <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, p. 52

¹⁶ Ibidem.

A judge should also consider whether there is a **person who is able to accompany a child into a prison**. Huge problem can arise when a child is in custody of second parent, grandparents or other relatives, and relationships in a family are not good.¹⁷ Czech Constitutional Court argued that if second parent doesn't want to accompany a child to a prison, there's necessity of authoritative regulation of contact by judicial decision.¹⁸ If caregiving person can provide stable support for children and have open communication with them, then children often cope better with a situation.¹⁹ It can be assumed that professional foster families will deal with it better as they have legal obligation to support child-parent relationship and are well trained usually. Children in institutional care are dependent on willingness of social workers or NGOs.

As the General comment No. 14²⁰ states: *“The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.”* According to this commitment the judge should consider if contact between a child and his or her imprisoned parent has a special impact on **child's identity**. This question can arise if imprisoned parent is a foreigner and is the only one who communicates with a child in different language.

As a result of the Day of General Discussion on Children of Incarcerated Parent, United Nation's Committee on the Rights of the Child recommended that timing of visits should not negatively interfere with other elements of the child's life such as schooling.²¹ The same approach is supported by European Council²². Teachers are concentrated on education of a

¹⁷ Research made in the Czech Republic showed that the conflict between imprisoned parent and a care person is the second biggest obstacle for maintaining relationship with their children. VAŠÍČKOVÁ, Tereza, Support and Assistance to Children of Imprisoned Parents in the Czech Republic. Diploma thesis. Charles University. Prague. 2013. available from <https://is.cuni.cz/>, p. 77

¹⁸ Decisions of Constitutional Court of the Czech Republic, I. ÚS 3296/17, December 20 2017 and II. ÚS 22/17, August 8 2017.

¹⁹ Children of Imprisoned Parents, European Perspectives on Good Practice, Eurochips, available from <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, p. 43

²⁰ General comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para 1).

²¹ Report and recommendations of the Day of General Discussion on “Children of Incarcerated Parents”. United Nation's Committee on The Rights Of The Child 30 September 2011, p. 39, Available From <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>

²² Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, adopted on April 4 2018, p. 5, point 18

child but can provide emotional support as well.²³ Accordingly child's school **timetable** as well as timing of other **child's activities** which make them feel good and are beneficial for child's development and wellbeing should be taken into account.

A judge should find out **an opinion of a child**²⁴. An interference with the child's participation rights may lead to violation of article 8 of European Convention on Human Rights which enshrines the right to family life. It is necessary to emphasize that even if article 12 of Convention on the Rights of the Child says that a child shall be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, *either directly, or through a representative or an appropriate body*²⁵. It needs to be said that practice in real cases varies. There are decisions such as Case of M. M. v. Croatia²⁶ or Case of N. TS. and others v. Georgia²⁷ in which ECHR constituted an interference to article 8 of European Convention on Human Rights by not listening to a child directly by national courts. On the other hand, in Case of Sahin v. Germany²⁸ an opinion of a minor has been gained by an expert and it was found sufficient. In this case ECHR stated that: *"It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having a custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned."*²⁹ Czech Constitutional Court points out that it is necessary to assess which form is the most appropriate in each case individually. However direct questioning of a minor by a judge should be preferred.³⁰ On the other hand Constitutional Court of the Slovak Republic expressed an opinion that the situation when courts haven't heard the minor directly in custody proceedings is not, without taking into account other relevant circumstances (such as child's age or hearing the child by an expert), sufficient reason for pronouncement violation of applicant's fundamental rights.³¹

²³ Children of Imprisoned Parents, European Perspectives on Good Practice, Eurochips, available from <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, p. 43

²⁴ Convention on the Rights of the Child adopted by United Nations General Assembly resolution 44/25 of 20 November 1989, art. 12

²⁵ The same approach is included also in Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, adopted on April 4 2018, p. 4, point 1

²⁶ ECHR, CASE OF M.M. v. CROATIA, App. No. 10161/13, December 3 2015

²⁷ ECHR, CASE OF N.TS. AND OTHERS V. GEORGIA, App. No 71776/12, February 2 2016

²⁸ ECHR, CASE OF SAHIN V. GERMANY, App. No 30943/96, July 8 2003

²⁹ Ibidem, p. 16, point 73.

³⁰ Decisions of Czech Constitutional Court IV. ÚS 827/18 April 10 2018, II. ÚS 1931/17 December 19 2017.

³¹ Decision of Slovak Constitutional Court II. ÚS 659/2017 October 24 2017.

A **child's age** might be taken in consideration as well. Developmental stages play a significant role in child's ability to comprehend parental involvement in a criminal justice system. They are a major determining factor of how a child will respond.³² Anyway, this criterion is closely linked to other mentioned circumstances (especially the quality of child-parent relationship, children (non)friendly environment in prison, child's mental state). Every child needs loving parents, no matter if he or she is 2 or 16 years old.

The court should take into a consideration whether a **child is aware of parent's incarceration** or not. Research made in the Czech Republic showed that 56 % of asked prisoners think that their child is too small to understand, 16 % of prisoners is ashamed, 10 % don't know how to explain the situation to the child, 9 % of prisoners think that the main reason why their child doesn't know about imprisonment is a wish of caring person.³³ Some experts say that uncertainty and lack of information can cause fear and anxiety. Even when there may be a good reason for such silence, children of prisoners are more likely to have negative reactions when they can't talk about it.³⁴ According to Czech Constitutional Court concealing the real reasons for the absence of a parent can lead the children to the wrong and vulnerable belief that their parent has lost interest and left them³⁵. It is possible that a child has no relevant information about parent's imprisonment from current caregiver as he or she doesn't agree with prison visits. In this situation, it is up to judge to consider if this “silent” situation is in the child's best interest or not. On the other hand the necessity of informing a child arises out of child's participatory rights.

It is necessary to emphasize that abovementioned criteria are dependent one on each other. For better orientation, we can divide them into two categories - “**relationship category**” and “**situations category**”.

As the quality of the relationship between a child and imprisoned parent is probably the most important, **relationship category** should be examined first. The quality of the relationship influences how the child will adapt to the actual situation. A warm relationship is a major

³² MILLER, Keva. The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions. Available from https://www.researchgate.net/publication/226430580_The_Impact_of_Parental_Incarceration_on_Children_An_Emerging_Need_for_Effective_Interventions, p. 483

³³ VAŠÍČKOVÁ, Tereza, Support and Assistance to Children of Imprisoned Parents in the Czech Republic. Diploma thesis. Charles University. Prague. 2013. available from <https://is.cuni.cz/>, p. 74

³⁴ PARKE Ross, CLARKE-STEWARD K. Alison. Effect of Parental Incarceration on Young Children. Available from <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>, p. 4

³⁵ Decision of Constitutional Court of the Czech Republic II. ÚS 22/17, August 8 2017.

assumption for hope, that there will be a chance for family renewal after release from prison. If there is no relationship for example because parent's lack of interest or a relationship is pathological, prison visits would only hurt a child. Indicators of the quality of a relationship are facts about previous custody arrangements or the extent and the quality of previous mutual contact. A specific relationship, which has a special impact on child's identity (for example same foreign language), must be taken in account in this category as well.

After and if a court concludes that there is a relationship which should be protected and maintained, it is necessary to examine the criteria of “**situation category**”. In other words, it is necessary to find out if the actual situation of a child allows setting such contact without harming a child and what can help to mitigate the negative impacts of prison visits. Because of that, a court should be aware of child's mental state. In this context, an expert report can be useful, but there are also other pointers (based on longer observations) which can help, like reports from school, pediatrician, social worker, etc. Age of a child is also important, but it is crucial to perceive it in relation with other criteria. In other words, the age can't be the only one reason for not setting a contact in prison. Important question is, if there is a person, who can accompany the child and provide him a psychic support during them (it can be the other parent but also grandparent, aunt, social worker, NGO's worker, etc.). Last, but not least, visits in prison should not interfere with child's week timeframe, because school or free time activities as well as friends can help a child to feel “normal”.

Interviewing a child can help a court to evaluate all abovementioned criteria, but it must be conducted sensitively, considering the child's age and maturity.

2. Nature of the criminal act

One of the criteria rises from the question if a judge should take into account a nature of a criminal act committed by an incarcerated parent and if the answer is positive – to what extent it should happen. Is it important for the „custody“ judge to know why the parent is behind the bars? What did he or she commit and against who? Is it that relevant to know in which phase is the criminal proceeding against the parent?

Naturally a judge deciding over the contact between an incarcerated parent and his or her child does not in any way act as (or substitute) a criminal judge and does not decide over a sentence the parent in question should serve or (in his or her opinion) deserve to serve. In this

kind of proceeding the judge is not there to punish the parent again, but to ask what is in the best interest of a child. A judge should start from the premise that for a parent and a child the right to be together means the essential element of their family life³⁶ and that article 8 of the Convention includes a right for the natural parents to have measures taken with a view to their being reunited with their children and an obligation for the national authorities to take such measures³⁷.

We conclude that in order to respect these principles and act in the best interest of a child it is important for a judge even in this type of proceeding (regarding a contact between a parent and a child) to look deeper into a nature and circumstances of the committed criminal act and possible effects that such an act could have on the child.

First of all a judge should take into account what **kind of crime** has been committed. We can imagine two types of situation – a crime committed by a parent that does not have any connotation with his or her parenthood. This is a very broad category typically consisting of property related offences or economic and trade related offences but also offences against life, health, personal liberty or dignity not concerning the closest family of a child. Irrespective of the fact if such an offence was a small scale theft or a highly sophisticated white-collar scheme, it does not play any further role in the process of deciding a form or an extent of a contact between an incarcerated parent and his or her child as far as the criminal act did not involve a child or her or his closest relatives. In such situations a judge can leave this criterion (a nature of a criminal act) behind and concentrate on other relevant aspects of a given case. On the contrary the situation where the criminal act is somehow connected with a child is much more difficult to fully assess. It is not rare that a judge must decide to what extent (or even if) to set a contact between a child and his or her parent that is imprisoned because he or she was convicted of a crime committed against the second parent or a close relative to the child or even the child itself. Such cases are obviously more delicate and require a thorough deliberation.

When the **crime** was committed **against the second parent** (or in general against a close relative to the child) **or** even the **child** itself, the first variable to consider is to clarify who was the intended and the factual victim of the crime and (if it was a relative) how close a relationship had the child with this victim-relative. It is practically impossible to imagine

³⁶ Case *T. v. THE CZECH REPUBLIC*, judgement of ECHR from 7th July 2014, App. No. 19315/11, point 105,

³⁷ Case *OLSSON v. SWEDEN (No. 2)*, judgement of ECHR from 27th November 1992, , App. No. 13441/87, point 90

how a contact could be in the best interest of the child if the crime was committed (or intended to be) directly against this child.

However less obvious and more common is a situation where the victim was the other parent (or another person – usually a relative - who took primary care of the child). It can often be a parent to whom the child was much attached or has a very strong positive relation. In such cases it is not just morally deplorable, but this kind of crime that leaves the child without a carer or someone to whom it was attached, significantly interfere and disrupt the healthy psychological development of a child and thus – indirectly – we must regard also a child itself as a victim of the crime. In our view this is the most important aspect regarding the nature of a criminal act that need to be taken into account when deciding over the existence, extent and form of a contact.

Other elements that should not be discarded are the **broader circumstances** of the criminal act. In this regard the corresponding criminal judgment should provide useful source of information though of course an expert report on the character and mental (pre)condition of the incarcerated parent gives a court more solid basis in this sense.

On the one hand circumstances of a crime can indicate for example a manipulative behavior of the incarcerated parent that can negatively affect development of his or her child or unreal perception of reality and future prospects that can hinder building a steady and normal relationship with the child. Inclination to violence is very common tendency in this context. In this sense it is nevertheless crucial to assess whether the violence is exercised by the parent in general or just in certain situation or towards a certain (group of) people. In other words, how is this inclination to violence shown in a relation with a child and whether some kind of means (for example a supervision of a professional during the contact) can neutralize this attribute.

On the other hand circumstances of a crime can be also mitigating. For example when the incarcerated parent was previously himself a subject to a violence from a second parent or the criminal act was committed in a (alleged) protection of a child or when the parent acted without previous deliberation – impulsively, in affect when such „mishandling“ of strong emotions (under a right treatment) does not have to have an impact on a relationship with a child. All such circumstances can facilitate the decision over the existence, extent and form of a contact in question.

After all one of the crucial decisive factor remains the opinion of a child for which a rich and constant case-law of ECHR exists. In this respect it is however important to comprehend how the child perceive the crime committed by his or her parent (does the child has its own explanation of what happened?), how it was informed about the crime (was the child a direct witness?) or how it affected the life of the child up to now. All these questions are relevant in deciding the best way how to maintain a contact between a child and his or her incarcerated parent.

At last an incarcerated parent does not only refer to a parent in prison who is serving his (final) sentence, but also a parent who is in custody only waiting for the outcome of the criminal proceeding, i. e. still *de iure* an innocent person. While we certainly feel that from the point of view of a criminal law and after all from the general moral principles there is a huge difference between a convicted and a prosecuted person, from the perspective of a custody judge who must define an extent and a form (or even an existence itself) of a contact between such parent and his or her child, the difference is not that crucial. As the Czech Constitutional court summed it up in a case of a father held in (pre-trial) custody, the principles governing a relationship between an imprisoned parent and his or her child are fully applicable to the situation of parents in custody. However any interference by a court with a right of an accused person holding in custody must be all the more considerate given the fact that a person is in accordance with a presumption of innocence regarded innocent³⁸.

In conclusion the most important factor to consider among those related to the crime is the intended and factual victim of the crime. The question is whether the victim was someone from a child's family and thus indirectly the child itself or someone not related to the child at all with no attachments to a child. Another highly important issue to take into account is the effect that the crime had on a child and his or her life up to that date, as well as his or her perception of it. In these cases probably an expert report from the field of children's psychology and psychiatry is highly advisable if not practically indispensable. Other relevant aspects are the broader circumstances of the crime that can indicate more about the character of a parent (for example inclination to violence, manipulative behavior, illusory apprehension of reality or „just“ mishandling of strong emotions) and thus can significantly influence the perception of what is in the best interest of the child. Finally for better assessment of the situation it is necessary to take into account the precise phase of the criminal proceeding

³⁸ Finding of Czech Constitutional court from 20th december 2017, n. ÚS 3296/17 #1, point 30, accessible from <https://nalus.usoud.cz/Search/ResultDetail.aspx?id=100283&pos=1&cnt=1&typ=result>

against the incarcerated parent as the parent may ask for a contact from a custody while the investigation or the criminal proceeding before the court is still pending in order to respect the general principal of presumption of innocence.

3. Prison conditions

As far as the judge concludes that both, child's circumstances and the nature of criminal act, don't impede setting a contact of a child with the imprisoned parent, prison conditions should be considered. There are several possible ways in which contact of a child with imprisoned parent can be set, such as personal visits, video calls, telephone calls or correspondence.

Undoubtedly, the best way how to maintain and strengthen relationship between child and his or her incarcerated parent is to enable them personal contact as often as possible. Although Article 24.4 of European Prison Rules stipulates that *“the arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible”*³⁹, most prisons do not provide satisfactory conditions for children visits and visiting a parent in prison might be rather traumatic experience than a pleasant reunion. For that reason, before setting down a contact in a form of personal visits, the judge should first consider conditions of parent-child visits and the overall environment of particular prison.

In the first place, a judge should seek whether the parent-child visits should be contact or not (also called as open and close visits). There are no doubts that contact visits are preferable, especially for younger children. The course of contact visits should be friendlier and more informal, thus more likely to establish, maintain or deepen parent-child relationship. During contact visit parent and child might personally greet each other (e.g. give a hug), a child can sit on parent's lap, hold his hand or they can even play games together. Physical contact during open visits should not be limited to a shorter fixed period of time unless there is a reasonable suspicion a minor is being used to bring contraband to prison.⁴⁰ The ideal form of contact visits might be visits outside the prison area which can offer more relaxed atmosphere for family reunion. However, these are usually allowed only in a form of disciplinary reward

³⁹ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Council of Europe.

⁴⁰ Statement of the Czech ombudsman, file number 873/2009/VOPMČ

and might be conditioned by the prison regime, behavior of prisoner, surroundings of the prison, weather and other factors.

Unfortunately, there are many prisons, where even parent-child personal contact is strictly prohibited, and imprisoned parent sits behind a glass partition during the whole visit. This physical barrier is usually justified by security reasons. Such visiting conditions were subjected to judicial review of ECHR in case of **Ciorap v. Moldova**, where the Court stated that *“the limitations on the manner of maintaining contacts with the outside world, including the installation of physical barriers such as a glass partition, may pursue the legitimate aim of protecting public safety and preventing disorder and crime, within the meaning of the second paragraph of Article 8 of the Convention.”*⁴¹ Nevertheless, within the meaning of the second paragraph of Article 8 of the Convention, to forbid personal contact during the visit, two other conditions shall be completed – the interference shall be in accordance with the law and necessary in a democratic society which means there is a real risk of collusion, reoffending, escaping or smuggling contraband into the prison. As far as these conditions are not met, impeding physical contact of a child and his parent leads to the violation of the Article 8 of the Convention.⁴²

Secondly, prison environment should be considered. Considering that the aim of parent-child visits is to maintain the relationship between both child and parent, visiting rooms should be adapted for more activities than chatting at the table. Especially for younger children it can be difficult or even impossible to sit for few hours and talk to a person they don't meet that often. Therefore, a designated children space equipped with toys and games should be available. Moreover, playing with younger children during the visit might help to overcome the initial shyness, leave behind the thought of being in prison and constitute new common experiences. As an example of Czech prison caring about children friendly environment can be mentioned Jiřice or Bělušice prison, where children visits can take place in the garden or at playground built by prisoners themselves.⁴³ According to Czech ombudswoman non-contact visits should take place in sufficiently large spaces to allow the visitors and imprisoned to talk face-to-face

⁴¹ ECHR, *Ciorap v. Moldova*, application no. 12066/02, 19 June 2007.

⁴² In case *Ciorap v. Moldova* domestic authorities failed to consider whether the nature of security measure is necessary. Taking into account that the applicant was accused of fraud and his good behavior during the detention, the Court concluded that there has been a violation of Article 8 of the Convention, since allowing the applicant to meet his family would not have created a security risk.

⁴³ *Skype nebo Den otců, i tak vězni udržují kontakt s rodinou*. Novinky.cz. 1 February 2018. Available in Czech at <https://www.novinky.cz/domaci/461903-skype-nebo-den-otcu-i-tak-vezni-udrzuji-kontakt-s-rodinou.html>.

and to provide them at least some privacy. Visiting rooms should also be adequately technically and materially equipped.⁴⁴

The importance of prison environment for parent-child visits is also known to the Council of Europe whose Committee of Ministers stated in recently issued Recommendation concerning children with imprisoned parents (hereinafter referred to as “Recommendation concerning children with imprisoned parents”) that *“A designated children’s space shall be provided in prison waiting and visiting rooms (with a bottle warmer, a changing table, toys, books, drawing materials, games, etc.) where children can feel safe, welcome and respected. Prison visits shall provide an environment conducive to play and interaction with the parent.”*⁴⁵ According to the Committee of Ministers, hygiene, ventilation, light, a child-friendly atmosphere, utilities for taking care of infant children and furniture which is adapted to the use by children of different ages are the minimum standards that ought to be respected. The emphasis should also be put on child-friendly staff.⁴⁶ During a visit children should also have possibility to consume food and drink they brought to the prison or in case that bringing own food and drinks to visiting room is prohibited, there should be possibility to buy at least a small snack in a food machine or canteen inside the prison.⁴⁷

Thirdly the judge should weigh up the process in prison that the child must go through before getting to visiting room. Article 24.2 of European prison rules prescribes that communication and visits may be subject to restrictions and monitoring but they shall allow an acceptable minimum level of contact.⁴⁸ Recommendation concerning children with imprisoned parents goes deeper and more specifically provides that *“Any security checks on children shall be carried out in a child-friendly manner that respects children’s dignity and right to privacy, as well as their right to physical and psychological integrity and safety. Any intrusive searches*

⁴⁴ Návštěvy ve věznici seděly před odsouzenými jako v divadle, zjistila ombudsmanka. Česká justice. 25 January 2019. Available in Czech at <http://www.ceska-justice.cz/2019/01/navstevy-ve-veznici-sedely-pred-odsouzenymi-jako-v-divadle-zjistila-ombudsmanka/>.

⁴⁵ Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents. Council of Europe.

⁴⁶ Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents.

⁴⁷ Děti vězněných rodičů: naplňování práv a potřeb dětí, které mají rodiče ve výkonu trestu – teorie a praxe. Mgr. Lucie Rybová, director of Czech Helsinki Committee. Available in Czech at <http://www.helcom.cz/cs/zastupci-chv-prezentovali-situaci-deti-s-rodicem-ve-vykonu-trestu-na-prvni-odborne-konferenci/>.

⁴⁸ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Council of Europe.

on children, including body cavity searches, shall be prohibited."⁴⁹ Although there is no doubt that security checks of all visitors are important to ensure safety in prison (children can be misused to bring drugs or other prohibited items to prison), children should be searched sensitively by appropriately trained staff, because they can be psychologically harmed easily. The Committee of Ministers mentions as a good example searching children in a playful manner or suggests analogies with searches for air travel to normalize the whole process.⁵⁰

Security searches do not have to be the only problem that can occur before getting to visiting rooms. In case of **Horych v. Poland** ECHR dealt with situation where appellant's minor daughters in order to get to visiting room in a ward for dangerous detainees had to walk through the entire prison, moreover, they also had to past prison cells situated on both sides of the corridor which exposed them to staring of inmates and other reactions to the girl's presence. The appellant argued that this constituted an exceptionally traumatic experience for his daughters so that he gave up receiving visits from them. In this case the Court noted that *"visits from minors in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited. However, positive obligations of the State under Article 8 includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment"* In the end the Court concluded that there had been a violation of Article 8 of the Convention, because the restrictions on the applicant's visiting rights⁵¹, taken together with failure to ensure proper conditions for visits from his daughters, did not achieve balance between the requirements of the dangerous detainee regime and the appellant's right to respect for his family life.⁵²

To sum it up, before setting down regular parent-child contact in penitentiary the judge should focus on the course of visit in detail. First, a judge should find out whether the child and parent will be allowed to have a personal contact during the visits or whether they will be separated by bars or glass partition. In case that visits should be non-contact, other aspects such as child's age, maturity and mental health shall be thoroughly considered, because seeing a parent in prison behind a partition might cause a child undue emotional suffering. Another

⁴⁹ Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents. Council of Europe.

⁵⁰ Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents.

⁵¹ Appellant also complained about frequency of visits and that most of visits were non-contact.

⁵² ECHR, Horych v. Poland, application no. 13621/08, 17 April 2012.

important criterion to be considered is prison environment. Visiting rooms should be equipped at least with some games, toys and books to make the time spent together more pleasant and interactive. Attention should also be paid to the behavior of prison staff. Last but not least the judge should seek a process that a child has to go through to reach visiting room such as mode of security searches and location of visiting room within the prison building, because it is not desirable that minor children go through the entire prison including cells and get in touch with other prisoners.

Provided that conditions for regular personal visits in prison are not met, the judge should consider alternative means of contact. Relevant alternative to face-to-face visits are video calls. Recommendation concerning children with imprisoned parents stipulates that *“In accordance with national law and practice, the use of information and communication technology (video-conferencing, mobile and other telephone systems, internet, including webcam and chat functions, etc.) shall be facilitated between face-to-face visits and should not involve excessive costs.”*⁵³ Technologies enabling video calls are available for many years and there are some European prisons including Czech ones experimenting with Skype-type communication. Even so national governments and most prisons seem to be a bit reserved as far as practicing this progressive form of face-to-face contact is concerned. It is worth mentioning, that video calls might be extremely useful means of communications for children situated in institutional care who cannot visit their parents personally on a regular basis as a result of lack of social workers and finance as well as for children who live far away from the prison.⁵⁴

In cases where personal visits and video calls are not suitable or possible, parent-child contact can be set in a form of telephone calls. Difficulties of telephone calls might be that they are less personal and, in most cases, eavesdropped or recorded so that child's privacy is being violated. Since in some countries telephone calls are unduly expensive and therefore inaccessible to many prisoners (Czech Republic is not the exception), Committee of Ministers put stress on its financial availability as mentioned above.

Another form of parent-child contact can be realized by means of e-mails or letters. This form of contact is less personal, so it might be used as a complementary means of communication

⁵³ Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents. Council of Europe.

⁵⁴ Český helsinský výbor prosazuje videonávštěvy mezi vězni a dětmi. Česká justice. 30. January 2015 Available in Czech at <http://www.ceska-justice.cz/2015/01/cesky-helsinsky-vybor-prosazuje-videonavstevy-mezi-vezni-a-detmi/>.

combined with other ways of contact mentioned above. While establishing contact in a form of correspondence, the judge should consider mainly the age of child and his ability to write and read as well as the parent's literacy.

4. Extent of a contact

In the Czech Republic, although the law provides that visits of convicts should be usually organized during the daytime on weekends or holidays, a number of prisons organize visits at weekdays on regular basis, mostly for capacity reasons. This raises question whether the judge can establish a parent-child contact on specific days in favor of a child interest regardless of the prison's visiting days. Undoubtedly, if the right to respect for private and family life proclaimed by the Article 8 of the Convention is to be fulfilled, prison staff should be more flexible and visiting days should be organized with respect for prisoner's children and families' private lives and their everyday duties. Therefore, a parent-child contact should primarily be established on days which comply with needs and capabilities of a child and visits on weekdays should be ordered only exceptionally and on the grounds of prison's justifiable reasons or at the request of prisoner's family itself.

Another significant restriction of parent-child contact is that in most countries' prisoners' right for visits from their relatives is limited by law up to a few hours per month⁵⁵. However, in some cases, especially when it comes to younger children, more often and intense contact might be required in order to maintain family relations. This raises a question, whether a judge can exceed statutory monthly visit period when determining a frequency and length of child's contact with an imprisoned parent. It is necessary to stress that a judge is during his decision-making process bound not only by law, but also by ratified international treaties and in case of conflict international treaty prevails. Provided that more frequent parent-child contact is in the best interest of the child proclaimed by the Convention on the Rights of the Child, a judge should probably establish contact which is beyond the limits of the national criminal law.

⁵⁵ According to § 19 of the Czech Law on the Execution of the Sentence a sentenced person has right to receive visits of close people for a period of 3 hours per calendar month and in most prisons, this right has to be done at once.

Another argument in favor of the more intense contact (not limited by the provision of the criminal law) can be found in the division between the public and private law⁵⁶.

On the other hand, such extended contact – fully in compliance with the best interest of the child - may in reality prove unenforceable. The prison surely can respect the civil judgment establishing a contact beyond the limit of the national criminal law, but if it refuses to do so, there are no legal means to enforce the cooperation of the prison. According to the provisions of criminal law dealing with the execution of the sentences, the incarcerated person is entitled to only few hours of visits per month and the prison – who moreover does not take a part in the civil proceeding concerning a parent-child contact – is not strictly speaking bound by this civil judgment. From the point of view of the prisons there might also be significant objective hurdles (capacity reasons, regime of the prisoners) to such benevolent parent-child contacts.

Even though a judge can theoretically exceed the statutory limits of contact stipulated by the national criminal law, the extent of a contact should be rational, with respect to possibilities and capacity of particular prison and its regime. Played down or left out should not be even the fact that a parent is serving a sentence for a criminal act.

Although a judge should also consider prison's visiting days, he should always bear in mind that contact with imprisoned parent cannot limit a child in his everyday life and duties such as school attendance. Therefore, a contact should be established mainly on weekends and holidays and prison management should do maximum to make it possible. In the end parent-child contact should correspond to the best interest of a child within the meaning of the Convention on the Rights of the Child which may lead to exceeding the statutory time limits set for visits in prison.

Conclusion

A decision-making process concerning contact of a child with an incarcerated parent should comprise of assessing numerous factors and aspects relating to a child, parent and prison where a parent serving his or her sentence. We divided these criteria into four main categories that are (i) circumstances on the child's side, (ii) the nature of criminal act, (iii) prison conditions and (iv) the extent of a contact. Although each category has a different

⁵⁶ According to § 1 par. 1 of the Czech Civil Code the application of private law is independent of the application of public law.

significance, all of them are led by the principle of the best interest of a child proclaimed by the Convention of the Rights of the Child and right to respect for private and family life within the meaning of Article 8 of the Convention.

A custodial judge should consider parent-child relationship first. If a judge finds out that a parent was deprived from parent responsibility, wasn't interested in child's life at all or that the relationship was pathological, there is no sense in establishing a parent-child contact in prison which would be a burden rather than a benefit for the child. On the contrary warm relationship, favorable previous mutual contact or specific connection concerning child's identity are aspects that may lead to conclusion that a regular contact with an incarcerated parent is appropriate. After dealing with the quality of parent-child relationship, a child's mental state substantiated by expert opinions should be assessed. Other relevant aspects are child's age or attitude to the accompanying person who should be child's psychological support before, during and even after the visit. The distance of prison from child's place of residence should also be considered, because it may cause a significant obstacle in determining the frequency of contact.

Provided that a judge concludes, that quality of parent-child relationship does not prevent him from establishing regular contact, he should move to subsequent category of relevant factors. At the forefront of the second category is the nature of criminal act. Initially a judge should find out whether the crime was committed against a child itself, someone from child's family or other people to whom a child might have an emotional relation. In case that the crime was committed against someone not related or somehow close to the child, the judge can move to the second category and consider circumstances on the child's side. Since the crime was committed against child or people close to the child, a judge should go deeper and ascertain the child's perception of crime and its impact on his subsequent life. Broader circumstances of a crime are also relevant, because it can tell a judge more about parent's character and its possible effect on a child. In case that criminal proceeding against a parent has not finished yet, the principal of presumption of innocence shall be respected.

Then, prison conditions should be assessed. Although a judge should examine the entire course of visit, the most important seems to be the fact, whether visits in particular prison are contact or not. In case that contact visits are not possible, the judge should look at child's age and mental health to find out whether the child is able to participate non-contact visit with no negative consequences. The judge should also consider prison environment, more specifically whether visiting rooms are properly adapted to children's visits, the mode of security

searches, location of visiting rooms within the prison building and whether behavior of prison staff towards minor visitors, but also towards visited parent, is appropriate.

Parent-child contact should correspond to the best interest of a child within the meaning of the Convention on the Rights of the Child which may lead to exceeding the statutory limits stipulated by the criminal law. However the extent of a contact should be rational, with respect to possibilities and capacity of particular prison and its regime not only because the civil judgment establishing a contact exceeding the statutory limits may proved to be *de facto* unenforceable. The judge should bear in mind that contact with imprisoned parent cannot limit a child in his everyday life and duties, on the other hand the prison's visiting days should be also considered.

Even if an importance of criteria mentioned above varies, they are all dependent on each other and they should be assessed coherently. During the decision-making process a judge should always bear in mind that a child did not commit any crime and should not be punished for crimes committed by his or her parent. Parent-child contact should be established only in cases where it corresponds to the best interest of particular child and no negative consequences on child's mental health are expected.