THE PRINCIPLE OF OPEN JUSTICE

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20 years ago, the Royal Court stated unequivocally that the principle of open justice was part of the law of Jersey. It acknowledged, however, that there were exceptions to this principle and that the overriding imperative was to do justice to the parties in the case before it. This article considers how the court has developed those exceptions during the last two decades.

Introduction

1 Public justice has long been recognised as a pillar of every civilised judicial system, and indeed of democracy. It is an aspect of the aphorism that justice must not only be done but be seen to be done. Twenty years ago, the *Jersey Evening Post* took up cudgels to defend the principle of open justice in a case where the then Minister of Foreign Affairs of the State of Qatar had responded robustly to an article in the newspaper. He had procured a court order banning all media coverage of an investigation by the Attorney General into the payment of commissions to certain Jersey trusts by foreign companies in relation to arms contracts with Qatar. The newspaper brought proceedings against the then Minister, a member of the ruling family of Qatar, seeking the discharge of the order. The proceedings are reported in *Jersey Evening Post Ltd v Al Thani*[1] ("*JEP v Al Thani*").

2 The principle was recognised by the Royal Court which stated—

> "The principle of open justice has not yet found statutory expression in Jersey but we have no doubt that it forms part of our law. Indeed it has been given judicial expression in numerous judgments of the court."[2]

The court referred to *G v A*[3] where Page, Commr, underlined that the general principle that all proceedings should take place in public was not in doubt, and that it was of constitutional and practical importance that the principle should not be displaced except for compelling reasons.

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[1] 2002 JLR 542. The author was a member of the court.
[2] *Ibid*. at para 14.
[3] 2000 JLR 56.

It should not be displaced, for example, simply on grounds of convenience or to avoid embarrassment to one of the parties.

3 What is the overriding consideration for a court contemplating making an exception from the principle? The *locus classicus* is to be found in a judgment of Viscount Haldane, LC in *Scott (or Morgan) v Scott*[4] where the Lord Chancellor stated—

> "While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions … But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of the controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."[5]

4 In *JEP v Al Thani*, the court summarised Viscount Haldane in these terms—

> "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

[4] [1913] AC 417.
[5] *Ibid*, at 437–438.

> expedience, but only if it is necessary to do so in the interests of justice."[6]

5 How then have the courts in Jersey applied these principles in the last 20 years?

Matters of trust administration

6 Administration applications by settlors, trustees, beneficiaries and others under art 51 of the Trusts (Jersey) Law 1984 (formerly art 47) have customarily been heard in private. The statute is silent on the point, but r 17(1) of the Royal Court Rules 2004 provides that applications under art 51(1) and (3) may be conducted in chambers. Wherever they are physically conducted, however, they are usually held in private.

7 The rationale is to protect the confidentiality of the trustee/client relationship. There may be curiosity but there is, generally, no public interest in private family affairs. When family members open their souls to the court in the context of the administration of a trust, or reveal confidential information, absent compelling reasons to the contrary, the court has sat in private. In *JEP v Al Thani*, the court declined to accept the proposition that it should always sit in private to determine applications under art 51, but in cases where the trustee seeks the court's blessing for a "momentous decision", or where the trustee is permitted to surrender its discretion to the court,[7] it will almost invariably do so. As the court stated in *JEP v Al Thani*—

> "[t]he underlying rationale is a desire not to undermine the confidence which lies at the root of the relationship between a trustee and the beneficiaries, particularly of a discretionary trust. In striking the balance between the principle of open justice and the rights of individuals to respect for the confidentiality of their private business arrangements, the court must have regard to the purpose of the [art 51] jurisdiction. Its broad purpose is to assist those concerned with the administration of trusts to resolve their differences and to seek judicial guidance or direction in an orderly context but in a relatively informal and flexible manner. When hostile litigation is being conducted, it must naturally be conducted in public in the ordinary course of events. But where the court is sitting administratively, or is exercising a quasi-parental jurisdiction to protect the interests of all the beneficiaries of a trust, the court should generally sit in private."[8]

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[6] 2002 JLR 542, at para 16.
[7] Categories (b) and (c) in *Re S Settlement* 2001 JLR *N* [37], *per* Birt, DB.
[8] 2002 JLR 542, at 561.

8 Another reason for sitting in private in trust administration cases was identified in *In re M Trust.*[9] The court stated—

> "It is of vital importance that, if such applications are to serve the purposes to which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed."[10]

9 In *Re Sanne Trust Co Ltd*,[11] the court considered how these principles applied to an application for the rectification of a trust instrument. Having referred to *JEP v Al Thani*, the court stated—

> "An application for the rectification of a settlement or other trust instrument is not however an administrative matter of that kind. Applications for rectification involve the commission of a mistake by someone, and the exercise of a judicial discretion as to whether that mistake can be put right. There is no public interest in sparing the blushes of professional advisers who have made mistakes in or about the drafting of trust deeds or related documents. On the contrary there might be said to be a public interest in ensuring that such errors are put into the public domain so that clients can be made aware of them. Furthermore, the exercise of the court's discretion may affect others, particularly tax authorities; as a matter of generality, there is no justification for sitting in private to hear an application for the rectification of a trust document, and the application to sit in private at an earlier stage of these proceedings should not have been made."[12]

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[9] [2012] JRC 127 (Sir Michael Birt, Bailiff, and Jurats Le Cornu and Marett-Crosby).

[10] *Ibid*, at para 15. See also *Re C Trust* [2010] JRC 001, where William Bailhache, Deputy Bailiff stated that

> "… a trustee should be able to come to court under Article 51 to make a candid appraisal of its position and the problems which are to be addressed. If trustees thought that such affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated."

[11] [2009] JRC 025B (Sir Philip Bailhache, Bailiff and Jurats Tibbo and Bullen).

[12] *Ibid*, at para 5.

10 The court sat in public but redacted its judgment to protect the privacy of the family members involved. A similar course was adopted in *Re Saffrey Champness Trust Corp.*[13]

11 The general practice of the court in trust administration cases is to sit in private[14] but, in deference to the important principle of public justice, to issue a written judgment which is published but in anonymised form. The facts will, so far as possible, be described and the court's reasoning for its decision will be set out, but the judgment will omit names and other matters which might enable the parties to be identified. Not only does this observe the imperative of public justice, but it also enables the legal profession to be aware of any new developments in the law and to see how the court has applied settled law to particular facts.[15]

12 An unusual trust administration case was *HSBC Trustee CI Ltd v Kwong.*[16] The court sat in private, as is customary, and gave its blessing to the proposed actions of the trustee. The question then arose as to whether the court's judgment should be issued in full, in anonymised form, or not at all. The dispute involved trusts governed by Jersey law where the beneficiaries were members of a very wealthy family in Hong Kong. The family had a very high profile and the media there had already published detailed accounts of the trustee's application and the nature of the disputes between the beneficiaries even though the court had been sitting in private. Much of the relevant information was in the public domain, although some inaccurate and misleading material had also been published. The names of the trustee and the various parties and their legal advisers had been made public. The court referred to the relevant principles in *JEP v Al Thani* and to other cases where those principles had been applied.

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[13] [2005] JRC 052 (Sir Philip Bailhache, Bailiff and Jurats Georgelin and Le Cornu).

[14] The legal position in England is different, even if in practice the outcome may often be the same. If the hearing in trust administration cases is to be in private, the court must be satisfied that the case falls within one of the specified exceptions to the rule that justice must be done in public. In addition, the court must also be satisfied that it is necessary for the court to sit in private to secure the proper administration of justice. (See *Lewin on Trusts* (20th ed., Sweet and Maxwell), at paras 39–059 *et seq*; see also *Re Delphi Trust Ltd* (2014) 16 ITELR 885 (Isle of Man High Ct) where there is a full discussion of the practice in offshore jurisdictions.)

[15] See *HSBC Trustee CI v Kwong* (Sir Michael Birt, Commr and Jurats Grime and Sparrow) 2018(1) JLR 332, at para 27.

[16] 2018(1) JLR 332.

13 The court concluded that no purpose would be served by anonymising the judgment because much of the relevant material was already in the public domain and the media would be able readily to identify the parties and the arguments that had been deployed on their behalf. The court reminded itself that there must be a good reason to depart from public justice. Sir Michael Birt, Commr, stated—

> "Ultimately, this is a case where the application is known about by the media and details of the application and of the factual background have been widely reported. At some stage questions will undoubtedly be asked as to whether the court has given a decision and if so what that decision was. It would in our judgment be unsatisfactory at that stage for the media to be told that the decision and the reasons for it are private. It is likely to lead to further speculative (and possibly inaccurate) reporting coupled with the risk of unofficial leakage of the decision. Given the level of detail already in the public domain and the attitude of the other members of the family, we consider that, in the particular circumstances of this case, the balance comes firmly down in favour of publication of the judgment rather than non-publication."[17]

The judgment was published subject to the omission of some insignificant details.

Defeating the very objective of the proceedings

14 Sometimes it is not possible for the court to sit in public without undermining the overriding principle of doing justice to the parties before the court. Such a case was *Sinel v Hennessy*.[18] In those proceedings, the question for determination was whether injunctive relief should be granted to preserve the confidentiality of documents which were, additionally, *prima facie* subject to legal professional privilege. If the hearing had been conducted in public, involving a detailed examination of the documents in question, the whole purpose of the hearing would have been defeated. The court referred to the relevant passages in *JEP v Al Thani* and accordingly determined to sit in private.

15 A slightly different example of this exception concerned the application of the anti-money-laundering provisions of the Proceeds of Crime (Jersey) Law 1999 in *Prospective Applicant v States Police*

[17] *Ibid*, at para 68.
[18] [2019] JRC 105 (Clyde-Smith, Commr, sitting alone).

(Chief Officer).[19] Under the 1999 Law, if a suspicious transaction report (STR) were made to the police, the effect (in the absence of consent from the police for the customer to deal with the assets) could be an indefinite informal freezing of the assets.[20] The prospective applicant was given leave in chambers to apply for judicial review of the refusal by the Chief Officer of Police to grant consent to the normal operation of accounts following such an STR. The judge ordered that the proceedings should be heard in private, and that the applicant should remain anonymous pending further order. The Chief Officer challenged the orders.

16 The applicant, the CEO of a company advising a hedge fund, stated that he and the company were defendants in several class actions in the US in which they were accused of fraudulent conduct which were being investigated by the US Securities and Exchange Commission (SEC). The STR had been filed as a result of these allegations which were disputed and all in the public domain. The SEC was a regulatory body and not a criminal authority. No criminal investigation was in train.

17 It was argued that class action lawsuits were common in the USA, rarely went to trial and often did not survive initial scrutiny. They were often "costly nuisance litigation" and their reputational damage was accordingly limited. Knowledge that the applicant was suspected of criminal misconduct in Jersey was however very different and would have a severe impact upon the applicant, his company and its employees, and investors in the hedge fund. *Inter alia*, all prime brokerage accounts would be shut down which would have a catastrophic effect upon the company. The applicant contended that without anonymity he would be unable to pursue the application and that justice would be denied him.

18 The court referred to *JEP v Al Thani* and to the passage cited at para 4 above. It also referred to the judgment of the Court of Appeal in *Warren v Att Gen*[21] where Beloff, JA stated—

> "On occasions the elements of procedural justice have to yield to higher imperatives of substantive justice. Such occasions are exceptional and the circumstances which engender them must be exceptional too."[22]

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[19] 2019(1) JLR *N* [3]; [2019] JRC 032 (Clyde-Smith, Commr, sitting alone).
[20] This aspect of the 1999 Law has been the subject of judicial criticism. See the remarks of Birt, DB in *Chief Officer of States of Jersey Police v Minwalla* 2007 JLR 409. at para 17 *et seq.*
[21] 2013 (2) JLR 224.
[22] *Ibid*, at para 15.

19 The court considered a number of English cases and in particular the approach of the Supreme Court in *R (C) v Justice Secy*[23] where a prisoner convicted of murder whose tariff of 15 years had expired and who was then a mental patient detained in hospital sought judicial review of the refusal to allow him unescorted community leave. He also sought an anonymity order. Lady Hale distinguished two aspects of the principle; the first being that justice should be done in open court, and the second that the names of people involved should be public knowledge. She concluded that a balance needed to be struck between the right to respect for private life protected by art 8 of the ECHR and the right to freedom of expression protected by art 10 of the ECHR. The public had a right to know what was going on but also who the principal actors were. On the other hand, the purpose of detention in hospital was to make people better; and the whole therapeutic exercise could be placed in jeopardy if the release of confidential information enabled the public to identify the patient.

20 The court concluded in the *Prospective Applicant* case—

> "24. In summary and in the context of this case, the general principle is that proceedings should be held in public and be freely reported, but that principle can be displaced if it is necessary to do so in the interest of justice. In considering the interests of justice, the court will take into account the Article 8 Convention rights of the person concerned as well as the countervailing right to freedom of expression under Article 10 of the Convention, but the consequences to that person of being identified must be sufficiently severe to justify the displacement of the general principle of open and freely reported justice …
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> 30. I accept the applicant's evidence as to the serious damage that could be done to the applicant's financial business in which confidence is key, and that without anonymity in these proceedings the applicant is effectively left without a remedy under a statutory regime where the informal freeze can last indefinitely. I am satisfied that we are not concerned here with the avoidance of embarrassment on the part of the applicant, and certainly not with convenience or expedience. In essence, on the facts of this case, I find that the consequences to the applicant are sufficiently severe to justify the displacement of the principle of open justice."[24]

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[23] [2016] UKSC 2.
[24] 2019 (1) JLR *N* [3]; [2019] JRC 032, at paras 24 and 30.

The court determined to sit in private until further order but to explain its decision in a judgment to be anonymised but placed in the public domain.

Prevention of identification of children in public law cases

21 Article 73(2) of the Children (Jersey) Law 2002 provides that any person who publishes any material intended or likely to identify a child concerned in court proceedings, except in so far as the court directs otherwise in the interests of justice and the welfare of the child, commits an offence.[25] It should be noted, however, that the Law does not prohibit the media from publishing material concerning a child (his abandonment, for example) but material which might identify the child.[26] More importantly, perhaps, the Royal Court has issued a practice direction[27] designed to ensure that the risks of identifying children arising from the publication of judgments in public law cases are minimised. It seeks also to ensure the redaction of explicit descriptions of sexual abuse and other matters personal to the child (*e.g.* medical treatment). The practice direction acknowledges the importance of open and transparent justice but also the need for public justice to yield to the welfare of children. Guidance is given as to how judgments should be anonymised with a view to ensuring that any material liable to lead to the identification of the child is omitted.[28] The court will continue its current practice of providing the parties with a draft judgment for comment having regard, *inter alia*, to the matter contained in the practice direction.

22 The court considered the effect of art 73(2) of the Children (Jersey) Law 2002 in *In re Jenson*.[29] In that case a baby boy had been found abandoned soon after birth at the General Hospital. Despite police inquiries and much publicity, all efforts to trace the parents proved unsuccessful. The child was taken into the care of foster parents and flourished, and the Minister of Health and Social Services applied to the court for an order freeing the child for adoption under art 12 of the Adoption (Jersey) Law 1961. The court made the order and turned to

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[25] The Children Rules 2005 go further in prohibiting the disclosure of any document, other than the record of an order, to anyone other than a party, legal representative, person appointed under art 75 of the Law, welfare officer, or expert without the leave of the court. See r 25.

[26] *In re Jenson* [2018] JRC 096, at para 11.

[27] RC19/02 which came into force on 2 December 2019.

[28] Personal and geographical indicators should be redacted, as well as references to ethnicity, religion, and school and professional witnesses. Explicit descriptions of sexual abuse or medical treatment should be avoided.

[29] [2018] JRC 096.

consider whether the judgment should be published. Counsel for the Minister and the *amicus curiae* argued that this might lead to the identification of the child.

23 The court reminded itself that the decision whether to publish was a public interest decision. It stated that—

> "[t]he starting point is that judgments of the Court are published. That is a fundamental principle which exists to ensure that the public has confidence in the work of the courts. It means that no-one can say that there is secret justice."[30]

The judge added—

> "The principle of open justice is such that there would have to be very convincing reasons why the judgment is not published, even if redacted."[31]

24 The court did not agree with counsel that publication of the judgment would necessarily lead to identification of the child by the public. On the other hand, any publicity given to the judgment by the media would mean that the mother might become aware that an order had been made freeing her child for adoption. If she wanted to reverse her decision not to care for the child, she would know that she would have to act quickly before an adoption order was made. If the judgment were not published, she would not be aware. It was in the child's best interests that the judgment should be published, and the court so ordered.

25 In *X Children v Minister of Health & Social Services*,[32] the proceedings involved three children (two of whom were minors) who alleged negligence against the Minister for failure to protect them from child abuse and serious neglect during and after the 1990s. It was not suggested by counsel that the hearing should be conducted in private, but the question arose as to whether, and if so how, the plaintiffs' identities could be protected from disclosure. The court recognised the importance of the principle of open justice and determined that the public and press should have access to the trial and be free to report it, subject only to protecting the identity of the plaintiffs from disclosure. The court made appropriate orders to that effect.

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[30] *Ibid*, at para 13, *per* Sir William Bailhache, Commr.
[31] *Ibid*, at para 14.
[32] [2015] JRC 045A (Pamela Scriven QC, Commr).

Protection of victims of crime and witnesses

26 The legislature has intervened to derogate from the principle of open justice in relation to the victims of sexual crime and vulnerable witnesses. The Criminal Justice (Anonymity in Sexual Offence Cases) (Jersey) Law 2002 provides at art 3 that—

(1) Where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the complainant.

(2) Where a person is accused of a sexual offence, no matter likely to lead members of the public to identify a person as the complainant shall, during the complainant's lifetime be included in any publication.

The Royal Court has power to give a direction disapplying the provisions of art 3 in certain circumstances[33] but generally the name(s) of the victims of sexual crimes may not be published.

27 The Criminal Justice (Evidence of Children) (Jersey) Law 2002 provides for the giving of evidence by children under 16 and patients under the Mental Health (Jersey) Law 2018 by television links. It also provides for the admissibility of video recordings of the testimony of such children and vulnerable witnesses. In *Att Gen v Drean*[34] it was held that the legislature had intended that, when appropriate, young witnesses should have the benefit of giving their best evidence by video recording and avoiding the stress of having to give it live in the intimidating surroundings of the court. It was not an automatic process, however, and the court should always balance the interests of the victim against the interest of the defendant and his need for a fair trial.

28 Witnesses may be shielded from a defendant if they are fearful, or their evidence might otherwise be adversely affected. It is a matter for the discretion of the judge, although the Court of Appeal has indicated that reasons should be given for the exercise of that discretion.[35] In *Att Gen v P*,[36] Sir Michael Birt, Commr in responding to a submission from counsel about the importance of public justice, and the ability of the public to see as well as hear the evidence of a witness, stated—

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[33] *E.g.* to induce persons to come forward as witnesses, or to avoid substantial prejudice to the conduct of the defence.
[34] 2007 JLR *N* [69].
[35] *Att Gen v Myles* 2005 JLR *N* [5]; on appeal 2005 JLR *N* [19]; see also *Baglin v Att Gen* 2005 JLR 180, at 186 *et seq*.
[36] [2017] JRC 193 (Sir Michael Birt, Commr, sitting alone).

> "If the matter was one which simply rested upon the natural distress that the complainant in a sexual case has about giving evidence in front of the public, I would not accede to the application. However, the complainant has explained why she is particularly concerned. [The judge then elaborated the concerns.] [T]his takes us into special circumstances notwithstanding the importance of the public being able to see what is going on in the court. The greater interests of justice are that a witness should be able to give her evidence without pressure and to give of her best."[37]

Adoption, capacity, and other business

29 Article 18(3) of the Adoption (Jersey) Law 1961 provides that "Adoption Rules may provide for applications for adoption orders to be heard and determined otherwise than in open court". No such provision has been made, but it is the invariable practice for the court to sit in chambers for the making of adoption orders.

30 The court's jurisdiction under Parts 2 and 4 of the Capacity and Self-Determination (Jersey) Law 2016 is exercised, unless the court otherwise orders, in private for the protection of patients.[38] Practice Directions may specify the circumstances in which a court may make an order for the hearing, or part of it, to be conducted in public.[39]

31 Part 17 of the Royal Court Rules 2004 sets out what non-contentious business may be conducted in chambers before the Bailiff and Jurats, Bailiff alone and Greffier respectively.

32 Commissioners of Appeal appointed under the Revenue Administration (Jersey) Law 2019 customarily sit in private to determine tax appeals, but as they do not really settle points of law, or even facts, it can be argued that the process of justice has not actually been engaged.

Sex Offenders (Jersey) Law 2010

33 The Sex Offenders (Jersey) Law 2010 ("the 2010 Law") mirrors certain provisions of the Sexual Offences Act 2003 of the UK.[40] It makes persons who have committed relevant offences under the Sexual Offences (Jersey) Law 2018, and certain customary law and other statutory offences relating to sexual misconduct, subject to a

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[37] *Ibid*, at paras 3 and 4.
[38] Rule 14A/10 of Royal Court Rules 2004.
[39] Rule 14A/11 of Royal Court Rules 2004.
[40] See Sex Offenders (Prescribed Jurisdictions) (Jersey) Order 2011.

notification requirement requiring them to notify the police of each name they use, and their home address.[41] Such persons are also required to disclose information about their travel outside Jersey.[42] They may also be subjected to a restraining order prohibiting them from certain activities or employment and other prescriptive orders of the court. The broad purpose is to protect the public from the risk of further offending by the convicted sex offender. The Law came into force on 1 January 2011.

34 The notification requirement has no limit in time, but a court convicting a person of a relevant offence must generally specify the period that must expire, considering the risk of sexual harm to the public, before an application can be made by the offender to set the requirement aside. It should generally be a period of at least 5 years.[43] Article 5(6) provides that the court should not set aside the requirement—

> "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."

35 In 2015, the Royal Court adopted a Practice Direction[44] in relation to applications under art 5(5) of the 2010 Law to lift notification requirements. It stated at para (8) that the application should be listed for hearing in private and that "the first matter for consideration by the [court] will be whether the case should be heard in private or in public".

36 The first case to consider the effect of the new Law was *Att Gen v Roberts*.[45] The defendant had been convicted in 2010 of making indecent photographs of children and, exceptionally, sentenced to community service. The Attorney General applied for various orders under the 2010 Law. The court observed that the notification requirements of the Law were not intended to be punitive, and indeed could not be punitive without infringing the Human Rights (Jersey) Law 2000. The court also considered whether it should sit in public, especially in relation to retrospective applications. Circumstances

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[41] Article 6 of the 2010 Law. Article 7 also requires a person giving notification to allow an officer to take fingerprints, a photograph, and a non-intimate sample (as defined in the Police and Criminal Evidence (Jersey) Law 2003).
[42] Article 8 of the 2010 Law. The requirements are set out prescriptively in the Sex Offenders (Travel Notification Requirements) (Jersey) Order 2011.
[43] Article 5 of the 2010 Law.
[44] RC15/06.
[45] 2011 JLR 125 (William Bailhache, DB and Jurats Clapham and Fisher).

might have changed since the offender's conviction; he might have married and had children who were unaware of his previous offending. Publicity might adversely affect work being done by the Probation services. These were illustrations of the kind of circumstances where the court might consider that the interests of the offender outweighed the public interest in sitting in public. The court nonetheless adopted the principles in *JEP v Al Thani* and decided on the facts that its judgment should be published in full without anonymisation.

37 The factors referred to in *Roberts* came to the fore in *Att Gen v T*.[46] This was a retrospective application by the Attorney General. The court referred to *JEP v Al Thani* and reiterated that there was a strong presumption, fortified by art 6 of the ECHR, that proceedings should take place in public. The Convention did, however, provide that press and public may be excluded, *inter alia*, to protect the private life of the parties under art 8 of the Convention. The court found that, on a retrospective application under the 2010 Law where the offender had served his sentence and was back in the community, different considerations might arise. In this case, T had been released a year before and had been subject to verbal abuse when his identity became known. His daughter was in a fragile condition and was the subject of care proceedings. A medical report indicated that publicity to the application might well jeopardise T's rehabilitation. The court stated that in this type of case—

> "The court will … have to balance the Article 8 rights of the offender and his family against the principle of public justice referred to earlier. The circumstances will vary considerably from case to case and it is impossible to lay down any guidelines."[47]

In that case the court determined to sit in private.

38 In *Att Gen v L*,[48] the court emphasised that the burden was on the offender show why the principle of open justice should be displaced. L had applied for the notification requirements to be lifted and stated that if the application were not heard in private, he would withdraw it. He was in a stable long-term relationship with his wife and children and had since conviction built up a successful business which provided employment to others. He argued that publicity to his application, if reported in the press, would be damaging to him, his family and

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[46] 2011 JLR *N* [9]; [2011] JRC 055 (Birt, Bailiff and Jurats de Veulle and Kerley).
[47] *Ibid*., at para 28.
[48] 2016(2) JLR *N* [7]; [2016] JRC 152 (Clyde-Smith, Commr and Jurats Fisher and Grime).

business and punish him twice for his offences. The Attorney General considered that L remained in denial about the gravity of his offences (making indecent photographs of children) and continued to represent a danger to the public. The notification requirements were not intended to be punitive, but to enable the police to manage the risk that L posed. His family was aware of his conviction, as were others living in proximity to the family on the same estate. The application for the hearing to be conducted in private was refused and was accordingly withdrawn.[49]

39 A different conclusion was reached in *AG v H*[50] where the applicant had been 17 at the time of committing various sexual offences with a girl of 13. It was said that publicity would adversely affect H's personal life; he was a student and there could be a substantial impact upon his friendship group. He had been emotionally immature at the time of the offences. The court found that H was a vulnerable individual and that in the interests of justice the application should be heard in private.

40 In *L v Att Gen*,[51] the court the court was told that publicity around the applicant's conviction had caused difficulties for him and his wife. In determining to sit in private, the court found that it was no part of the Law's intent to encourage vigilantism, putting the safety of innocent parties at risk and increasing burdens upon the police in having to increase patrols in the area where the wife lived.

41 Two recent judgments appear to have taken a more liberal stance in relation to applicants seeking to lift the notification requirements pursuant to art 5 of the Sex Offenders (Jersey) Law 2020. In *A v Att Gen*,[52] the applicant's offences took place some years before and were non-contact offences. He had complied with the notification requirements and re-built his life. He was assessed as being at low risk of reoffending. His partner and his employer were aware of his offending but the partner's family and his colleagues at work were not.

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[49] In *K v Att Gen* [2019] JRC 193 (Clyde-Smith, Commr and Jurats Blampied and Hughes) similar arguments were advanced by the applicant who sought to have the application heard in private. He did not wish his wife to have to put up with all the abusive comments he had received at the time of conviction. The court noted that the judgment would be anonymised to protect the victims, but that there were no exceptional circumstances justifying a departure from the rule in *JEP v Al Thani*.

[50] [2018] JRC 212 (Le Cocq, DB and Jurats Grime and Sparrow).

[51] [2019] JRC 223 (Clyde-Smith, Commr and Jurats Crill and Olsen).

[52] 2020 (1) JLR *N* [1]; [2020] JRC 004 (Sir William Bailhache, Commr and Jurats Blampied and Averty).

The court acknowledged the open justice principle in *JEP v Al Thani* but stated that offenders should not be deterred from seeking to have the notification requirements disapplied. The risk of publicity might destabilise an offender and make the prospect of re-offending more likely. Sexual offences attracted much media attention which was not always helpful in that it led to offenders coming under the scrutiny of self-appointed protectors of the public interest whose focus was understandably more on the victims of crimes than the need to reduce the risk of further offending. The court's statutory duty under art 5(6) of the 2010 Law was to consider, on a balance of probabilities, whether the risk to the public or to particular individuals justified the offender remaining subject to the notification requirements.

42 The court concluded—

> "Although the Practice Direction[53] provides that the Court will consider at the first hearing whether the case should be heard in public or in private, in our view, 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 [*sic*], requiring him to prove that it is the only way in which justice could be done. The public interest is wider than those issues which are contemplated by *Al Thani* and includes the factors we have set out above. Accordingly, in our judgment, the Court should be more willing than hitherto to sit in private for applications of this kind and although no applicant can be entirely certain that that will be the outcome, it would be unsurprising if sitting in private for these cases became the norm. That would generally be followed by publication of a judgment in anonymised form."[54]

43 *A v Att Gen* was followed a few months later by *C v Att Gen*[55] where the court adopted the approach articulated by Sir William Bailhache, Commr, stating *inter alia* that "the burden should not lie with the offender seeking an order for a hearing in private, requiring him to prove that it is the only way in which justice could be done".[56]

Conclusion

44 Unsurprisingly, perhaps, given the importance of the principle of open justice, it may be asserted that *JEP v Al Thani* has stood the test

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[53] RC15/06.
[54] *Ibid*, at para 15.
[55] 2020 (1) JLR 236 (MacRae, DB, sitting alone).
[56] *Ibid*, at para 4.

of time. The court should in general sit and deliver its judgments in public even if those judgments may occasionally be redacted or anonymised to observe the overriding imperative of doing justice to the parties. As to sitting in private there should, again, be compelling reasons for excluding the media and public from the court's deliberations. The exceptions justifying the court for sitting in private are well established and circumscribed, even if the class is not closed.

45 It is respectfully submitted, however, that 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 art 5 of the Sex Offenders (Jersey) Law 2010. 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. What the court stated in *JEP v Al Thani* was that—

> "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."[57]

46 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". The 2010 Law was not in force at the time when *JEP v Al Thani* was decided and there is obviously no express reference in the judgment to it. What the courts in *A v Att Gen* and *C v Att Gen* surely meant, however, was that, for all the reasons given by the learned Commissioner in *A v Att Gen*, it may often be the case that an offender seeking an order to lift the notification requirement under art 5 of the 2010 Law can satisfy the burden of showing that the case should be heard in private in the interests of justice.

Sir Philip Bailhache was Bailiff of Jersey and President of the Jersey Court of Appeal between 1995 and 2009. He has been the editor of the Jersey and Guernsey Law Review since its foundation in 1997.

[57] 2002 JLR 542, at para 16.