

‘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]²
- 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].³

¹ See also *Re Gaylor* [2019] VSC 46, [34] (‘*Gaylor*’).

² See also *Re MI* [2019] VSC 347, [32] (‘*MI*’).

³ *Gaylor* [34].

***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]⁴
- 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 remands and the offending is at the lower end of seriousness. [49]–[50]

***Re Gaylor* [\[2019\] VSC 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]

***Re JM* [\[2019\] VSC 156](#)**

- The observations of *Re JO* also apply to the compelling reason test in cases involving children. [59]–[60]
- Youth and special vulnerability may constitute compelling reasons. [49]–[51], [62].

***Rodgers v The Queen* [\[2019\] VSCA 214](#)**

- The principles of *House v The King* apply to an appeal from the refusal of a bail application. [42], citing *Robinson v The Queen* [\(2015\) 47 VR 226, 253 \[86\]](#).

⁴ [Ibid](#) [34], [42]. See also *Re Mihalitsis* [\[2020\] VSC 6, \[4\]](#).

⁵ [Gaylor](#) [34]. See also *Re JM* [\[2019\] VSC 156, \[49\]–\[51\], \[62\]](#).

- The Court affirmed the principles to be applied in considering the ‘compelling reason’ test as laid down in *Re Alsulayhim* and *Re Ceylan*. [43]

***Re Koshani* [2019] VSC 678**

- A compelling reason may be established by a combination of circumstances. [6]

***Re JK* [2020] VSC 160**

- In addition to delay, the coronavirus pandemic affects bail applications in two ways: firstly, personal visits to correctional facilities are curtailed and this is particularly difficult for a young person. Secondly, it curtails opportunities for education and training. [19]–[26]⁶
- The *Bail Act* requires a court to consider all other options before remanding a child in custody and granting bail with strict conditions is an acceptable alternative to leaving them in custody for an unknown period of time during a pandemic. [21], [33]
- In such circumstances, compelling reasons exist that are sufficient to justify a grant of bail. [34]

‘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]⁷
- 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]

***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

⁶ See also *Re JB* [2020] VSC 184, [40].

⁷ *Re MI* [36]; *Re Moore* [2019] VSC 344, [23] (*Moore*).

exceptional in the case of an adult offender might be considered so in the case of a child.⁸ 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]⁹

***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]¹⁰
- ‘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]¹¹
- 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]¹²

***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]¹³

***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]

⁸ See also *Re HAH* [2019] VSC 776, [26].

⁹ See also *Re TP* [2018] VSC 748, [34] (*TP*); *Re DB* [2019] VSC 53, [46] (*DB*); *Re Moore* [18]; *Re LD* [2019] VSC 457, [20]. But this does not change the fact that any assessment of exceptional circumstances ‘must be a legitimate one based on a proper analysis of the surrounding circumstances’. *Re IH* [2020] VSC 325, [61].

¹⁰ See also *Re Dukic* [2018] VSC 664, [55] (*Dukic*); *Re Frank* [2018] VSC 718, [38] (*Frank*); *TP* [31]; *Re Naughten* [2018] VSC 806, [43] (*Naughten*); *Re MI* [32].

¹¹ See also *Dukic* [56]; *Frank* [39]; *TP* [31]; *Naughten* [44].

¹² See also *Dukic* [57]; *Frank* [40]; *TP* [32]; *Naughten* [45]; *DB* [44].

¹³ It is not, however, a guarantee of a grant of bail. See *Re KN (No 2)* [2020] VSC 490, [76].

***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]¹⁴

***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]¹⁵

***Re Logan* [2019] VSC 134**

- ‘Exceptional circumstances’ may exist because of a single exceptional circumstance or by a combination of circumstances, none of which might individually be considered exceptional. [13]
- Exposure to serious, repeated violence on remand is a special vulnerability that may constitute an exceptional circumstance. [67]–[69]

***Re LT* [2019] VSC 143**

- Exceptional circumstances found to exist in the case of a young Aboriginal offender who should be supported to explore her heritage and strengthen family bonds, rather than have that opportunity disrupted by time on remand. [66]–[67]¹⁶

***Re DR* [2019] VSC 151**

- The possibility of being sentenced to a custodial term of less than the period spent on remand may be an exceptional circumstance. [56]¹⁷

***Re Ebertowski* [2019] VSC 676**

- Although the parties may agree that a Schedule 2 offence will not be pursued, so long as it remains on file and has not been struck out, the applicant is still required to establish the existence of a compelling reason justifying a grant of bail. [4]

***Re O’Shea* [2019] VSC 791**

- A significant lapse of time between the alleged offending and the laying of charges may be of particular influence in determining where exceptional circumstances exist. [60]

¹⁴ But see *Re KN (No 2)* [2020] VSC 490, [76].

¹⁵ See also *Re Reker* [2019] VSC 81, [39]; *Re Sipser* [2019] VSC 362, [43], [47].

¹⁶ See also *Moore* [39].

¹⁷ See also *Re Dillon* [2019] VSC 80, [41]; *Re Logan* [2019] VSC 134, [72]. But it does not, itself, determine the result of a bail application. See, eg, *Re KN (No 2)* [2020] VSC 490, [81].

- While hardship to an offender’s family is not sufficient in itself to establish exceptional circumstances, it is relevant when considered in combination with other circumstances. [74]

***Re Foster* [2020] VSC 62**

- The vulnerability of Aboriginal persons in custody, combined with factors such as alternatives to remand, opportunities for an applicant to explore their culture, and the availability of drug and alcohol rehabilitation treatment ‘based on therapeutic community principles and Aboriginal cultural practices’ may satisfy the exceptional circumstances test. [14],¹⁸ [33]
- Although an offender may present an unacceptable risk, the availability of a place at a facility offering such treatment may constitute a condition that renders it acceptable. [34]–[35]

***Re El-Refei* [2020] VSCA 65**

- A combination of factors such as charges of very serious offending committed while the accused was on an adjourned undertaking, the accused’s admitted presence at the scene, a lengthy criminal history including a record of non-compliance with bail and community correction orders, the possible exposure of the accused’s children to criminal associates, and a risk of continued offending, may not be sufficient to show the existence of exceptional circumstances that justify a grant of bail. [30]–[49]¹⁹

***Re El-Refei (No 2)* [2020] VSC 164**

- Evidence of significant unexpected delays the coronavirus pandemic is causing within the justice system may qualify as new facts and circumstances sufficient to permit the court to hear a further application for bail under the *Bail Act 1977* (Vic) s 18. [3]–[4].²⁰
- However, it does not follow that exceptional circumstances will be established even in circumstances where the delay may be quite significant. [17]–[21].²¹ The COVID-19 pandemic needs to be considered in relation to all of the surrounding circumstances. [24].

¹⁸ Citing *Re LW* [2019] VSC 616.

¹⁹ See also *Re Azimi* [2020] VSC 118, [46]–[59] (this may be so even where the applicant has no prior criminal history and there is a possibility of substantial delay).

²⁰ But such evidence must be adduced, a court may not presume delay will occur. See *DPP (Cth) v Lee* [2020] VSC 275, [93]–[99].

²¹ See also *DPP (Cth) v Sun* [2020] VSC 399; *Re Goldsworthy* [2020] VSC 500, [91]–[94].

***Re Broes* [\[2020\] VSC 128](#)**

- In the circumstances that now prevail in the criminal justice system as a result of the COVID-19 pandemic, an applicant may²² demonstrate exceptional circumstances from the possibility of delay and lockdown. [35]–[42]²³

***Re Tong* [\[2020\] VSC 141](#)**

- Although the current health crisis facing our world and the community is unprecedented, an accused should not expect that it will lead every judicial officer to conclude that exceptional circumstances have been established or that this will necessarily lead to a grant of bail. [33]²⁴

***Re Kennedy* [\[2020\] VSC 187](#)**

- The restrictions in place on remand are quite onerous for an Aboriginal offender who is both isolated from his family during a period of grieving, a significant process for his community, and the increased danger to him as a person at risk of contracting the virus. [6]
- Failing to attend a bail hearing because of restrictions imposed by the Magistrates' Court in response to the coronavirus pandemic is a reasonable excuse. [2]–[4]

***El Nasher v DPP (Vic)* [\[2020\] VSCA 144](#)**

- A combination of delay, onerous custodial conditions, and the relative weakness of the prosecution case may, when considered with *all* relevant circumstances, compel the conclusion that exceptional circumstances have been established. [42]–[43].

***Re Goldsworthy* [\[2020\] VSC 500](#)**

- Repeated failure to comply with a family violence intervention order in force at the time of the most serious offending demonstrates the accused is not deterred by the imposition of conditions, and so is relevant in determining whether exceptional circumstances have been demonstrated. [89].²⁵

²² But not necessarily, see eg, *Re Lado* [\[2020\] VSC 132, \[43\]](#); *Re Goldsworthy* [\[2020\] VSC 500](#).

²³ *Re McCann* [\[2020\] VSC 138](#); *Re Tong* [\[2020\] VSC 141, \[30\]–\[32\]](#); *Re Taylor* [\[2020\] VSC 146, \[49\]–\[51\]](#); *El Nasher v DPP (Vic)* [\[2020\] VSCA 144, \[42\]](#).

²⁴ See also *Re El-Refei (No 2)* [\[2020\] VSC 164, \[23\]](#); *Re Velluto* [\[2020\] VSC 188, \[47\]](#); *Re Nichols* [\[2020\] VSC 189, \[32\]–\[39\]](#); *Re KN (No 2)* [\[2020\] VSC 490, \[86\]](#).

²⁵ See also *Re McKay* [\[2020\] VSC 558, \[44\], \[56\], \[66\]](#).

***Re Biba* [2020] VSC 536**

- A delay of two years and seven months between arrest and trial is inordinate and in itself is sufficient to constitute exceptional circumstances. [31]–[32]

‘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]–[59]²⁶

***Re Moore* [2019] VSC 344**

- Assessing whether an applicant poses an unacceptable risk requires evaluation of the suggested risk(s), and as the Act recognises some may be made acceptable by the imposition of conditions. [22]²⁷
- Although some risks may be substantial, they may ‘be acceptably ameliorated by strict conditions’. [40]²⁸

²⁶ See also *Re Richardson* [2020] VSC 289.

²⁷ See also *Re El-Refei* [2020] VSCA 65, [22].

²⁸ See also *Re DG* [2019] VSC 622, [82].

***Re LK* [2019] VSC 349**

- The nature of an offender’s breach of bail conditions may demonstrate that they pose an unacceptable risk. [19]–[23], [27]–[28], [30], [34]–[35], [39]–[40].

***Re LD* [2019] VSC 457**

- An applicant is not required to show an absence of an unexceptional risk. [23]²⁹

***DPP (Vic) v Walker (a pseudonym)* [2020] VCC 447**

- Although an applicant may establish compelling reasons, the risk to his domestic partner and her children from having him reside with them during the pandemic, when people are required to remain at home, and the accused has a significant history of family violence offending, is unacceptable. [45]–[49], [52].

***Re Lowe* [2020] VSC 584**

- The unacceptable risk an offender poses may be sufficient to deny a grant of bail even where a compelling reason has been demonstrated because of the inordinate delay likely to occur, as a result of the coronavirus pandemic, before their matter will proceed to trial. [51]–[52].

Other points of principle

***Re Gloury–Hyde (No 2)* [2018] VSC 520**

- The *Bail Act 1977* (Vic) s 18AE provides a court with the power to revoke bail, and while the Act gives no guidance on how that discretionary power is to be exercised it must be done ‘by reference to the guiding principles in s 1B’. [13]³⁰

***Re Reker* [2019] VSC 81**

- Failure to provide reasons re-opens the bail discretion. [42]³¹
- An accused’s aboriginality is an important consideration, but it does not swamp all others. [69]

²⁹ See also *Re Gloury–Hyde* [2018] VSC 393, [29]. See also *Moore* [22].

³⁰ See also *Dukic* [18], [61].

³¹ See also *Re Martinow* [2019] VSC 118, [3].

***Re HAH* [2019] VSC 776**

- Because of the applicant’s very young age (13), significant intellectual disability, and PTSD, the court released the applicant on bail on an undertaking entered into on his behalf by a guardian per the *Bail Act 1977 (Vic)* s 16B. [30], [45]
- The court further urged that bail applications by young children be heard in a more welcoming forum. [46]

***Re Politis* [2019] VSC 780**

- The court found that the sentencing principles and purposes of community protection, rehabilitation, and parity³² are relevant in determining a bail application. [22]–[24], [32], [41]–[46]

***Re Bertucci* [2020] VSC 88**

- In a bail application where the central allegation involves family violence, a court may have regard to past instances where the complainant has made allegations of family violence against the applicant. The fact that they were withdrawn or not made out does not mean they are not relevant. They are material as they may throw light on the risk of future endangerment to the complainant and her children. [58]–[59]

***Re McCann* [2020] VSC 138**

- The spreading of COVID–19 into the prison system is one of the circumstances that a court must keep in mind when considering an application for bail, for with that occurrence ‘it is overwhelmingly likely that the prisons will be locked down in a way that will make time in custody very difficult for all prisoners’. [40]³³

***Re Ashton* [2020] VSC 231**

- The new possibility of judge–alone trials in Victoria does not alleviate the fact that unsatisfactory delays still exist due to the COVID–19 pandemic. [65]–[66]³⁴

³² See also *Re LW* [2019] VSC 616, [4]; *Re Nguyen* [2019] VSC 698, [40]–[45]; *Re O’Shea* [2019] VSC 791, [31]–[32], [75].

³³ See also *Re Tong* [2020] VSC 141, [33]; *Re AM* [2020] VSC 569, [68].

³⁴ See also *Re Bochrinis* [2020] VSC 411, [8]. Nor is an accused required to consent to a judge alone trial in order to shorten any delay. *Re Goldsworthy* [2020] VSC 500, [73].

DPP (Cth) v Lee [\[2020\] VSC 275](#)

- Although the legislation does not dictate a starting point for considering a bail application, or which factors are the most important, it is logical to begin with the nature and seriousness of the offence³⁵ and the strength of the prosecution’s case. [89].

Re AM [\[2020\] VSC 569](#)

- The strength of the prosecution case is an important “surrounding circumstance”. In some cases a hopelessly flawed prosecution may be determinative, but in many others its true strength will be beyond the power of a judge to decide at the early stage of a bail application. [57]
- Although the principles of *Re JO* have application in a case involving an 18 year old accused, and while children have special status where bail is concerned, this does not mean that the guiding principle of maximising community safety does not also apply. [66]

Re Assad [\[2020\] VSC 561](#)

- In the present circumstances of the pandemic, it is not just the likely delay but the uncertainty surrounding all criminal trials in Victoria that is to be considered. [110]

Re Busari [\[2020\] VSC 572](#)

- Compliance with the directions of public health officials in respect of the coronavirus may be made a condition of bail. [61(j)]

³⁵ See also *Re DR* [\[2020\] VSC 282, \[42\]](#); *Re Hamad* [\[2020\] VSC 440, \[49\]–\[50\]](#).