## 'Compelling reason' cases

***Re Ceylan*** [2018] VSC 361

- Section 4(4) of the *Bail Act 1977* (Vic) ('the Act') requires bail to be refused unless an applicant shows 'compelling reason' why their detention is not justified. This section must be interpreted by its text, context and purpose. [30], [45]
- In applying its terms, the Act requires a court to consider two considerations that may factor against each other when it comes to determining if bail should be granted. They are the safety of the community as well as the presumption of innocence and right to liberty. [31]–[32][1]
- The 'exceptional circumstances' test in the Act is plainly intended to be more difficult to satisfy than the 'compelling reason' test. [45]
- Whether an accused shows a 'compelling reason' involves considering all relevant circumstances including the strength of the prosecution case, the accused's personal circumstances, and criminal history. A synthesis of all the factors must compel the conclusion that detention is not justified. [46].
- This will likely be shown if there is a 'forceful, and therefore convincing, reason showing, that in all the circumstances, the continued detention of the applicant was not justified.' [47]
- But this does not require the applicant to show a reason that is irresistible or exceptional. A 'compelling reason' might be described as one that is 'difficult to resist.' [47]

***Re Alsulayhim*** [2018] VSC 570

- The Act's amended language in s 4C requiring an applicant to now show there is a 'compelling reason' that 'justifies the grant of bail', compared to the former language that 'detention in custody was not justified' does not change the *Re Ceylan* test or its application. [28].
- So, to succeed, an applicant must show a compelling reason (in the sense of one that is convincing and forceful) that justifies the grant of bail. This can be established by a number of circumstances relating to the strength of the prosecution case, the applicant's personal circumstances, and those mentioned in s 3AAA. [29].[2]

***Re Johnstone (No 2)*** [2018] VSC 803

- A 'compelling reason' is shown by the applicant having been remanded in custody longer than any sentence of imprisonment that would likely be imposed. [15][3]

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[1] See also *Re Gaylor* [2019] VSCA 46 [34].
[2] Ibid.
[3] Ibid [34], [42].

- This is a very relevant circumstance, and generally, all other things being equal, is a compelling reason justifying the grant of bail. [18]
- For it not to be a compelling reason there would have to be 'significant countervailing factors or circumstances affecting the synthesis' required to find compelling reasons under s 4C. [18]–[19].

***Re Walker*** [2018] VSC 804

- Compelling reasons may be shown if the applicant would be vulnerable on remand[4] and the offending is at the lower end of seriousness. [49]–[50]

***Re Gaylor*** [2019] VSCA 46

- If granting an applicant bail is likely to be in the community's interest, then this is a principal factor supporting the existence of a compelling reason. [35], [40]–[41]
- Matters important to finding the existence of this factor are:
  - A low risk of the offender endangering public safety, because they lack prior convictions and have strong family support; [36]
  - Real prospects of rehabilitation, based on youth, lack of a prior criminal history, the existence of mental health issues that might be treated while on bail; [40]
  - Remand is unlikely to reduce the risk of re-offending and may have the opposite effect by denying the accused family and treatment, thereby minimising the long-term risk of re-offending to the community; [38]
  - An applicant's compliance with conditions of bail and seeking treatment will inform the court of their prospects of rehabilitation and an appropriate sentence; [39]

## 'Exceptional Circumstances' cases

***Re Gloury-Hyde*** [2018] VSC 393

- The concept of 'exceptional circumstances' is elusive, but in an appropriate case it may be a combination of the strength of the prosecution's case, an applicant's personal circumstances, and an absence of factors showing that the applicant poses an 'unacceptable risk.' [30]
- The right to liberty is particularly important when the applicant is young and has physical, psychological and cognitive problems. The nature and extent of those problems and their impact on the applicant's functioning, when considered with other factors – such as the availability of treatment – may 'establish exceptional circumstances justifying a grant of bail.' [35]

[4] Ibid [34].

***Re JO*** [2018] VSC 438

- While the burden of proving 'exceptional circumstances' is a heavy one, the age of the applicant is a significant factor in favour of a child because they are afforded a 'special status' under the Act and an assessment of exceptional circumstances has to be 'viewed through the prism of s 3B(1).' This means that a set of circumstances that might not be exceptional in the case of an adult offender might be considered so in the case of a child. The circumstances enumerated in s 3B(1) make any determination under the Act, including the exceptional circumstances test, a different exercise in the case of child. [14][5]

***Re CT*** [2018] VSC 559

- Having to show 'exceptional circumstances' takes a case out of the normal and is a high hurdle for a bail applicant; however, it is not an impossible standard. [64][6]
- 'Exceptional circumstances' may be established by a combination of factors involving the nature of the Crown's case – including its strength, undue delay in bringing the matter to trial, or unusual features of the offending or investigation – and the applicant's personal circumstances. [65][7]
- What is ultimately of significance is that the circumstances, viewed as a whole, can be taken as exceptional to the extent that bail is justified, even considering the very serious nature of the charge. [66][8]

***Re TP*** [2018] VSC 748

- Although the provisions considered in *Re CT* have been amended, the term 'exceptional circumstances' remains and there is no reason to depart from previous analyses of it. [33]
- Special considerations apply to children, even those charged with serious offending; specifically, s 3B(1)(a) requires all other options to be considered before a child is remanded in custody. [48]–[51]

***Re Matemberere*** [2018] VSC 762

- Conditional release under the *Sentencing Act 1991* (Vic) s 75 is a 'sentence' for the purpose of s 4AA(2)(c)(v) of the Act and so requires an applicant who offends while on conditional release to show 'exceptional circumstances'. [29]–[30]

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[5] See also *Re TP* [2018] VSC 748 [34] ('*TP*'); *Re DB* [2019] VSC 53 [46] ('*DB*').
[6] See also *Re Dukic* [2018] VSC 664 [55] ('*Dukic*'); *Re Frank* [2018] VSC 718 [38] ('*Frank*'); *TP* (n 5) [31]; *Re Naughten* [2018] VSC 806 [44] ('*Naughten*').
[7] See also *Re Ceylan* [2018] VSC 361 [36]; *Re Gloury-Hyde* [2018] VSC 393 [30]; *Dukic* (n 6) [56]; *Frank* (n 6) [39]; *TP* (n 5) [31]; *Naughten* (n 6) [44]; *Re Reker* [2019] VSC 81 [40].
[8] *Dukic* (n 6) [57]; *Frank* (n 6) [40]; *TP* (n 5) [32]; *Naughten* (n 6) [45]; *DB* (n 5) [44].

*Re DB* [2019] VSC 53

- 'Exceptional circumstances' exist if only because of the applicant's young age (13) particularly when the considerations of s 3B are applied. [47]

*Re Martinow* [2019] VSC 118

- The hardship that incarceration might impose on an offender's family does not itself rise to the level of exceptional circumstances. [7]

## 'Unacceptable risk'

*Hall v Pangemanan* [2018] VSC 533

- This case demonstrates how minor offending (public drunkenness) committed whilst already on bail, may be elevated to the exceptional circumstances threshold, the same that applies to individuals charged with murder or terrorism offences. [16]–[17].
- The nature of this type of offending is not serious and does not risk harm to the public. It is a nuisance and hard work for the police and others, but the risk of harm is very low. [21]
- An 'unacceptable risk' does not mean any risk of re-offending. The question is whether the risk is unacceptable. As the law recognises circumstances where the risk of committing a very serious offence whilst on bail is 'unacceptable', it must also recognise that the high risk of something very minor re-occurring is not 'unacceptable'. Here the risk was tolerable because the alternative, imprisonment for an offence that would not warrant it in the first place, is not tolerable. 'Common sense says that we cannot keep locking people up in those circumstances.' [25]

*Re Dib* [2019] VSC 11

- Although the Crown may concede that an accused might spend more time on remand than a term for which they might imprisoned, a court must still consider the matter, [10], and may refuse bail if satisfied the accused poses an unacceptable risk of endangering the safety of another, committing another offence, obstructing justice in any way, or failing to surrender as required by bail conditions. [53], [57]

## Other points of principle

*Re Reker* [2019] VSC 81

- Failure to provide reasons re-opens the bail discretion. [42][9]
- An accused's aboriginality is an important consideration, but it does not swamp all others. [69]

[9] See also *Re Martinow* [2019] VSC 118 [3].