

Bail Applications in 2022

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Guiding principles – s1B, *Bail Act 1977*

- (1) The Parliament recognises the importance of—
 - (a) maximising the safety of the community and persons affected by crime to the greatest extent possible; and
 - (b) taking account of the presumption of innocence and the right to liberty; and
 - (c) promoting fairness, transparency and consistency in bail decision making; and
 - (d) promoting public understanding of bail practices and procedures.
- (2) It is the intention of the Parliament that this Act is to be applied and interpreted having regard to the matters set out in subsection (1).

What is the applicable threshold?

1. Prima Facie entitled
2. Exceptional circumstances (Schedule 1 offences)
3. Compelling reason/s (Schedule 2 offences)

In considering whether exceptional circumstances or compelling reasons exist, the bail decision maker must take into account the “surrounding circumstances” (s4A(3) and s4C(3)).

Either threshold can be satisfied by one factor or a combination of factors, ‘including matters involving the nature of the Crown case, as well as personal factors pertaining to the applicant’ (*Re CT* [2018] VSC 559 at [65]).

Note: *Re Ebertowski* [2019] VSC 676) – applicant must meet threshold for charged offending, even where it is agreed the scheduled offence will not be pursued.

Definition of ‘exceptional circumstances’

Justice Champion summarised the meaning of exceptional circumstances in *Re CT* [2018] VSC 559 at [64] (adopting Beach JA’s reasoning in *Re Sam* [2017] VSC 91):

The Act does not define what may amount to exceptional circumstances. It is well established that, ‘in order to be exceptional, the circumstances relied on must be such as to take the case out of the normal, so as to justify the admission of the applicant to bail’. It has been observed that ‘the hurdle confronted by an applicant in establishing exceptional circumstances ‘is a high one’. That having been said, it is not an impossible standard to reach.

Exceptional circumstances may be made up of a combination of factors, none of which might individually be considered exceptional (*Re Logan* [2019] VSC 134 at [13]).

Re Gloury-Hyde [2018] VSC 393 (and see *Re Cugurno-Pfabe* [2020] VSC 687) – absence of ‘unacceptable risk’ factors can contribute to demonstrating exceptional circumstances.

Definition of ‘compelling reason’

Compelling reason/s 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.’ A synthesis of all the factors must compel the conclusions that detention is not justified (*Re Ceylan* [2018] VSC 361 at [46]-[47]).

What are exceptional circumstances and compelling reasons?

- Delay (increased due to Covid-19 pandemic)
 - including likelihood of time on remand being longer than any potential ultimate term of imprisonment
 - *Re Jiang* [2021] VSC 148 at [60]: ‘a period of pre-trial custody of three years will demonstrate exceptional circumstances in almost every case’
 - However delay needs to be considered in relation to all of the surrounding circumstances (*Re El-Refei* (No 2) at [24])
- Conditions of custody
- Weakness of the Crown case/triable issues

- '[I]f there is a good argument that the only charge on which an accused is being held in custody is foredoomed to failure, that fact, in and of itself, amounts to exceptional circumstances and necessitates bail' (Croucher J in *Turner v Lill* (No 20 [2021] VSCA 255 at [22])
- *Re Biba* [2020] VSC 536 at [32]
- *Re VR* [2021] VSC 874 at [67]
- Availability of:
 - Family support
 - Stable address
 - Residential rehabilitation
 - Treatment and support services
- Special vulnerability:
 - Age (see *Re DB* [2019] VSC 53 at [47] and *Re JO* [2018] VSC 438 at [14])
 - Aboriginal person
 - Ill health/cognitive impairment/intellectual disability/mental illness
- First time in custody
- No priors (or no Bail Act breaches, breach of court orders)
- Note: *Re Gaylor* [2019] VSC 46 "I consider that placing the applicant on bail, subject to appropriate conditions, is in the interests of the community. This is a compelling reason justifying the grant of bail."

Unacceptable Risk

- Identifying a risk (s4E(1)(a))
 - (i) Endangering the safety or welfare of members of the public; or
 - (ii) Committing an offence whilst on bail; or
 - (iii) Interfering with witnesses or otherwise obstructing the course of justice in any matter; or

- (iv) Failing to surrender into custody in accordance with the conditions of bail

- Onus and Standard of Proof

- s4E(2) – the prosecution carries the burden of proving unacceptable risk
- *Haidy* [2004] VSC 247 at [16] (Redlich J) (recently cited in *Brookman* [2020] VSC 470 at [17]):

As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient...

It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events. To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable.

- Assessing the relative level of risk

- *Re Shea* [2021] VSC 207 at [66] – granting of bail is never risk-free
- Predicting future risk is notoriously difficult – Maxwell P in *Asmar* [2005] VSC 487 at [25]
- s3AAA Surrounding Circumstances, e.g. criminal history
- Nature, gravity, likelihood and harm of the alleged risk
- Examples of lower-level offending with high likelihood: *Re Johnstone (No 2)* [2018] VSC 803 and *Hall v Pangemanan* [2018] VSC 533
- Example of higher-level offending with lower/acceptable likelihood: *DPP(Cth) v Carrick (a pseudonym)* [2021] and *Re Moore* [2019] VSC 344 at [22] & [40].

Conditions

- s4E(3)
- Some risk is so extreme that conditions cannot mitigate risk to acceptable level, e.g. *DPP(Cth) v Khan* [2021] VSC 224.

- s5AAA(4) of the Act:
 - report to a police station;
 - live at a particular address;
 - adhere to a curfew; (can't be greater than 12 hours)
 - surrender his or her passport;
 - not attend certain places or areas; (e.g. places of international departure, or geographic restrictions on suburbs where the victims reside, or a prohibition on attending nightclubs or bars).
 - comply with conditions of an intervention order;
 - attend bail support services;
 - not contact specified people, or a class of people (e.g. witnesses or co-accused);
 - not drive a motor vehicle;
 - not use drugs or alcohol.

'Extra' Conditions

- Prohibitions on Internet / Mobile Phone / Encrypted Message Service
- Electronic Monitoring / GPS Tracking Ankle Bracelet
 - Private company - Attenti
 - \$25,000 for 12 months, paid by accused
 - Two recent cases in support of Electronic Monitoring Devices (EMD): *Re Raffoul* [2020] VSC 848 at [172] and [175] and *Re Shea* [2021] VSC 207 at [73]
 - Some judges less enthusiastic, e.g.: *Re Biba* [2020] VSC 536 at [36]; *Formica & Forni v Victoria Police* [2020] VSC 719 at [108]-[120]; *Re Assad* [2020] VSC 561 at [91] and *Re MJ* [2021] VSC 592 at [68].
- Sureties (s5(2)(c))

Cross-Examination of the Informant

- Try to get as much information as possible before application.
- The prosecution will use the informant to adduce most of the evidence (without restriction from the rules of evidence), some of which might be speculative. XXN of the informant is the opportunity to test/expose tenuous or speculative assertions by the prosecution.
- Ask questions that confirm the submission you want to make about the surrounding circumstances and level of risk. E.g.:
 - “My client has a residence at ...”
 - “He has employment at ...”
 - “She has no prior history / limited prior history / no relevant priors ...”
 - “My client has no priors for failing to answer bail ...”
 - “Ties the the jurisdiction include...”
 - etc

Further Resources

- Judicial College of Victoria – Bail Materials – [‘Key Bail Act Cases’](#)
- Judicial College of Victoria – Bail Materials – Annotated [Schedule 1](#) and [Schedule 2](#)
- Judicial College of Victoria – Bail Materials – [Decision-making flowchart](#)