

JERSEY / JUDGMENT

V v AG [2024] JRC 044 (23 February 2024)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Applicant was convicted of a count of indecent assault and sentenced to a non-custodial sentence approximately 10 years ago. The Court then ordered that a period of five years should elapse before the Applicant be entitled to apply under Article 5(5) of the Sex Offenders (Jersey) Law 2010 ("the Law"). The Applicant became eligible to make such an application approximately five years ago. Should the hearing be in private? 2. The Applicant requests that this application is heard in private. It needs to be understood that following the decision of the Royal Court in S v AG

[2023] JRC 140 the burden of proving that it is necessary for such an order to be made is on the Applicant. It is not on the Crown. 3. We set out what the Court said in S v AG at paragraphs 4 to 7 inclusive: "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 A v 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. The decision of the Royal Court in *S v AG* was not drawn to the attention of the Court in the subsequent and recent case of *Z v AG*
- [2024] JRC 002 and ought to have been. It is important that counsel draw to the attention of the Royal Court the decision in *S v AG* when these applications are made. 5. We now consider whether the Applicant has shown that this application should be determined in private. Counsel for the applicant distinguished between general factors in favour or such an order common to all such applications and factors specific to the Applicant in this case. Foremost amongst the general considerations are practical management of what is colloquially described as the Jersey Sex Offenders Registry by the Offender Management Unit. The Register would, it was said, become unmanageable if no one was ever removed from it and accordingly there is a public interest in such applications, so long as they are meritorious, being made. Publication of applications would, it was said, act as a deterrent to those making applications as they would fear consequences in terms of the attendant publicity, particularly publicity in relation to matters which had occurred many years before. Indeed in the case of *S v AG* the Court referred at paragraph 9 to its own recent experience of hearing an application by an offender to vary the terms of a restraining order imposed upon him under Article 10 of the Law which he applied to vary very shortly after his release from a custodial sentence and during the currency of that restraining order. When the Court determined the application would be heard in public the application was subsequently withdrawn. 6. These general concerns expressed in the terms that we have outlined were supported by the evidence this morning given on oath

by DC Le Chevalier of the Offenders Management Unit who gave evidence principally in relation to a matter which we will come to in due course, but she told the Court that if these applications were determined in public then people would not apply for such orders. In her view people simply would not make applications because of concerns they would have about losing employment, friendships, new relationships and in extreme cases being compelled to leave the Island. An absence of such applications would ultimately in her opinion make the register unmanageable. There are now, she observed, 192 people on the Register who they need to monitor. The extent of that monitoring depends on the risk that those individuals present. 7. In terms of considerations which were germane to this Applicant, a number of matters were drawn to our attention specific to him which we do not need to set out in detail as they are all matters which support the Applicant's contention that this application ought to be granted and some are matters we will come to in due course. It is plain from the evidence that the Applicant is a suitable candidate for denotification and we accept that the stronger the merits of an application such as this the greater the public interest in the application being granted. In view of the general consideration to which we have referred it is axiomatic that it will often be necessary to determine such matters in private bearing in mind, as we have said, that in each case the applicant will need to show that that is necessary. 8. We are also told the Applicant has a longstanding job in what may be described as a light industrial environment which he secured after the offending. His co-workers are not aware of this offence. Our attention was also drawn to the contents of the original and most recent Probation Report in this case which speak to various challenging and sensitive adverse childhood experiences of a delicate nature which provide a background to the Applicant's original offending. Such circumstances are not perhaps particularly unusual in cases such as this but, nonetheless, if those circumstances were matters that the Court thought it necessary to set out in a reasoned published judgment to support a decision made such as this then it would cause difficulty for the Applicant if the judgment identified him. 9. Accordingly, having regard to those factors of general application and those specific to the Applicant, noting that the Crown does not oppose the application, we have determined that it is necessary in the interests of justice for this application to be heard in private. Nonetheless we remind ourselves that in the usual way this judgment will be published so that the public can properly understand the reasons why the Court has made the decision that it has. The merits of the application 10. Article 5(6) of the Law provides: "(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." 11. Accordingly today the Court needs to be satisfied that the risk of sexual harm to the public or any particular person or persons that the Applicant poses by virtue of the likelihood of his re-offending does not justify him being subject to those requirements in future. 12. We have been furnished with a report from the Probation Service for the purpose of this hearing which indicated that when the Applicant admitted the offence ten years ago he

was assessed at that time of posing a significant risk of sexual re-offending. 13. The Applicant is now single and not in a relationship. He has a small number of close friends and a good employment record. He lives with a member of his family. He has a good relationships with various members of his family and proposes to move to the United Kingdom in a few years' time. 14. The Offender Management Unit, in conjunction with the Probation Service, carried out a risk assessment of the Applicant in January. The Court is familiar with the risk assessments in relation to this sort of application, namely the Stable and Acute 2007 Risk Assessments. These tools were considered in the case of C v AG

- [2020] (1) JLR 236, and at paragraph 8, 9 and 11 the Court described those tools and the scoring methodology as follows: "8. The court heard evidence from Det. Sgt. Hamon of the OMU, in particular having regard to the Stable and Acute 2007 Risk Assessment. This risk assessment tool is specifically designed for sex offenders. It was first used in 2007 and is commonly known as the SA07.
9. The stable risk assessment is a detailed assessment of the risk factors which may pertain to an individual and scores offenders by reference to 13 criteria categorized into five broad areas of concern (significant social influences, intimacy deficits, general self-regulation, sexual self-regulation, and cooperation with supervision). Such an assessment normally takes place by way of a face-to-face interview of between 45 and 90 minutes. The assessment yields overall scores in the following ranges: 0-3 is low, 4-11 is moderate, and 12-26 is high.
 11. He has been far more frequently assessed by reference to the acute risk assessment. The applicant has been tested every year for six years and the outcome of each of those tests is that he is at low risk of sexual reconviction, low risk of violent reconviction with an overall recidivism risk assessment of low risk. Sometimes the "acute" test has been carried out more frequently than annually as it is a quicker test to administer and deals with dynamic risk factors which may change from time to time. The overall scoring of the assessment is as follows: zero equates a low risk; 1-2 equates to moderate risk, and 3-14 is high risk. The applicant has scored zero on all tests. The acute assessment tests examine the following aspects which may give rise to risk: victim access, sexual preoccupation, hostility, rejecting supervision, emotional collapse, collapse of social support, and substance abuse." 15. We heard from DC Le Chevalier in relation to assessments in this case. As to the SA07 Acute Assessments, in recent tests the Applicant has scored zero and is accordingly at low risk. As to the SA07 Stable Assessments, recent assessments have yielded a score of 5 which is at the low end of the moderate range. However, as explained to us by DC Le Chevalier and accepted by the Probation Service, the scores that have led to that assessment in the Stable Risk Assessment have largely arisen by virtue of the Applicant scoring in static risk domains which are unlikely to change - such is the fact that the Applicant has limited social support and is not currently in a relationship. Those matters, on analysis, do not necessarily demonstrate an objective risk of likelihood of sexual offending and in the circumstances, having regard to all the factors of which the Probation Service and the OMU are aware, their most recent overall assessment of risk is low. There has been no offending of any nature for

over a decade, with the exception of minor motoring offences. The police observe that this is the Applicant's first application for a denotification order and that he appears to have made several positive changes in his life over the last decade. Indeed at the end of her report DC Le Chevalier says that, on the available evidence, the applicant "now appears to be living a productive lifestyle, and there is no indication that he has a proclivity to sexual offending."

16. The Crown does not oppose this application and, having regard to the matters to which we have referred, we grant the application. Accordingly the Applicant is no longer subject to the notification requirements under the Law. Authorities Sex Offenders (Jersey) Law 2010. S v AG

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