'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]

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]

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[1] See also *Re Gaylor* [2019] VSC 46, [34] ('*Gaylor*').
[2] See also *Re MI* [2019] VSC 347, [32] ('*MI*').
[3] *Gaylor* [34].
[4] Ibid [34], [42]. See also *Re Mihalitsis* [2020] VSC 6, [4].

- 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[5] 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].
- 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 Ebertowski [2019] VSC 676

[5] *Gaylor* [34]. See also *Re JM* [2019] VSC 156, [49]-[51], [62].

- 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 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]

Re SC [2021] VSC 770

- An individual charged with historic sex offences that do not appear in Schedule 2 has a prima facie entitlement to bail and does not need to demonstrate that compelling reasons exist which justify release. [32]-[36]

- The fact that eight years have passed without further offending is strong support for the proposition that the risk of releasing the accused on bail is acceptable. [74]

'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

[6] See also *Re JB* [2020] VSC 184, [40].
[7] *Re MI* [36]; *Re Moore* [2019] VSC 344, [23] ('*Moore*').

- 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.[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]

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]

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[8] See also *Re HAH* [2019] VSC 776, [26]; *Re GG* [2021] VSC 12, [47], [50].
[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].
[14] But see *Re KN (No 2)* [2020] VSC 490, [76].

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 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]

- 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], [33][18]

- 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]

[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].
[18] Citing *Re LW* [2019] VSC 616.

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].

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 may[22] 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]

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].

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[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 Nhat* [2021] VSC 446, [50] (delay must be considered in context) citing *Re James* [2020] VSC 602.
[22] But not necessarily, see eg, *Re Lado* [2020] VSC 132, [43]; *Re Goldsworthy* [2020] VSC 500. Any period of delay must be looked at in the circumstances of the case. *Re Kakar* [2020] VSC 806, [29]. For example, it may be tempered by the applicant's involvement in bringing about the delay. *Re Lokodu* [2021] VSC 759, [57]-[58].
[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].

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]

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]

Re Biba [2020] VSC 536

- A delay of two years and seven months between arrest and trial is inordinate and in itself may be sufficient to constitute exceptional circumstances. [31]-[32][26]

Re Wilio [2020] VSC 677

- In the case of a person facing prosecution for two murders and, if convicted, a very long term of imprisonment, an assessment of the prosecution's case as strong is very damaging to the prospect of proving there are exceptional circumstances that will justify a grant of bail. There will have to be some very powerful matters among the other surrounding circumstances to justify such a grant. [45][27]

Re Cugurno-Pfabe [2020] VSC 687

- In considering whether there are exceptional circumstances, it is also relevant that there is an absence of factors suggesting an applicant poses an unacceptable risk if granted conditional bail. [54]

Re Rahman [2020] VSC 748

- A young applicant's inability to sit their exams while on remand might, considering all other matters put on their behalf, have constituted exceptional circumstances. [21], [42]-[46].

Re Granata [2020] VSC 879

- The requirement to establish 'exceptional circumstances' under the *Crimes Act 1914* (Cth) s 15AA is analogous to those provisions of the *Bail Act 1977* (Vic) respecting the grant of bail for certain State and Commonwealth offences. [20]

[25] See also *Re McKay* [2020] VSC 558, [44], [56], [66].
[26] See also *Re Boo* [2020] VSCA 882, [71] (having to spend years in custody when charges are contested is at odds with the presumption of innocence).
[27] Conversely, if substantive issues have been raised regarding the weakness of the prosecution's case, this may, in combination with other factors, demonstrate the existence of exceptional circumstances. See *Re Dickenson* [2020] VSC 721, [44].

- 'Exceptional' is an ordinary English word that is commonly used. It is flexible and a combination of circumstances may be exceptional where singly they would not. It is not a mere arithmetic measure, and where, as here, Parliament has left a term undefined and 'the liberty of its subjects are concerned', it should not be construed narrowly. [24]-[25]

Roberts v The Queen [2021] VSCA 28

- Exceptional circumstances may be of certain recurring types. They include unreasonable delay before trial, unacceptable adverse impacts of pre-trial incarceration on the accused or their dependants, and the likelihood that time spent on remand will exceed any term of imprisonment if the accused is convicted. What they all have in common, however, 'is that they are capable of rending continued pre-trial incarceration unjust….' [9]

- Subject to the separate question of 'unacceptable risk', bail may be justified if continued pre-trial incarceration will produce injustice. The bail decision maker is therefore looking to the future and considering the likely consequences of continued incarceration on the accused. While the past may be relevant to that consideration, it is the need to prevent or mitigate *future* injustice that justifies a grant of bail. [10]

- Past injustice resulting from a corrupted trial and an applicant's personal hardship in enduring a lengthy period of custody, do not compel a conclusion that bail is justified, or stated differently, they do not necessarily constitute 'exceptional circumstances'. [11]-[12]

- Establishing exceptional circumstances in a general sense is not sufficient, 'there must be exceptional circumstances *that justify* the grant of bail'. [33]-[34][28] The concept of justification is central to bail decision maker's consideration when the 'exceptional circumstances' test is engaged. [35]

- It is the perceived need to avoid or mitigate injustices such as those identified above which justifies the grant of bail, provided the circumstances are exceptional. [47]

- Time spent in custody pursuant to a sentence that was valid until it was set aside cannot be characterised as time spent on remand for the purposes of demonstrating exceptional circumstances. At no point during that period is the accused awaiting trial, nor is the prosecution being slow to bring them to trial. [50]-[52] The correct focus in that situation is the time, absent a grant of bail, which the accused may spend in custody between the quashing of their conviction and the commencement of their retrial. [53]

Re Jiang [2021] VSC 148

- 'A period of pre-trial custody of three years will demonstrate exceptional circumstances in almost every case'. [60][29]

Re KE [2021] VSC 175

[28] Quoting *Re Roberts* [2020] VSC 793, [20].
[29] See also *Re Shea* [2021] VSC 207, [58]-[59], quoting *Re Raffoul* [2020] VSC 848, [84]-[90] (lengthy delays resulting from the COVID-19 pandemic are not a new normal but are 'due to an acute event never before seen in the world' and there is no reason to think that the current delays will persist over time).

- Although an applicant may identify a number of factors militating in favour of a finding of exceptional circumstances, those factors are to be considered in the context of other important circumstances. In particular, the seriousness of the alleged offending, the fact that it occurred while the applicant was on bail for similarly serious charges, and the degree of violence involved in both. This may mean that exceptional circumstances justifying a grant of bail have not been established. [70]

Re Nicholson [2021] VSC 221

- The existence of significant medical conditions that may not receive adequate and proper treatment in custody may establish the exceptional circumstances. [20], [23]

Turner v Lill (No 2) [2021] VSCA 255

- If there is a good argument that the only charge on which the accused is being held is foredoomed to fail, that fact itself 'amounts exceptional circumstances and necessitates bail. [22][30]

Madafferi v The Queen [2021] VSCA 332

- The requirement for an applicant to establish exceptional circumstances is a stringent one given that they have been convicted and sentenced, and the right of appeal is conditioned by the presumption of the validity of the conviction and sentence. This is in contrast to an applicant seeking bail before their trial when they enjoy the presumption of innocence and the presumption favouring a grant of bail. [34]

- 'There is no hard and fast rule for how much of a term of imprisonment or non-parole period needs to expire before consideration can be given to granting bail. Each case depends upon its own facts'. [43]

- Serving a substantial part of an imposed sentence and facing significant delays (not of the applicant's making) in preparing an appeal go some way to demonstrating exceptional circumstances, but they are not in themselves sufficient establish the existence of those circumstances. [43], [51].

Rapisarda v The Queen [2022] VSC 192

- The absence of matters identified in s 4E as constituting an unacceptable risk is to be taken into consideration in determining whether exceptional circumstances of have been established. [42]
- An applicant's 'unremarkable and lawful conduct' during a four and a half year delay between incident and charge may go towards demonstrating the existence of exceptional circumstances. [46]

Re Kelly [2022] VSC 232

- The possibility of that an applicant might spend more time on remand than they would if convicted and sentenced on the charges they face is an important factor, but it is only one of many that must be considered and it is not determinative. [73]
- Where an applicant has 'little prospect' of complying with any condition of bail that might be imposed, this is 'an important factor tending against a grant of bail.' [78]

[30] See also *Re Jackson* [2022] VSC 101, [58]-[59].

Re Firebrace [2023] VSC 137

- 'Bail is a significant matter for Aboriginal and Torres Strait Islander accused, both because of their overrepresentation in the criminal justice system and for cultural reasons'. [114]
- Any opportunity for an applicant's plea to be heard in the Koori Court is a very significant matter in considering whether exceptional circumstances have been established. [115]-[120], [123]-[124]

Re Murray [2023] VSC 266

- The risk that incarceration might further alienate a young Aboriginal offender from his culture and from the positive community supports directed to supporting and maintaining his cultural heritage are important factors in determining if exceptional circumstances exist. [78]-[79], [86]

Higgs v The King (No 2) [2023] VSCA 279

- The expiry of a non-parole period is a relevant consideration in determining if there are exceptional circumstances unless it appears the applicant will not be released. [8]
- However, an applicant for bail pending appeal is not entitled to do little to progress their application for leave to appeal and then contend bail should granted because of delay they have caused. [30]

'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][31]

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

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][32]

- Although some risks may be substantial, they may 'be acceptably ameliorated by strict conditions'. [40][33]

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][34]

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 Ilpola [2020] VSC 578

- Given that the applicant was subject to a CCO for family violence against his former partner, as well as a family violence intervention order, at the time of his alleged serious re-offending against her, the court was satisfied that he posed an unacceptable risk of harm, which could not be mitigated by a long list of conditions, if released on bail. [60]

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].

Re SS [2020] VSC 618

- Although the relevant offending alleged may be low level, that does not mean that the question of the risk posed by the accused can be similarly confined. An accused's circumstances may raise a concern that they pose a risk of repeated low level offending and of more serious of criminal conduct as in their past. [60]

Re Howell [2021] VCC 112

[32] See also *Re El-Refei* [2020] VSCA 65, [22].
[33] See also *Re DG* [2019] VSC 622, [82].
[34] See also *Re Gloury-Hyde* [2018] VSC 393, [29]. See also *Moore* [22].

- An accused's extensive criminal history and disregard for court orders may indicate they pose an unacceptable risk, even if conditions might ameliorate that risk to some degree. The question of risk is one of fact and degree. [58]-[66]

Re Blackmore [2021] VSC 93

- Although great weight is given to unacceptable risk, that does not mean bail is used as a means of preventative detention although in some cases of very, very serious offending that is the effect of the operation of the *Bail Act*. [22]

HA (a pseudonym) v The Queen [2021] VSCA 64

- '[T]he question of unacceptable risk "must be relative to all the circumstances", in particular the exceptional circumstances that justify the grant of bail'. If the relevant circumstances are particularly compelling, a risk which might otherwise be considered unacceptable may be seen as acceptable. [6], [54]

- Sections 3A and 3AAA(1)(h) of the *Bail Act* require a court to consider any issues that arise due to a person's Aboriginality and are an important and salutary recognition that cultural connection can play a significant role in rehabilitating an offender of Aboriginal heritage. It can be a pivotal factor diverting such an offender from entrenched offending behaviour. [58][35]

- These sections of the Act are also a recognition of the unacceptable overrepresentation of Aboriginal and Torres Strait Islander peoples in custody. A practice that unfortunately continues even 30 years after the report of the Royal Commission into Aboriginal Deaths in Custody which addressed the factors that contributed to these overincarceration rates, including failures by the criminal justice system to deal justly with Aboriginal and Torres Strait Islander people before the courts. Accordingly, the courts have a duty in cases like this to be conscious of the need to avoid compounding those incarceration rates, unless there is good cause to do so. [59][36]

- If it is conceded that an offender is unlikely to receive a custodial sentence if found guilty of the offences charged, their continued incarceration pre-trial becomes a form of preventive detention, which is alien to the fundamental principles of our system of justice. This is particularly of concern in relation to children who are denied bail. [63]-[64]

Re Chew [2021] VSC 265

- An accused is unlikely to pose an unacceptable risk if they are 'tethered' to the jurisdiction by the likelihood of losing their children forever if they were to flee. [60]

Re Hamilton-Green [2021] VSC 484

- The availability of a place in a residential rehabilitation facility 'may be viewed in the matrix of surrounding circumstances considered to be relevant to risk mitigation'. [12]

[35] See also *Re Smith-Goode* [2022] VSC 798, [73].
[36] Ibid.

Re GA [2022] VSC 148

- When considering the capacity of conditions to mitigate risk, the mandatory considerations of s 3B are important; a child should be released on bail, with conditions, whenever possible. [61]

Re Brown [2022] VSC 578

- The question is not whether the risk can be eliminated but whether it can be reduced to a level at which it becomes an acceptable one. [105]

Zayneh v The King [2023] VSCA 311

- The length of any delay in bringing an accused to trial is relevant to the question of the whether they pose an unacceptable risk. Delay, particularly unacceptable delay, may come to be of such magnitude that risks normally considered unacceptable might come to be viewed as acceptable. The courts will not tolerate delay of *any* length in bringing an accused to trial because they pose a flight risk. [6]
- A time will come when the continued pre-trial detention of a person who is presumed innocent can no longer be justified, regardless of the seriousness of their alleged offending and the magnitude of the risk they will not answer bail. When this occurs depends upon all of the facts and circumstances,[37] there is no fixed point. [7]

Re Boland [2024] VSC 85

- Whether an accused is likely to receive a custodial sentence is a significant consideration in determining if they pose an unacceptable risk. If they are charged with serious offending and face a significant term if convicted the risk of their failing to answer bail may be unacceptable. But if they are charged with minor offending that does not call for an immediate custodial term, it will generally be harder for the respondent to establish the existence of an unacceptable risk. [52]
- 'A risk is 'unacceptable' if it cannot be tolerated; a real risk of something occurring may still be acceptable when regard is had to all the circumstances of the case'. [53] citing *Re Kyle Magee* [2009] VSC 384, [18]–[22].
- Both the likelihood of the risk occurring and the magnitude of its consequences if realised should be considered. [53]
- Even where there is a risk the applicant will fail to answer bail, what is to be assessed is whether that risk is unacceptable. It must be sufficient to justify their continued detention in custody, particularly where they are charged with an offence that is highly unlikely to attract a custodial penalty. [56]

Re PJ [2024] VSC 97

- The onus for demonstrating a risk is unacceptable rests with the respondent and the serious decision to continue the incarceration of a child requires it be demonstrated to a high degree with cogent evidence. [71]

Re Tiburcy [2024] VSC 163

- The *Bail Act* has been amended in two ways: firstly, the risk of committing an offence is no longer a stand-alone limb of the unacceptable risk test; secondly, the surrounding circumstances to be considered have

[37] This time was reached when the apparent possible delay exceeded five years. See *Re Zayneh (No 2)* [2024] VSC 374, [103].

been expanded to include whether it is likely that the accused would spend more time on remand if bail were refused than they would if found guilty and sentenced to a term of imprisonment. [21]-[23]
- Delay of four to five years between charge and trial may be fairly described as unacceptable and sufficient to establish the existence of exceptional circumstances justifying the grant of bail. [71]-[75]
- It is also relevant to an assessment of unacceptable risk as '[a]n actual or anticipated delay may be of such magnitude that risks which would, in other circumstances, be unacceptable may be properly viewed as acceptable'. [76], [91]

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][38]

Re Reker [2019] VSC 81

- Failure to provide reasons re-opens the bail discretion. [42][39]

- An accused's aboriginality is an important consideration, but it does not swamp all others. [69]

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 parity[40] 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]

[38] See also *Dukic* [18], [61]; *Re MM (No 2)* [2024[VSC 325, [8].
[39] See also *Re Martinow* [2019] VSC 118, [3].
[40] See also *Re LW* [2019] VSC 616, [4]; *Re Nguyen* [2019] VSC 698, [40]-[45]; *Re O'Shea* [2019] VSC 791, [31]-[32], [75]; *Re Tiba (No 2)* [2021] VSC 716, [52].

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][41]

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][42]

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 offence[43] and the strength of the prosecution's case. [89].

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 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 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)]

Re Whitfield [2020] VSC 632

- Although it may be unnecessary to describe the strength of the prosecution case, when considering it as part of the surrounding circumstances a court may accept there are real, and not fanciful, hurdles to proof beyond a reasonable doubt of the elements of an offence. [46]

[41] See also *Re Tong* [2020] VSC 141, [33]; *Re AM* [2020] VSC 569, [68].
[42] 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].
[43] See also *Re DR* [2020] VSC 282, [42]; *Re Hamad* [2020] VSC 440, [49]-[50]; *Re De Camillis* [2020] VSC 761, [49].

Re Zreika [2020] VSC 648

- While principles of parity are not predominate in questions of bail,[44] where one accused has been bailed and the evidence against them (on the same charges) is significantly stronger than the evidence against the applicant, it is difficult to say the applicant should be refused bail. [74][45]

Formica v Victoria Police [2020] VSC 719

- In considering whether bail should be granted pending extradition and the accused's appearance before a court in the receiving jurisdiction, it is not for a Victorian court to decide whether bail should be granted until trial as neither the court nor Victorian law enforcement agencies will play any further role in the matter. 'The weight to be given to the various surrounding circumstances in s 3AAA must be assessed with those important considerations in mind'. [22]

- The fact that s 3AAA requires the court to consider the strength of the prosecution case as part of the surrounding circumstances, 'does not require it to make detailed or specific findings about particular pieces of evidence, if it is not able to do so'. [66]

- Difficulties in assessing the strength of the prosecution case at an early stage does not mean a court should conclude it is weak. [68]

Re JL [2020] VSC 785

- Since preventing family violence in the community can be difficult, because of the reluctance of victims to come forward or their being easily dissuaded from pursuing complaints, the presence of a family violence intervention order may not be sufficient to mitigate the risks an applicant poses of committing further family violence which can be sufficiently ameliorated by conditions on bail. Particularly if the applicant has a history of poor compliance with previous court orders and a history of family violence. [55]-[57]

Re GG [2021] VSC 12

- The gross overrepresentation of Aboriginal people in custody is married to the dangerousness of custody and detention for them. [43] And 'the capacity for the imposition of conditions to mitigate any risk is especially important in the context of an Aboriginal child'. [51]

- The requirement in s 3A that Aboriginal cultural issues be taken into account should be read with the cultural rights Aboriginal people possess which are protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19. Together they mandate that appropriate consideration be 'accorded to a person's Aboriginal cultural identity in adopting procedures and making determinations in a bail application'. [44]

- The purpose of sections 3A and 3B is that children, especially Aboriginal children, should be released on bail where possible in order to protect them from the physical and emotional harm and the negative formative

[44] See also *Re Tiba* [2021] VSC 429, [34].
[45] See also *Re Oldis* [2020] VSC 769, [41]-[52].

influence they are especially vulnerable to in detention on remand. [51] (quoting *DPP (Vic) v SE* [2017] VSC 13, [38]).

Re Hooper (No 2) [2021] VSC 476

- An accused's inconsistent connection with their Aboriginal heritage does not weaken the importance of that factor in considering whether or not bail should be granted. [54]

Re Villani [2021] VSC 638

- The availability of a residential drug treatment will not always have force. In some cases, the alleged offending may be so serious that the risk to the physical safety of the community inherent in the release of the accused into a non-secure residential treatment facility may not be justified. [64]

- At a minimum, sworn evidence from a person with detailed knowledge of the assessment made about the accused's suitability for treatment, and the details of the treatment, will be of assistance to a court considering their release on bail with a residential treatment condition. [66]

Re ML [2022] VSC 10

- Cases involving an application for bail pending a *de novo* appeal from the Magistrates' Court to the County Court are distinguishable from the Court of Appeal's pronouncements in *Cvetanovski* and *Zoud*, requiring the applicant to demonstrate the existence of exceptional circumstances justifying a grant of bail. The test that applies is the same test that would have applied to the bail applications previously made in the Magistrates' Court. [16]-[22]

Re ML [2022] VSC 76

- In considering an application for bail a court is not required to take the strength of the prosecution's case at its highest, it is clear from the wording of s 3AAA(1)(b) that it is only one factor to be considered along with the other surrounding circumstances. [37(a)] n 19.

Re Hoang [2022] VSC 135

- The phrase 'triable issues' is often used in a bail application, yet it is not the role of the court in such an application to try such issues. Such a submission should not be lightly made and should founded on evidence and instructions. [66]

Re KF [2022] VSC 349

- Circumstances demonstrating the existence of a compelling reason justifying the grant of bail may include the profound grief caused to an Aboriginal accused by the death of two family members while on remand, and the sorrow and guilt associated with not being able to participate in Sorry Business. As well as the Sorry Business obligations imposed upon her as the senior next of kin for her daughter. [40]

- Counsel should proceed with caution in questioning a person's Aboriginality where no controversy on that question is raised on the material before the court. [38]

- The application of s 3A may be of central relevance to consideration of the question of unacceptable risk where the bereavement experienced by the accused on remand, and the need for her to finalise funeral arrangements, should serve as an incentive to avoid doing anything that would require her return to custody where she would not be able 'to participate in these important cultural obligations'. Further, if the accused breached her bail conditions she would be returned to custody and taken away from her family at a time when they need each other, and this strong family connectedness should serve as a protective factor. [48]

Re Hammoud [2022] VSC 613

- Section 18AF does not elaborate on the requirements or considerations necessary to determine a revocation application. The discretion must be exercised by reference to the guiding principles of s 1B, but there is no requirement for the court to return to the exceptional circumstances or unacceptable risk considerations that applied at the time of the original application. They may be relevant, but at other times they may not. What is necessary is to determine, in the circumstances and having regard to the guiding principles, is whether it is appropriate for bail to be revoked. [62]-[63][46]

Prider v The King [2023] VSC 294

- A drug and alcohol treatment order is a 'sentence' for the purposes of the *Bail Act*. [34]-[36][47]

Re FT [2024] VSC 158

- The absence of a criminal history does not create a right to bail, even for a child, where the Act otherwise mandates it be refused because the child poses an unacceptable risk and all reasonable attempts to alleviate that risk have failed. [89]

FT (a pseudonym) v The King [2024] VSCA 90

- An appeal from an order refusing a grant of bail attracts the principles of *House v The King* because it is both a discretionary decision and because its nature – interlocutory and related to a matter of practice and procedure – attracts appellant restraint as embodied in *House*. [51], [61]
- The decision is discretionary because in deciding whether to grant bail the judge must consider a broad range of potentially competing factors. They must also refuse bail if satisfied the applicant poses an unacceptable risk, and they must impose any conditions that they think will reduce the likelihood the accused may endanger another. Taken together, these features indicate that exercise of the power depends greatly on the decision-maker's evaluation of the facts and circumstances. [54]
- '[T]he statutory power to grant bail does not involve an evaluation that produces only one right answer' and so, is discretionary. [60]
- The question of risk is predictive and forward-looking, so it is often based on incomplete material. However, an assessment of risk is also informed by the accused's past behaviour. [79][48]
- 'The length of any potential sentence of imprisonment will often be an important factor in establishing whether or not there is a compelling reason or there are exceptional circumstances….' [88]

[46] See also *Re MM (No 2)* [2024] VSC 325, [10].
[47] Following *Re LW* [2022] VSC 567.
[48] See also *Re Chau* [2024] VSC 387, [64].

- Depending on the circumstances some risks of offending on bail, even a high risk, may not be 'unacceptable'. The calculus involves assessing the probability of the risk eventuating and the likely harm if it does. [96].

Re Terei [2024] VSC 294

- The significant reforms to the *Bail Act* introduced in 2024 require a court to pay particular attention to an applicant's Aboriginal cultural identity in an attempt to make the bail system 'safer, fairer, and more balanced'. The changes are meant to support the common-law responsibility of courts to ensure the incarceration rates of Aboriginal people 'are not further compounded unless there is good reason.' [55] quotations omitted.
- Section 3A is the critical section and its requirement that the bail decision-maker 'take into account any issues that arise due to a person's Aboriginality' is the crucial phrase in the provision if the reforms are to be as significant as intended. [56]-[57]
- 'Take into account' may be an innocuous phrase, but a court cannot allow the process of taking account of a person's Aboriginality to become anything less than the radical transformation in decision-making that was called for by the Yoorrook Justice Commission. 'It cannot simply become a box-ticking exercise on the way to considering the other statutory elements in the bail flow chart'. [57]
- 'It must inform every consideration and the perception of every aspect of' an Aboriginal person's application for bail and it must encourage a court 'not to contribute to incarceration levels unless there is a *good reason* to do so'. The bail decision-maker must look beyond an applicant's personal circumstances to the entrenched disadvantages of the class of people of which they are a part. [57]
- It is easy to see how s 3A informs consideration of the exceptional circumstances and compelling reasons provisions in ss 4A and 4C, but it must apply equally when considering the unacceptable risk test of s 4E. It sits apart from the other surrounding circumstances given in s 3. [58]
- When considering unacceptable risk for an Aboriginal person, the bail decision-maker must have each of the s 3A factors at the forefront of their reasoning. Accordingly, this may mean an applicant does not pose such a risk even where there are clear elements of risk which are close to being unacceptable. [59]
- Practically, this may seem to require more of a respondent in demonstrating that any risk is unacceptable, but it would be a mistake to miss the focus of the reforms on the decision-maker's reasoning process. They must take into account the opportunity they have not to contribute to the systemic incarceration of Aboriginal people. [60]
- This does not suggest that bail for an Aboriginal person becomes a foregone conclusion and usurps the bail decision-maker's discretion. The test is not more lenient, the paramount consideration remains the safety of the community. However, an applicant's Aboriginality is a weighty factor in a bail application. [61]
- The opportunity to engage with and care for children is of particular significance to an Aboriginal parent given the intergenerational and ongoing pain and trauma suffered by the separation of Aboriginal children and parents. [67]
- Being on remand may have a deterrent effect to an applicant participating in the Koori Court process as there may be additional delay awaiting a plea date. Moreover, it may limit an applicant's ability to engage in any culturally appropriate therapeutic services that are proposed by Elders or respected persons over the duration of a plea. [85]

Re Diu [2024] VSC 321

- An applicant does not have to show exceptional circumstances in an appeal *de novo* from the Magistrates' Court to the County Court. [4] citing *Re ML* [2022] VSC 10, [22].
- The uplift provisions in s 4AA(2)(c) no longer apply to a repealed bail offence committed prior to the amendments which commenced on 25 March 2024. This is because Parliament specifically intended to limit the uplift for repeated low-level offending that does not pose a serious risk to community safety. The purpose of repealing "committing an indictable offence while on bail" as an offence was to ensure that it is not a Schedule 2 offence for the purpose of considering which bail test applies. [4]-[8].

Re Terei (No 2) [2024] VSC 352

- The recent amendments to the *Bail Act 1977* are a significant step towards making the bail system safer and more balanced for Aboriginal people, but the failure to have corresponding social policy and social reforms that provide practical assistance and support will undermine the outcomes they envisage. [22]