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## Practice Profile

Aamina commenced pupillage under the supervision of William Davis in October 2023, she is now in her 2nd six and available to take instructions.

Aamina's Privacy Policy can be downloaded [here](#).

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### Sentencing: Overcrowding in Women's Prisons

9 April 2024

Should the court take into account the existence of overcrowding in women's prisons when sentencing female offenders? In *R v Foster*, the Court of Appeal confirmed that the answer is yes. Aamina Khalid, a first six pupil at 5KBW has written a commentary on the Court of Appeal judgment.

The article can be read here: <https://www.5kbw.co.uk/resources/view-article/sentencing-overcrowding-in-womens-prisons>

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### Sentencing: Overcrowding in Women's Prisons

Author: Aamina Khalid, first six pupil at 5KBW

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### Sentencing: Overcrowding in Women's Prisons

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#### Introduction

Should the court take into account the existence of overcrowding in women's prisons when sentencing female offenders? In *R v Foster*, the Court of Appeal confirmed that the answer is yes.

## Facts

On 6 March 2023, Ms Carla Foster (CF) pleaded guilty to administering poison with intent to procure her own miscarriage, contrary to the Offences against the Person Act 1861 s.58.

During a period of separation from her partner, CF became pregnant by another man. When she reunited with her partner she wanted to conceal and then terminate the pregnancy. She repeatedly searched online for abortion-inducing drugs and how to terminate a pregnancy over 24 weeks.

CF lied to the British Pregnancy Advisory Service (BPAS) about the length of gestation and obtained abortion-inducing drugs which she used. Soon after, she suffered a miscarriage and when her daughter was born she was not breathing. A subsequent post mortem examination determined that the cause of her death was a combination of stillbirth and maternal use of abortion-inducing drugs.

CF was initially sentenced to 28 months in custody.

## The Court of Appeal's Decision

The sentence was appealed for being manifestly excessive.

The factors pointing to a longer sentence included:

1. That the infant had been stillborn.
2. The length of gestation.
3. The fact that CF knew the pregnancy was beyond the legal limit for abortions of 24 weeks.
4. The fact that CF had lied to bring herself within the telemedical services for early medical abortions.

The mitigating factors included:

1. That CF was 44 and had no previous convictions.
2. The overall delay in the proceedings was unreasonable.
3. The offence was committed against the backdrop of the first, and most intense, phase of lockdown at the start of the Covid-19 pandemic and CF was in emotional turmoil as she sought to hide the pregnancy.
4. There was evidence of emotionally unstable personality traits.
5. CF was deeply remorseful, wracked by guilt and suffered from depression.
6. CF was the primary carer and a good mother to three children (one of whom had special needs) who would suffer from her imprisonment.

In deciding the appeal, the court paid particular attention to the sections of the Equal Treatment Bench Book headed "Women as offenders Who is in prison?". The court noted the disproportionate impact of custodial sentences on women and their dependants, and that the long-term effect of prison sentences differs between men and women. It was noted that:

*"The impact of imprisonment on women, more than half of whom have themselves been victims of serious crime, is especially damaging and their outcomes are often worse than men's...[and] research suggests that women released from prison are twice as likely to reoffend as a comparable cohort of women given community orders".*

*"Women are much more likely to be primary carers, with children far more directly affected by a prison sentence as a result.... and only 5% [of children] remain in their own home while [their mother] is imprisoned" [1].*

Further, the court stated that "in accordance with long established principles, the conditions in which prisoners are confined can properly be taken into account in sentencing, including in deciding whether to suspend a sentence. Judges can and in our judgment should therefore keep in mind that the impact of a custodial sentence is likely to be heavier during the present circumstances of overcrowding in the female estate than it would otherwise be".

The appeal was allowed and it was held that the sentence would be one of 14 months which should be suspended.

## Commentary

In October 2023, there were a record 88,225 people in prison in England and Wales leading to increased prison overcrowding. The Chief Inspector of Prisons, Charlie Taylor, has warned that the prison population crisis “will mean more deprivation, squalor and the risk of further violence”. [2].

In *R v Ali* [2023] EWCA Crim 232, the court referred to a letter from the Deputy Prime Minister to the Lord Chief Justice which stated that “operating very close to prison capacity will have consequences for the conditions in which prisoners are held. More of them will be in crowded conditions while in custody, have reduced access to rehabilitative programmes, as well as being further away from home (affecting the ability for family visits)” [3].

The issues of overcrowding exacerbate the already existing problems that female prisoners face. With limited resources, there is a risk that prison officers may prioritise security over welfare, resulting in many female prisoners not having their physical and mental health needs met [4]. Furthermore, there are only 12 women's prisons (out of 117 in total) in England and Wales and consequently a large proportion of female prisoners are imprisoned far away from their children [5]. This issue is worsened as a result of overcrowding.

In that context, *R v Foster* is a significant case as it confirms that Judges can and should take into account the particular issues that are faced by women who are sentenced to a term of imprisonment. The court rightly emphasised the fact that the present circumstances of overcrowding in women's prisons mean that the impact of a custodial sentence was greater than it otherwise would have been. The court also referred to the fact that Ms Foster had primary caring responsibilities, and that the children in her care would be detrimentally affected by a custodial sentence.

This is therefore an important judgment which is likely to be of assistance to practitioners acting for defendants, particularly female defendants, in circumstances where the court is considering imposing a custodial sentence.

[1] *Equal Treatment Bench Book* (February 2021) at [115]-[130] (“Women as offenders Who is in prison?”)

[2] <https://commonslibrary.parliament.uk/what-is-the-government-doing-to-reduce-pressure-on-prison-capacity/>

[3] *R v Ali* [2023] EWCA Crim 232 at [20]

[4] Claudia Vince and Emily Evison, ‘Invisible Women: Understanding women's experiences of long-term imprisonment’ (2024) 270 *Prison Service Journal* 30

[5] <https://mojdigital.blog.gov.uk/2022/03/04/creating-content-for-women-in-prison/>