JERSEY / JUDGMENT

# H v AG [2024] JRC 149 (03 July 2024)

**[2024] JRC 149**

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[2024] JRC 149 [ New search ] [ Help ] Application under Article 5(5) of the Sex Offenders (Jersey) Law 2010. [2024]JRC149 Royal Court (Samedi) 3 July 2024 Before : R. J. MacRae, Esq. , Deputy Bailiff, and Jurats Cornish and Le Heuzé Between H Applicant And Attorney General Respondent IN THE MATTER OF H AND IN THE MATTER OF AN APPLICATION UNDER ARTICLE 5(5) OF THE SEX OFFENDERS (JERSEY) LAW 2010 Advocate J. W. R. Bell for Applicant Advocate K. A. Ridley for the Respondent Ex tempore judgment the deputy bailiff:

## Introduction

1. Approximately eight years ago, the Applicant was sentenced to a custodial term for an offence of indecent assault upon a woman. When he was sentenced, the Court ordered that a period of seven years should elapse before the Applicant is permitted to apply under Article 5(5) of the Sex Offenders (Jersey) Law ("the Law") to be no longer subject to the notification requirements of that Law. The Court made a number of restrictive orders at the same time, which have now expired. These included an order that he not contact or attempt to contact his victim directly or indirectly. The Applicant complied with these restrictions. Early this year the Applicant became eligible to apply to have the notification requirements lifted. 2. During the period of the notification requirements, the Applicant has complied fully with his obligations in terms of cooperating with the Offender Management Unit of the States of Jersey Police and has not re-offended. 3. The starting point is to consider whether or not the application should be heard in public or private. We refer to the decision of S v AG

[2023] JRC 140, where the Court said the following: "4. The first matter the Court needed to determine was whether or not the application should be heard in public or in private. The starting point for such consideration is the decision of the Royal Court in Jersey Evening Post v Al Thani

[2002] JLR 542 , where Bailhache, Bailiff, having reviewed the relevant case law in respect of open justice summarised the position thus: "16. The aim therefore is to do justice to the parties before the court. That aim must not be stultified by a rigid application of the principle that justice must be done in public. Yet the principle of open justice should not be displaced as a matter of convenience or expedience, or to avoid embarrassment to one or more of the parties, but only if it is necessary to do so in the interests of justice."

5. These proceedings under the Law are civil proceedings and not criminal proceedings in nature. The Law is silent as to whether or not such an application should be determined in public or in private, and in 2015 the Royal Court adopted a Practice Direction which says that such an application should be listed for hearing in private but that 'the first matter for consideration by the [Court] will be whether the case should be heard in private or in public'. The principles upon which the Court should consider this application have been considered in a number of previous cases including AG v Roberts

[2011] JLR 125 , AG v L [2016] (2) JLR Note 7;

[2016] JRC 152 and Av AG [2020] (1) JLR N1; [2020] JRC 004. The relevant principles that emerge from these cases and the evolution in the approach was recently charted in an article entitled 'The Principle of Open Justice' written by Sir Philip Bailhache in the Jersey and Guernsey Law Review published in October 2022. As noted by Sir Philip, recent judgments 'appear to have taken a more liberal stance in relation to applicants seeking to lift the notification requirements' under the Law in that in A v AG, (cited with approval in certain following cases) the Court held at paragraph 15 that ' .... applications under the Law may be distinguished from the Al Thani approach in this limited respect - the burden should not lie in any sense with the offender seeking an order for a hearing in camera, requiring him to prove that it is the only way in which justice could be done'.

6. Although this may only be a difference in emphasis and may not affect the outcome of application, we agree with Sir Philip's observation at paragraph 45 of his article to which we have referred where he says: "The burden of showing that the needs of justice require the Court to sit in private should always lie with the offender seeking an order under Article 5 of the [Law]. The burden of proof must lie somewhere. It surely should not lie with the Attorney General to have to satisfy the Court that it should sit in public."

7. Sir Philip goes on to say that this is consistent with the approach in Al Thani and referred to paragraph 16 of the judgment in this case as quoted above. He concludes: "The lodestar is necessity. The presumption is that the Court sits in public. That presumption may be displaced only if it is 'necessary' ... in the interests of justice". We agree with that approach." 4. In this case, the Applicant contends that there are reasons of general application in favour of the hearing being in private. Such reasons are expounded in paragraphs 5 and 6 of the decision of the Royal Court in V -v- AG

[2024] JRC 044 including the proposition that the Register of Offenders would become unmanageable if no one was ever removed from it and publication of such applications would act as a deterrent to those making applications as they would fear the attendant publicity. Indeed, in the present case the police make the same points at paragraph 5 of the Offender Management Unit report. 5. The Applicant also contends that there are reasons germane to himself in favour of hearing this application in private. Primarily, as referred to at paragraph 7 of the judgment in V -v- AG

[2024] JRC 044 , the Applicant submits that he is a good candidate for denotification and given there is substantial merit in his application (as we will come to shortly,) it is in the public interest for the application for privacy to be granted. 6. The Offender Management Unit support the hearing being held in private and note that the Applicant's wife may struggle to tolerate any adverse publicity and may feel the need to protect her children from the same. The Unit also makes the point that it is in the public interest for those who no longer pose a considered risk of sexual offending being removed from the Sex Offenders Register as otherwise resources would be diverted from the management of higher risk offenders. We agree that in the circumstances of this case it is necessary for this application to be determined in private. 7. As to the merits of the application, we have been assisted by two reports. First a report prepared by the Probation Service. The probation officer notes that the Applicant's personal circumstances are stable. He lives in the family home with his wife and their children. The probation officer agrees that the risk of sexual offending in the Applicant's case is now low and supports the application. 8. The Offender Management Unit report notes that the Applicant pleaded guilty to the original offence. He is remorseful for his conduct. He has been routinely risk assessed during the period of management in accordance with two tools, one familiar to the Court namely the SA07 Stable Risk Assessment which is conducted annually. More recently another new actuarial tool, the Static 99 Assessment has been introduced and has been used by the Offender Management Unit for last few months or so. This takes into account unchangeable factors, such as age and sexual and criminal offending history. The outcome of the assessment of both tools is then considered together. 9. In relation to the SA07 Assessment, the Applicant has scored "low" during all recent tests. A score of between 0 and 3 results in a low-risk score - 4 to 11, medium and 12 or above, high. Only two factors resulting in the Appellant "scoring". In each domain an individual scores 0, 1 or 2. Such scores are a positive indicator of risk are static factors, in that they are unlikely to change or cannot change. The first of these factors is that the Applicant, notwithstanding his supportive family is relatively socially isolated, has few friends and rarely leaves the house, and the second factor arises from the circumstances of the original offence. 10. As to the Static 99 test this is, we were told today, a more advanced and complex tool which takes into account more material. Collectively both tests take a number of hours to apply and result in a detailed analysis of risks. The outcome of an assessment using this tool is that an offender will either be at very low or below average or average or above average or well above average risk of future sexual offending. In this case

the facts of the original offence, which cannot be changed, (although may become more remote in terms of distance of time) result in the Applicant being assessed at average risk. 11. In the professional judgment of the Offender Management Unit and the officer who gave evidence before us today, notwithstanding his overall assessment of average risk according to the combined effect of the two tools to which we have referred, having regard to the Applicant's conduct over the last several years, his domestic situation and all the circumstances of the case including the fact that the factors leading to him scoring on these assessments are static and unchangeable, the risk of future sexual offending in this case is low. The report notes that the Applicant has always been cooperative with supervision and recognises the impact of his offending. 12. The victim of this offence has been contacted. Initially she said that she understood that the Applicant cannot remain subject to notification requirements indefinitely and was comforted by the fact that the risk of reoffending has significantly reduced in this case. She has reflected on this and subsequently wrote to the Offender Management Unit by email. She refers to the prolonged and continuing effect the offence has had upon her. She is concerned that the Applicant will cease to be managed by the Offender Management Unit, and she is worried that she might encounter the Applicant again. The Court sympathises with these concerns and had there been any evidence of the Applicant contacting or attempting to contact his victim in any way during the years since he committed the offence, then we would not consider granting his application today. However there is no such evidence, and we note that the police have offered their continuing support to the victim. 13. The Offender Management Unit report concludes by noting that the Applicant is now living a more productive lifestyle and that there is no indication that he has a proclivity to sexual offending. His application is supported. 14. We must apply the test in Article 5(6) of the Law which says: "(6) The court must not make the order applied for under paragraph (5) unless it is satisfied that the risk of sexual harm to the public, or to any particular person or persons, that the person subject to the notification requirements of this Law poses by virtue of the likelihood of re-offending does not justify the person's being subject to those requirements." 15. Having regard to all the circumstances of this application we are satisfied that the risk of sexual harm to the public or any particular person or persons the Applicant poses by virtue of the likelihood of his re-offending does not justify him remaining subject to the notification requirements and accordingly he is no longer subject to such requirements. Authorities Sex Offenders (Jersey) Law 2010. S v AG

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