JERSEY / JUDGMENT

AG -v- T [2016] JRC 034 (08 February 2016)

[2016] JRC 034

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JUDGMENT

THE commissioner: 1. On 21 st January, 2016, the Court recommended the deportation of the defendant, who is a Portuguese national, and we now set out our reasons. 2. The defendant was sentenced on 8 th December, 2015, to two counts of indecent assault on a child when she was aged 8 and 10 and received a prison sentence of 6 years. The Court set out its reasons in its judgment of 4 th January, 2016, (AG-v-T

[2016] JRC 001). The Court regarded the offending in this case as being in a similarly serious category for sentencing purposes as rape, saying at paragraph 10:- "....the Court considers that assaults of this kind, namely when a penis is forced into a bodily orifice of a vulnerable and clearly unwilling complainant, using force and threats, should be regarded (and would be regarded by right thinking members of society today) as being in the same category of seriousness as rapes involving vaginal penetration. It seems to this Court that penetration of the mouth constitutes an intensely intimate and degrading act, which can involve a severe degree of emotional and psychological trauma." 3. On the issue of deportation, the Court found the first part of the test in Camacho v AG

[2007] JLR 462 met, saying this at paragraph 33:- "33 The prosecution sought a recommendation that the defendant be deported. Taking the first part of the test set out in Camacho v AG

[2007] JLR 462 , the Court had no doubt that the defendant's continued presence in the Island was detrimental for the following reasons:- (i) The defendant had committed two serious sexual offences on a child which he had consistently attempted to minimise and justify. (ii) He is assessed as being of a moderate risk of sexual recidivism. (iii) He has three previous convictions for robbery and five for aggravated theft between 1987 and 1999 for which he was sentenced in Portugal to periods in custody ranging from 1½ years to 8 years. (iv) Both the complainant and her mother fear for their safety should the defendant not be deported; indeed, the complainant fears that she is at risk of being killed by the defendant." 4. However, when it came to the second part of the test, the Court did not feel it had sufficient information and adjourned the matter, asking in particular for:- (i) A report from the Probation Department on the issue of deportation. (ii) A statement from the defendant. (iii) A statement from his partner, also we believe a Portuguese national. (iv) A report from the Children's Service in relation to his child (who was not the complainant). The defendant's statement 5. In his statement dated 19 th January, 2016, the

defendant, who was born and brought up in Madeira, described an abusive childhood where he was regularly beaten by his father and eventually was taken into foster care. He lived independently from the age of 14 years and had very little schooling. Accordingly, he has difficulty reading and writing. He started working in Jersey on a seasonal basis in 1983 and has lived here permanently since 1999, working as a self-employed full-time gardener, with a number of customers some of whom provided references to the Court. 6. He has been in a relationship with his partner for 11 years and they have a 3 year old son ("the child"). He described a close family relationship although he acknowledged that he and his partner now faced an uncertain future. They wanted to remain together and she was supportive but feels pressured by the Children's Service, who have told her she could not visit the defendant or have any contact with him or risk having the child taken into care. 7. The defendant has two brothers and a sister in Madeira, who he says have disowned him since his conviction. He has two grown up children there who he says he doesn't have much contact with and a grown up son in London who he is in contact with. His statement made no reference to his mother who lives in Madeira also. 8. The defendant also has three brothers and a sister who live in Jersey, all of whom wrote letters of support at his sentencing. They all have children here and he says are supportive of him, visiting him in prison. Like him, they all regard Jersey as their home. 9. The defendant suffers from significant levels of depression, anxiety and post-traumatic stress disorder dating back to the abuse he suffered as a child for which various treatments have been recommended, which he said he would best receive in Jersey. 10. Deportation would affect his ability to contribute financially to his partner and child in Jersey and he would be unlikely to afford the costs of travel that would be necessary to maintain contact with them. Partner's statement 11. In her statement of 8 th January, 2016, the partner, who was born and brought up in Madeira, also described a close relationship, with the defendant being a "great and loving father" who fully supported the family. She considers Jersey to be her home, having been here since 2003. Her parents are deceased and she has 3three brothers in Madeira, who she does not keep in touch with that much. She regards the defendant and his family in Jersey as her family. 12. She has received help from the defendant's family in Jersey for which she was very grateful and help and support from the Children's Service, although she felt she was under immense pressure from them:- "My difficulty is that I have been told by my social worker Vanessa that if I have any contact with [the defendant], or allow [the child] to have any contact with [the defendant] (even by telephone), then I will lose my son. They have told me that I will be putting my son at risk and he will be taken away from me. This is the only reason that I have not been to visit [the defendant] in prison. I feel so scared of losing my son. It has been pointed out to me that in the probation report it says that I did not visit [the defendant] for many months. The suggestion seems to be that I no longer support him. That is not correct. If the probation officer had asked me why I had not visited [the defendant] I would have told them that the Children's Service had told me I was not allowed to." 13. The child was entitled to have a relationship with the defendant and although she needed time to come to terms with what he had done, she wanted him to be part of her life, provided the child

was not at any risk. 14. She had no intention of returning to Madeira and if the defendant were to be deported, she did not know what she would do. She would be unable to afford the cost of travel to see him and she did not know how she would cope. She asked the Court not to recommend his deportation. Report from the Probation Department 15. The report from the Probation Department dated th January, 2016, paints a completely different picture. The partner informed the Probation Officer that whilst she had been previously supportive of the defendant, having had time to reflect on the seriousness of the offences, she had decided to end the relationship and confirmed that she was no longer willing to be supportive of him. She had moved accommodation, engaged with the Children's Service and was in receipt of income support. She wished to remain in the Island with the child. 16. The partner had told the Children's Service that when making her statement at the defendant's lawyers, she felt pressurised to say that it was okay for the defendant to stay in Jersey. The defendant's brother had told her before Christmas that if asked, she should say that she wanted the defendant to stay in the Island, but in fact she had had little contact with the defendant's family in Jersey since his incarceration and she was happy with this. She and the child would feel safer if the defendant was deported because they would be able to continue with their lives without stress and pressure. On his release, the defendant would attempt to see the child and her intention was to protect the child from harm. 17. The prison records showed that the partner visited the defendant a number of times at the prison initially (only once with the child) but there had been no visits since June 2015. She had been surprised to receive a telephone call from the defendant on Christmas Day, as she had changed her telephone number and can only surmise that one of his brothers had passed it on to him. That number has since been removed from the defendant's account at the request of the Children's Service. 18. The report indicates that the defendant has a long-standing history with alcohol and experiencing stress. He had told the Probation Officer that he intended to kill himself upon his release from custody and the prison records show his current risk profile consists of self-harm and suicide risk. His medication is supervised and he is regarded as a vulnerable prisoner. 19. The report states that the defendant has had 4 relationships, with one child from each. He does not have any contact with his ex-partners. 20. The defendant's brothers visit him regularly at prison, but despite several attempts the Probation Officer had been unable to get in contact with them. Report from the Children's Service 21. The report from the Children's Service expressed some concern over delay in the child's development, which in its provisional view was more likely to be attributable to environmental and parenting factors rather than organic causes. It recites that the partner received almost no formal education, leaving school aged 8, and in addition to having little English, was unable to read and write in Portuguese. She had three older children from a previous relationship which had been abusive. They were removed from her care as a result of domestic abuse. 22. Whilst the defendant had not physically hurt her, she reported to the Children's Service that he was verbally abusive and aggressive, which the child would have witnessed. Since Mr Jonathan Collins, the social worker, had been allocated to the case on 7 th September, 2015, she had been consistent that she no longer

wanted any contact with the defendant and would not permit any contact between the defendant and the child, backing that up by liaising with HMP La Moye to place a bar on the defendant making calls to her from prison. 23. A file note from the Children's Service following a home visit on 31 st December, 2015, reads as follows: - "31/12/15 [The partner] told me that she received a telephone call from [the defendant] advising her that he was going to write a letter for her to be able to collect her mobile and IPAD from the Police. [The partner] stated that she does not know how he got hold of her number and why the prison allowed him to call her. She suspects that it might be his brother that provided it to him. [The partner] has not disclosed her current address and will collect the letter from her previous address. [The defendant] also advised her that his solicitor would like to speak to her re supporting [the defendant] to remain in Jersey on the grounds of him paying child maintenance. [The partner] said that she will not support [the defendant] to remain in Jersey; she does not want anything to do with him and if he wants to pay child maintenance he can do this from Portugal." 24. In the view of Mr Collins, the partner was a vulnerable individual in her own right. The law 25. The test applied by the law when considering whether to recommend deportation is set out in Camacho . The Court was required to find:- (i) Firstly, that the defendant's continued presence in the Island was detrimental to the public good (which it has found) and (ii) Secondly, that his deportation would not be disproportionate having regard to the relevant Convention rights of the defendant and his family to respect for family life under Article 8 of the European Convention of Human Rights ("the ECHR"). As the Court said in AG v Benyoucef

[2009] JRC 014 at paragraph 9:- "The second part of the test requires the Court to balance the interests of the community in deporting the offender against the interests of the offender and perhaps more significantly, members of his family. Their right to respect for their family life must be fully considered." 26. Article 8 of the ECHR is in the following terms:- "Article 8 Right to respect for private and family life Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." 27. There is no precise definition of family life for the purposes of the ECHR. It is not confined to the nuclear family but incorporates other forms of relationship including unmarried couples, the relationship between an illegitimate child and either parent and the relationship between the adopted child and adopting parent. The existence of "family life" will depend on the nature of the relationship at issue, not on their legal status. It is essentially a question of fact, depending upon the real existence (and practical consequences) of close personal ties (see K v UK App. No. 11468/85 and paragraph 8 - 025 of Human Rights Practice). 28. Although in the vast majority of cases applicants rely on the safeguards in Article 8 in relation to relationships between parents and children (or within a couple) the

jurisprudence shows that "family life" may encompass relationships between children and members of their extended family, such as grandparents (Marckx [1979-80] 2 E. H. R. R. 330), siblings (Boughanemi v France

[1996] 22 E. H. R. R.228), and uncles and nephews (Boyle v United Kingdom [1995] E. H. R. R.179). 29. However, the protection afforded by Article 8 in immigration cases is more limited for more distant relationships, requiring an element of dependency beyond emotional and blood ties. This was made clear by the Guernsey Court of Appeal in De Sousa v Law Officers of the Crown [27 th June, 2014] where Logan Martin JA giving the judgement of the Court said at paragraph 21:- "Although the applicant has lived primarily in Guernsey for 27 years, the Royal Court was made aware that he has maintained connections with Madeira, not least by visiting there regularly. Whilst he has a number of family connections in Guernsey and Jersey, he does not have any dependent children. We refer to the judgment of the European Court of Human Rights in Khan at paragraph 32 where it is said that 'In immigration cases, the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence'. The Court does accept that Article 8 will apply to the family and social ties which constitute the private life which the applicant has in Guernsey and Jersey but the absence of dependency between the applicant and his children does suggest that in the balancing exercise less weight may be attached to his Article 8 convention rights than would otherwise be the case. In this regard, we refer to the judgment in Uner at paragraph 59 both to demonstrate that social ties may be an aspect of private life and to show that the significance of family life and private life will depend upon the circumstances of each individual case. Taking all of these factors into account, we are satisfied that a recommendation for deportation is justified when the applicant's family and social connections are balanced against the seriousness of the offences of which he was convicted and his criminal record." 30. In Khan v United Kingdom

[2010] 50 EHRR 47 , the applicant, an adult, had been sentenced to 7 years' imprisonment for the importation of a Class A drug. He had moved to the United Kingdom when he was 3 years old, had no continuing social, cultural or family ties to Pakistan and had not re-offended following his release. His ties with the United Kingdom were strong and it was held that his deportation would not be proportionate. However, the fact that the applicant was living with his mother and brothers and that the entire family suffered from different health complaints was held not to constitute a sufficient degree of dependence to result in the existence of family life for the purposes of Article 8. 31. In Pinto, Loreto and Almeida v Law Officers of the Crown [2013/14] GLR 83, the defendant had been convicted of rape and sentenced to, inter alia, 8 years' imprisonment. He contended that the Guernsey Royal Court had paid insufficient attention to the impact of deportation on him and his 6 year old daughter. At the time of sentencing, he had been permanently resident in Guernsey for 13 years and had a large family residence there. The mother had ceased to have contact with the daughter since she was 2 years old and the defendant was effectively therefore his daughter's sole parent, sharing parental responsibility with his own mother. As

Montgomery JA giving the judgment of the Guernsey Court of Appeal acknowledged at paragraph 50:- "the more pressing the public interest in imprisonment or deportation, the stronger must be the claim under Article 8 if it is to prevail." She went on to say at paragraph 53:- "53 In any criminal sentencing exercise, the legitimate aims of sentencing have to be balanced against the effect of any sentence on family life. These aims include the need of society to punish serious crime and to protect society from persons who may present a risk of committing further serious crimes. The interest of complainants that punishment should constitute just desserts is also a legitimate aim as is the need of society for appropriate deterrence. The graver the offence the less likely it is that any interference with family life inherent in a sentence of imprisonment or an order for deportations will be disproportionate. It needs to be remembered that just as a sentence may affect the family life of the defendant and of his innocent family, so the crime will very often have involved the infringement of other people's family life. This present case is one in which Article 8 rights are affected not only in the Appellant and his child but in the Complainant and her family." 32. With respect to the complainant and her family in the case before us, the Court noted the following at paragraph 12 of its judgment of 4 th January, 2016:- "12 One feature of the report from the psychologist is the ongoing fear that the complainant and her mother have that the defendant will find and kill them on his release from prison. The mother is particularly fearful of the risks of harm towards her, the complainant and the complainant's sister. Whilst he accepts that this fear may be disproportionate, he says that the evidence shows that prognosis is negatively impacted if the complainant is at risk of contact with the perpetrator or suffers anxiety at the time of his release into the community." 33. In Boucheikia v France

[1998] 25 EHRR 686 , the European Court considered the lawfulness of the deportation, following a conviction for rape, of an Algerian national who had come to France at the age of 2 and whose mother and siblings were lawfully resident there. Due to the seriousness of the offence and the existence of ties in the country of origin, the European Court found that the interference with his Article 8 rights, which pursued the legitimate aim of preventing disorder and crime, struck a fair balance between the relevant interests at stake. 34. In contrast, in Nasri v France

[1996] 21 EHRR 458 , the defendant, who had been convicted of one offence of gang rape, had lived virtually all his life in France with his parents and eight siblings, some of whom had become French nationals, but he was deaf and dumb from birth, had little education, could not read and did not know or recognise sign language. The European Court inclined to the view that to a person confronted with such obstacles the family was especially important in terms of providing a home and preventing him from lapsing into a life of crime and in these circumstances deportation was found not to be proportionate to the legitimate aim pursued. 35. In Uner v The Netherlands

[2007] 45 E. H. R. R.14, the defendant challenged his deportation to Turkey from the Netherlands where he had been convicted of manslaughter and assault and sentenced to 7 years' imprisonment. He submitted that the government had failed to strike a fair balance. He had moved to the Netherlands when he was 12 years old with his parents and brother, he had two sons aged 10 and 14 with a Netherlands national, and, although they were no longer in a relationship, they remained in close contact. The government did not deny that the applicant had strong ties with the Netherlands but the European Court found there was no violation of his Article 8 rights given the seriousness of the offences. Decision 36. Because of the mixed messages coming from the partner, it was arranged for her to be independently represented on legal aid, with a view to ascertaining her true views in relation to the proposed deportation of the defendant. Advocate Redgrave was appointed and he sent the Court this communication:- "Contact was made that day with [the partner] and she agreed to come to our offices on Monday 18th January (yesterday) at 10.00 a.m. A Portuguese interpreter was booked to attend the meeting. At 10.10 the interpreter phoned [the partner's] mobile and spoke in Portuguese to her. [The partner] said she knew she was due to come to the offices, however, she said her son ["the child]" was ill. She asked if she could bring him with her to our offices. Given the time constraints we agreed. [The partner] said that she was leaving with him 'now'. Her address is a short walk from our offices. She did not, however, attend. At 11.05 and again at 11.20 the interpreter called [the partner's] mobile number. The phone rang and then went to voice mail. On the second occasion the interpreter left a message in Portuguese, giving our telephone number. [The partner] did not contact us to explain why she had not attended, or to say whether she would attend at some other time. We abandoned the meeting. I understand that the police then went to her home but could not locate her. I understand that Mr Collins of Children's Services met [the partner] this morning and that she told him she did not want to see us." 37. Accordingly, Advocate Redgrave was released from attending the hearing and the partner did not attend. 38. Jonathan Collins attended the hearing. He informed us that he met with the partner regularly, and indeed had seen her three times in the last two weeks. The issue of contact between the child and the defendant had not been assessed by the Children's Service, because the partner, who has sole parental responsibility, had been consistently against it (and had been very clear on that). In his view, she was acting appropriately to protect the child from harm, but she had not been placed under pressure by the Children's Service to take that stance. If she changed her view on contact, or if the defendant applied for contact, there would be no knee-jerk reaction on the part of the Children's Service but the risks would be assessed in the usual way. 39. The Court had done its best to ascertain the views of the partner, but was left with her very supportive witness statement on the one hand and quite contrary views being expressed through the Probation Department and the Children's Service on the other hand. It was clear that in practice she was not in contact with the defendant and had not been for some time, but even so we felt we could only assess her position as being neutral. 40. It was accepted by the Crown and by the Court that the partner and the child fell within "family life" for the purposes of Article 8, but the key question for the Court was whether the offences he had

committed were sufficiently serious to make it proportionate to recommend his deportation. 41. As in Benyoucef , the cause of the break-up of this family is the defendant's imprisonment for his offences and the partner's decision to have no contact with him and that may well endure for the whole of the time that he is due to remain in prison. The interference with the Article 8 rights will take place as a result of any deportation order made on his release. 42. As the Court of Appeal said in Pinto , the graver the offence, the less likely it is that any interference with family life will be considered disproportionate. In our view, these were very serious offences, committed on a young girl being looked after by the partner in the home she shared with the defendant. On the second occasion, the complainant, who was then aged 10, had been driven by the defendant to a property on a building site where he had locked the gates behind them. The offence involved partial penetration of the complainant's mouth with some semen spilling on to her lips. This was followed by a threat that if she said anything, he would report the mother to Social Security, because the complainant was sometimes left at home alone and she would be taken away from her mother. It was the second offence involving the same complainant. Subsequently in interview with the police, the defendant sought to place the blame on the complainant, describing her as the sexual aggressor (paragraph 6 of the judgment of 4 th January, 2016). 43. For such serious offences, the Court took the view that the interests of the community in deporting the defendant weighed very heavily in the balance. 44. As against that, the Court considered all of the circumstances of the partner, the child and the defendant. The partner was now living independently in her own accommodation and receiving income support and was clearly working closely with the Children's Service in the interests of the child. There was no contact with the defendant. The defendant clearly had ties with the Island which were important to him, but he retained ties with Madeira with his mother, siblings and two of his adult children residing there. 45. As part of that balancing exercise, the Court considered the position of the defendant's siblings in the Island but there was no evidence of any kind of dependency and in the Court's view, their Article 8 rights carried very little weight. 46. The Court concluded that the interests of the child, the partner and the defendant, even if the partner was fully supportive of the defendant, were insufficiently strong to prevail against the interests of the community. The interference in their family life that the deportation of the defendant would entail was not disproportionate. 47. The Court therefore recommended the defendant's deportation. Authorities AG-v-T

[2016] JRC 001 . Camacho v AG

[2007] JLR 462 . European Convention of Human Rights. AG v Benyoucef

[2009] JRC 014. K v UK App. No. 11468/85. Marckx [1979-80] 2 E. H. R. R. 330. Boughanemi v France [1996] 22 E. H. R. R.228. Boyle v United Kingdom [1995] E. H. R. R.179. De Sousa v Law Officers of the Crown [27 th June, 2014]. Khan v United Kingdom

[2010] 50 EHRR 47 . Pinto, Loreto and Almeida v Law Officers of the Crown [2013/14] GLR 83. Boucheikia v France

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