IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
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AT MELBOURNE

CRIMINAL JURISDICTION

PT[1] Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGE:	HIS HONOUR JUDGE GAMBLE
WHERE HELD:	Melbourne
DATE OF HEARING:	13 February and 13 May 2019
DATE OF RULING:	22 May 2019
CASE MAY BE CITED AS:	PT v DPP
MEDIUM NEUTRAL CITATION:	[2019] VCC 836

REASONS FOR RULING

Catchwords: CRIMINAL LAW - Applicant child charged with a Category A serious youth offence of aggravated home invasion for which he was refused a summary hearing and determination in the Children's Court pursuant to s. 356(6) of the *Children, Youth and Families Act* 2005 (CYFA) - Applicant now seeks an order pursuant to s.168 (1) of the *Criminal Procedure Act* 2009 (CPA) for the transfer of the charge to the Children's Court – Onus on applicant under s. 168A(1) to show there is a substantial and compelling reason why the charge should be heard and determined summarily – In determining whether the threshold test is satisfied the Court must, under s. 168A(2), have regard to the intention of Parliament that a charge for a category A serious youth offence should not normally be heard and determined summarily – Application of the *Charter of Human Rights and Responsibilities Act* 2006 – Application for transfer refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr A. Waters	Claudia Grimberg

[1] To ensure that there is no possibility of identification of the applicant, who was a child at the time of the offending the subject of this application, this ruling has been anonymised in respect of the name of the applicant.

For the Respondent	Mr P. Pickering	Office of Public Prosecutions

HIS HONOUR:

Introduction

1 The applicant PT is a child. At the time of the offending the subject of this application, he was aged just over 17 years and 9 months.[2] He is now aged just over 18 years and nine months.

2 The applicant committed two of the offences in company with three other youths during an incident that occurred at a residential home in the early hours of 10 June 2018. Later the same day, the applicant was arrested and charged. As reflected in the indictment filed with this court,[3] the case in respect of the applicant has resolved to one charge of aggravated home invasion[4] and two charges of theft.[5] The prosecution case against PT is one based on complicity.

3 In respect of those offences, PT was committed to this Court by order of a Magistrate sitting in the Children's Court. More particularly, on 29 November 2018, the learned Magistrate refused to hear and determine the matter summarily. As the offence of aggravated home invasion is, by definition, a Category A serious youth offence,[6] and as it was committed by the applicant when he was aged at least 16 years, Her Honour was bound to refuse to hear and determine the charge summarily unless sufficient of the relevant criteria in s.356(6) of the *Children, Youth and Families Act* 2005 (CYFA) were satisfied. The onus in relation to establishing the requisite criteria fell on the child, PT. Whilst Her Honour was satisfied that there was a request for summary

[2] The applicant was born in August 2000 and the subject offending occurred on 10 June 2018.
[3] Indictment C1811918.1 was filed on 13 December 2018.
[4] Contrary to s. 77B of the *Crimes Act* 1958 (charge 1).
[5] Both contrary to s. 74 of the *Crimes Act* 1958 (charges 2 and 3). Charge 2 involved the theft of a vehicle from those premises while charge 3 related to the theft of petrol from a service station a short time later.
[6] As to which, see definition in s.3 of the *Children, Youth and Families Act* 2005.

jurisdiction and the sentencing options available to the court under the CYFA were adequate to respond to the child's offending, she was not satisfied that PT's counsel had established a substantial and compelling reason why the charge should be heard and determined summarily. Accordingly, she refused the application and committed PT to the County Court.

4 PT now makes application for his case to be transferred back to the Children's Court for a summary hearing and determination. The relevant provisions are to be found in the *Criminal Procedure Act* 2009 (CPA).

5 As s.168(1) of the CPA makes clear, at any time except during trial, the Supreme Court or County Court may order that a proceeding for a charge for an indictable offence that may be heard and determined summarily be transferred to the Magistrates' Court or the Children's Court, as the case requires. If the latter is being sought, the Court in which the application is being made must be satisfied that the accused consents, there has been a significant change in the charges or in the prosecution case and the charge is appropriate to be determined summarily having regard to whether the Children's Court is required to hear and determine the charge summarily pursuant to s.356(3) of the CYFA. Under that provision of the CYFA, there is a statutory presumption in favour of a summary determination, with certain exceptions, one of which relates to a charge for a Category A serious youth offence.[7]

6 However, the transfer procedure set out in s.168 is subject to the provisions of s.168A in cases involving a child who seeks a transfer of

[7] See s. 356(3) (ab).

a Category A or B serious youth offence committed when the child was 16 years or over.[8] The relevant criteria and test to be considered vary according to whether it is a Category A or B serious youth offence. As PT's transfer application relates to a charge involving a Category A serious youth offence, this court must consider s.168A(1) and (2).[9]

Section 168A of the CPA

7 The relevant provisions of s.168A of the CPA are in the following terms:

> (1) Despite s.168(2), the court may, under s.168(1), transfer a charge in respect of an accused who is a child to the Children's Court if –
>
> (a) the charge is for a Category A serious youth offence committed when the child was 16 years or over, other than murder, attempted murder, manslaughter, child homicide, arson causing death, or culpable driving; and
>
> (b) the Children's Court has refused to hear and determine the charge summarily; and
>
> (c) the child or prosecution requests that the charge be heard and determined summarily; and
>
> (d) the Court is satisfied that the sentencing options available to the Children's Court under the **Children, Youth and Families Act 2005** are adequate to respond to the child's offending; and
>
> (e) any of the following applies-
>
> (i) it is in the interests of the victim or victims that the charge be heard and determined summarily;
>
> (ii) the accused is particularly vulnerable because of cognitive impairment or mental illness;
>
> (iii) there is a substantial and compelling reason why the charge should be heard and determined summarily.
>
> (2) In determining whether there is a substantial and compelling reason why the charge should be determined summarily, the

[8] Providing the Category A serious youth offence is not one of murder, attempted murder, manslaughter, child homicide, arson causing death or culpable driving.
[9] In the case of a Category B serious offence charge, the relevant provision is s. 168(3.)

> court must have regard to the intention of Parliament that a charge for a Category A serious youth offence should not normally be heard and determined summarily.

8 The prosecution opposes the application on the basis that the applicant has been unable to satisfy the burden that rests upon him under s.168A(1)(e)(iii) of the CPA.

9 In this application, the parties' detailed written submissions were supplemented by focused oral submissions.

10 As between the parties, there was no dispute that the matters referred to in s.168A (1) (a)-(d) have been established. Those provisions make clear that this court must be satisfied that each and every one of those matters has been established.

11 As to sub-s.(1)(a), there is no doubt that the offence of aggravated home invasion alleged in Charge 1 of the indictment is a Category A serious youth offence.[10] Equally clear is the fact that PT was a child aged 16 years or over at the time he committed that offence; as I have already noted, he was in fact 17.

12 In relation to sub-s.(1)(b), I note that on 28 November last year, the learned Magistrate made a ruling in which she refused PT's application to have the charge heard and determined summarily, pursuant to s.356(6) of the CYFA.[11]

13 Sub-section (1)(c) of the CPA is satisfied because PT himself has made application to this court for the charge to be heard and determined summarily in the Children's Court.

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[10] See definition of **Category A serious youth offence** in section 3 (1) of the CYFA, in particular, at sub-para (e)(ii).
[11] [2018] VChC7.

14 The issue of whether sub-s.(1)(d) is satisfied is more involved. It requires this court to make an assessment, on the currently available material, of whether the sentencing options available to the Children's Court under the CYFA are adequate to respond to the child PT's offending. That task requires this court to consider a number of matters, one of which is the objective seriousness of the subject offending. In that regard, I note the contents of the typed prosecution opening, a copy of which was tendered without objection on this application.[12] I note, in particular, the following:

- PT was in company with three other offenders aged 20, 18 and 15, all of whom wore a hooded top as a means of disguise;
- Two of the offenders were armed; one with a knife or machete, another with a wooden stick or bat;
- They entered through a front door that is believed to have been unlocked, although such entry appears to have involved some degree of force being applied to that door;[13]
- The entry occurred at 5.15 am, in darkness, when all four occupants of the home were asleep in their beds;
- Those occupants included an elderly woman in one bedroom and her son and his wife and their young child in another bedroom;
- The mother of the child was pregnant;

[12] Exhibit B.
[13] As noted by the learned Magistrate in her ruling, the large hole in the plaster behind the front door was consistent with that occurring.

- All of the adults were subjected to a frightening experience by the offenders;

- The offenders first confronted the elderly female occupant who was, by that time, standing just outside her bedroom. After being confronted, she fled and hid in another area of the home, injuring herself in the process;

- The offenders then woke the couple and confronted them, banging on the walls and demanding their car keys;

- While that was occurring, the pregnant female victim did her best to hide her young child under the bed covers;

- Subsequent police investigations confirmed that during the course of the aggravated home invasion, the offenders had put a hole in a wall, ripped an alarm off a wall, smashed a number of pictures, and slashed the bedhead of the couple's bed with the bladed weapon; and

- A video made on the applicant's mobile phone a short time later suggests that he was drug affected.

15 In PT's case, the current offending was aggravated by the fact that it occurred while he was on bail for other serious indictable offences.

16 Of course, other considerations are also relevant. They include the matters in mitigation upon which PT is likely to be able to rely on any plea; for example his age, lack of any prior convictions or findings of guilt and favourable prospects of rehabilitation. In regards to the latter consideration, it is nonetheless relevant to note the context provided by PT's subsequent criminal record.

17 Having been arrested and remanded in a youth detention centre for the current offences on the day they were committed, namely 10 June 2018, he was released on bail nearly three months later, on 7 September. On that same day, he appeared in the Children's Court in respect of the offences for which he had been on bail at the time he committed the current offences. Those earlier offences included seven of robbery and one each of armed robbery, obtaining property by deception and failing to answer bail. For those offences he was sentenced to 12 months' probation without conviction.

18 Then, on 10 November 2018, while subject to that probation order and while on bail for the current offences, and a short time before the date on which his application for a summary hearing on the current charges was to be determined by the learned Magistrate, PT became drunk and, together with a group of other youths, committed offences of affray and criminal damage. He was arrested and remanded for that offending on 19 November 2018, the night before he was due to appear before that Magistrate. PT remained on adult remand for that subsequent offending for approximately one month; that is, until he was sentenced for it at the Moorabbin Magistrates' Court on 20 December 2018. After pleading guilty, he was convicted and placed on a community correction order. The circumstances of that later offending are concerning to say the least, and not just because of the timing. It occurred at night and in company. It targeted an innocent male and female in their vehicle. After an egg was thrown at the vehicle, the group of which the applicant was a part, ran towards the victims and hurled abuse, calling the female a, 'fucking bitch'. Members of the group also punched and kicked the vehicle while the two victims were cowering inside, terrified. Approximately $9,000 worth of damage was

caused to that vehicle.

19 In order to consider the question posed by sub-s.(1)(d), namely whether the court can be satisfied that the sentencing options available to the Children's Court under the CYFA are adequate to respond to the child PT's offending, the court must understand what those sentencing options are and any relevant limitations to them. In light of the serious nature of the current offending, PT faces a very real risk of being made subject to some form of custodial order. In that regard, it is relevant to note that the sentencing options available in the Children's Court under the CYFA are different and less severe than those available to this court under the *Sentencing Act* 1991. In the former case, there is no capacity to impose a term of imprisonment and the court cannot detain an offender in a youth justice centre for more than three years for a single offence and an aggregate of four years in respect of more than one offence.[14] By way of contrast, the sentencing options available to this court include the power to impose a term of adult imprisonment or a period of detention in a youth justice centre for up to four years in respect of a single offence.[15]

20 I note that both in the application for summary hearing and determination before the learned Magistrate and in this application for transfer back to the Children's Court, the respondent conceded that the sentencing options available to the Children's Court under the CYFA were adequate to respond to PT's offending. That is, the respondent conceded for the purposes of the current application, that the applicant had discharged the onus that rested upon him in relation to sub-s.(1)(d) of s.168A of the CPA.

[14] Section 413(2) and (3) of the CYFA, respectively.
[15] See section 32(3) of the *Sentencing Act* 1991. Sub-s. (4) refers to the power to impose an aggregate period of detention for more than one offence.

21 It is not without some hesitation that I have ultimately come to the same conclusion.

22 That leaves sub-s.(1) (e) of s.168A of the CPA.

23 Whereas the conjunctive nature of sub-ss.(1) (a)-(d) make clear that an applicant is required to establish each and every one of those matters, the task posited by sub-s.(1)(e) is different; it is sufficient for an applicant to establish any one of the three matters listed in sub-paragraphs (i)-(iii) as opposed to all of them.

24 In this application, the applicant's counsel did not seek to rely on either of the first two matters. Thus, it was not suggested that it was in the interests of the victims of this offending that the charge be heard and determined summarily. Equally, there was no suggestion that the applicant accused is particularly vulnerable because of cognitive impairment or mental illness.

25 Rather, for the purposes of engaging sub-s.(1)(e) of s.168A, the applicant's counsel submitted that sub-para (iii) was made out because, in the particular circumstances of this case, there is a 'substantial and compelling reason' why the relevant charge of aggravated home invasion should be heard and determined summarily.

26 Two obvious questions arise for consideration under that provision. First, what is meant by the phrase 'substantial and compelling reason'? And second, are the matters upon which PT is able to rely sufficient to meet that threshold test? As their respective submissions made clear, the parties had differing views as to what the threshold test of substantial and compelling reason in s.168A (3)(c)(iii) meant and with respect to what the result should be when that test was applied to the

particular circumstances of this case.

27 Before considering the two questions raised by s.168A in turn, I will first mention for completeness sake, what the current position is in respect to each of the applicant's co-offenders.

The Co-offender's cases

28 The two oldest of the three co-offenders face sentencing in this Court for similar offences to those faced by PT. In respect of one, the plea is part-heard and returnable on 30 July 2019. For the other, the plea is listed to commence in the County Koori Court on 12 August 2019. On account of their age, neither of those offenders were entitled to seek a summary hearing and determination in the Children's Court. By contrast, the case of the youngest of the co-offenders had to be heard in the Children's Court on account of his very young age. The contested hearing of his charges was held on 26 November 2018 and resulted in the dismissal of all charges save for theft and unlicensed driving.

Substantial and Compelling Reason

29 In Victoria, we appear to be in uncharted waters when it comes to considering the meaning and application of 'substantial and compelling reason' in the context of deciding whether a child offender facing a Category A serious youth offence should be able to have that charge heard and determined summarily in the Children's Court. The meaning of that phrase, whether in s.356(6) of the CYFA or s.198A of the CPA is yet to be considered by a single judge of the Supreme Court or by the Court of Appeal. As best I can ascertain, it would appear that the ruling made by the learned Magistrate on 28 November 2018, is the

first such ruling made under s.356(6) of the CYFA and the ruling that I have been called upon to make by reference to ss.168(1) and 168A of the CPA is, likewise, the first of its kind.

30 In each of those provisions, similar matters need to be considered and an identically worded threshold test applies.

31 In considering what the test means for the purposes of s.168A of the CPA, it is necessary to pay due regard to the usual principles of statutory construction. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute under consideration.[16] In undertaking that task, a Court must not only have regard to the legislative intention but also, and importantly, to the text of the provision itself. Recently, the High Court in *Baini v The Queen*[17] quoted from an earlier case of *Fleming* in these terms:

> "…the fundamental point is that close attention must be paid to the language of the relevant provision because there is no substitute for giving attention to the precise terms in which that provision is expressed."[18]

32 Section 35 of the *Interpretation of Legislation Act* 1984 is also relevant. It provides that a construction that would promote the purpose or object underlying the Act or subordinate instrument is to be preferred over a construction that would not promote that purpose or object. However, in certain circumstances, there can be dangers associated with too strict an application of such a rule and care must be taken.[19]

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[16] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69] (per the majority).
[17] (2012) 246 CLR 469
[18] Ibid at [14].
[19] See consideration of the corresponding WA provision in *Carr v Western Australia* (2007) 232 CLR

33 The intention of Parliament is not commonly stated within a provision, let alone in circumstances where there is a direction to a court applying the relevant provision that it have regard to such intention when considering and applying it. But, such is the case with respect to s.168A of the CPA.[20] As stated in s.168A (2):

> In determining whether there is a substantial and compelling reason why the charge should be heard and determined summarily, the court must have regard to the intention of Parliament that a charge for a Category A serious youth offence should not normally be heard and determined summarily.

34 In their respective submissions, the applicant and respondent addressed the court on the relevant test and in that context referred to a number of cases where tests involving a similar word or words in a different context had been considered. In addition, an attempt was made to contrast the meaning of the test of substantial and compelling reason referred to in sub-ss.(1) and (2) of s.168A with what was submitted to be the higher test of 'exceptional circumstances' found in other legislation.

35 For example, the applicant's counsel submitted that little assistance was provided by the stated intention of Parliament in s.168(2) as the word 'normally' was not defined and its true meaning remained somewhat vague and elusive. Counsel went on to invite this court to reach a similar finding as to the meaning of substantial and compelling reason as was reached by the majority in the Court of Appeal case of *Gul v The Queen*[21], a case which concerned the meaning of the words 'substantial and compelling reasons' in the context of the *Jury*

138.

[20] Just as it is when considering s. 356(6) of the CYFA; see s. 356(7).

[21] [2017] VSCA 153 (per Ashley and Priest JJA).

Directions Act 2015 (JDA). Section 16 of that Act was to the effect that a trial judge was not required to give the jury a direction that had not been requested by any party unless satisfied that there were substantial and compelling reasons for doing so despite the non-request.

36 In relation to the interpretation of that phrase in s.16 of the JDA, the majority ultimately said as follows:

> "Although one must be careful of substituting for the statutory language, reasons will not be substantial and compelling unless they are of considerable importance and strongly persuasive in the context of the issues in the trial. Thus, for example, a judge might give a direction not asked for if he or she considered that the failure to seek a direction was borne of incompetence".[22]

37 On the other hand, the respondent submitted that the court should pay due regard to the clearly stated intention of Parliament in s.168A(2), namely that a Category A serious youth offence committed for hearing in this court should not normally be transferred back to the Children's Court so as to be heard and determined summarily. They submitted that such intention provided a relevant context to the words employed in the threshold test itself. They also submitted that further assistance as to what that test meant could be gleaned from the earlier decision of the Court of Appeal in *DPP v Hudgson*.[23]

38 In *Hudgson*, the court had to consider the meaning of the phrase 'substantial and compelling circumstances' in the context of the *Sentencing Act* 1991 provisions requiring the fixing of a mandatory minimum non-parole period of four years for an offence of intentionally

[22] Ibid at [48].
[23] [2016] VSCA 254.

causing injury in circumstances of gross violence. Pursuant to s.10(1) of the *Act*, the sentencing court was required to impose a sentence of imprisonment for which a non-parole period of at least four years duration had to be fixed unless the court found under s.10A that a *special reason* existed. The onus in that regard rested on the offender on the balance of probabilities. One such circumstance in which a court could find the existence of a special reason was if the offender was able to prove that there are *substantial and compelling circumstances that justify doing so.*[24]

39 Ultimately, the Court concluded at paragraphs [111]-[112] as follows:

> 'However, in our view, one thing is clear. It was plainly the intention of Parliament that the burden imposed upon an offender who sought to escape the operation of s.10 should be a heavy one, and not capable of being lightly discharged.
>
> More specifically, we accept the Director's submission that the word "compelling" connotes powerful circumstances of a kind wholly outside what might be described as "run of the mill" factors, typically present in offending of this kind.'

40 After considering the various matters relied on by the offender Hudgson, namely parity, PTSD, his prospects of rehabilitation and the effect of his incarceration on his family, the Court concluded that the original sentencing judge was in error to have found that such circumstances met the description of 'substantial and compelling'. As the Court stated:

> '…[T]here is nothing "compelling" about them in the sense required. Nor can it be said that they are "rare" or "unforeseen" in cases of this type.

[24] See s. 10A(2)(e).

> It follows that no "special reason" of the kind required to avoid the consequences of s.10 has been demonstrated'.[25]

41 In referring to that decision, the respondent eschewed any suggestion that the Court's interpretation of the similar phrase *substantial and compelling circumstances* amounted to or was akin to 'exceptional circumstances'. Nonetheless, the respondent submitted that it still amounted to what was, in effect, a high test.

42 The applicant's counsel argued strongly against this court accepting the respondent's invitation to apply the reasoning in *Hudgson* to this case. Counsel submitted that what was said by the majority in that case amounted to an exceptional circumstances test or so close to it that any difference was marginal and insignificant. He further submitted that the two contexts in which the words *substantial and compelling* were being used differed significantly and the meaning ascribed to them for the purposes of s.168A should reflect that. As counsel put it, the relevant provisions of the *Sentencing* Act 1991 being considered in *Hudgson* concerned the commission of a very serious offence by an adult offender whereas the relevant provisions of the CPA being considered in this case, concerned arguably less serious offences committed by a child.

43 The applicant's counsel also submitted that the background context provided by the fact that as a child, the applicant was entitled to a number of the rights enshrined in the *Charter of Human Rights and Responsibilities Act* 2006 (the Charter), was an important consideration.[26] Inter alia, those rights included the right to such protection as is in his best interests and is needed by him by reason of

[25] At [115]-[116]
[26] Counsel made specific reference to ss. 17(2), 23(2), 23(3), and 25(3).

being a child (s.17(2)), the right to be treated in a way that is appropriate for his age (s.23(3)) and the right to a criminal procedure that takes account of his age and the desirability of promoting the child's rehabilitation (s.25(3)).

44 Counsel further submitted that s.32 of the Charter requires a court to, 'so far as it is possible to do so' consistently with its purpose, interpret the phrase 'substantial and compelling reason' as it is used in s.168A of the CPA, 'in a way that is compatible with' the child PT's human rights.

45 In that regard, counsel highlighted the very different nature of the summary jurisdiction of the Children's Court which had to apply the provisions of the CYFA and focus very much on addressing the needs and prospects of the child, compared to the jurisdiction of this court when having regard to the *Sentencing Act* 1991. For example, in this court, the applicant faces a risk of adult imprisonment and, pursuant to s.32(2C), cannot be detained in a youth justice centre for the Category A serious youth offence of aggravated home invasion unless the sentencing court is satisfied that exceptional circumstances exist.

46 That said, counsel for the applicant properly acknowledged that Parliament had the power under the relevant provision of the CPA to affect the human rights of a child offender with respect to a certain cohort of offences; the question was really to what extent it should be countenanced given the context in which the words of the threshold test are employed, including that provided by the relevant Charter obligations. Put another way, any such interference to a child's human rights should be kept to the minimum possible extent consistent with the relevant provisions of both the CPA and the Charter.

47 As counsel for the applicant acknowledged, s.6(2)(b) of the Charter makes clear that a court will not be failing to comply with its obligations under the Charter if any limits imposed on rights by Parliament are justified. So, when a court has a function that empowers it to affect Charter rights, s.6(2)(b) requires the court to consider the content of that Charter right as part of the proper exercise of its power, and when performing any such function, to only limit those rights in a manner that is 'demonstrably justified' under s.7(2) of the Charter. Put another way, s.6(2)(b) of the Charter prevents a court from exercising its powers in a way that unjustifiably limits those rights.

48 A number of other matters need to be noted at this stage.

49 The first is that, as was acknowledged by Beach JA in *Ceylan*,[27] there is a difference between a 'compelling' test and a 'substantial and compelling' test. The latter composite phrase is clearly meant to be a more stringent test than the former.

50 The composite wording was considered by the Court of Appeal in *Hudgson* and later in *Gul*. The context of the respective legislation differed; in the latter case it concerned the circumstances in which a trial judge was required to give the jury a direction that neither party had asked for, while in the earlier case, it concerned the circumstances in which a sentencing court could find a special reason so as to justify not fixing a mandatory minimum non-parole period for a particular type of offence.

51 As Beach JA also recognised, context is important and the meaning of 'substantial and compelling' may vary in different circumstances. For example, it is a relevant consideration whether the legislation in which

[27] [2018] VSC 361.

the words appear also includes a higher test such as exceptional circumstances. The *Bail Act* 1977 does whereas the *Migration Act* 1958 (Cth) does not. Ascribing a more stringent meaning to the phrase can therefore be justified in the latter scenario.

52 In *Ceylan,* His Honour ultimately came to the view that the test of 'compelling reason' in the *Bail Act* 1977, required an applicant for bail to show that there was a compelling reason that justified the grant of bail in the sense that such reason 'compelled' that conclusion. That would occur if such reason was 'forceful and therefore convincing' or one that is 'difficult to resist'. However, it did not require such reason to be 'irresistible or exceptional'.

53 The test of 'exceptional circumstances' has been used in many contexts and is a somewhat elusive concept. But, it has consistently been described as a very stringent test and one that places a heavy burden on the party who bears the onus of establishing it.

54 I accept that whatever the meaning of the threshold test of 'substantial and compelling reason' under the CPA, it is not equivalent to the meaning which is given to the test of 'exceptional circumstances'. It is clearly less than that.

55 Quite apart from the obvious fact that the words used do not include the word 'exceptional', some support for that proposition can also be found in the fact that in the Second Reading Speech to the *Children and Justice Legislation Amendment (Youth Justice Reform) Bill* 2017,[28] reference was made to the intention of Parliament in s.356(7) that an included charge should ordinarily be heard and determined in a higher Court. The Attorney-General then went on to say, 'this is similar to the

[28] Delivered on 25 May 2017.

special reason exception available under the statutory minimum sentence provisions of the *Sentencing Act* 1991'. It is also not without significance that the phrase 'exceptional circumstances' appears elsewhere in the CYFA.[29]

56 I note also that s.10A(2)(e) of the *Sentencing Act* 1991 has, since *Hudgson* was decided and that second reading speech was delivered, been amended, apparently as a consequence of the legislature determining that the section was not being applied by the Courts as had been intended by Parliament.[30] The amendment made the test more stringent. To the words '*substantial and compelling circumstances*' were added the additional words *'that are exceptional and rare*'.[31]

57 To my mind, that latest amendment makes clear that the test is now one that is closely aligned with if not tantamount to one of exceptional circumstances.

58 In that context, it is worth re-stating that Parliament, in the second reading speech delivered in May of 2017, by reference to its stated intention in s.356(7) of the CYFA, referred to the equivalent substantial and compelling reason test in that *Act* as one that was 'similar to' the special reason exception in s.10A(2)(e) of the *Sentencing Act* 1991. At that point, Parliament was aware of the meaning given to that test by the Court in *Hudgson* and had not yet amended the wording of the applicable test to elevate it beyond one of just 'substantial and compelling'.

59 In my view, in light of the different context in which the respective

[29] To refer to just two examples; see ss. 356(3)(b) and 516(5).
[30] The second reading speech for that amending legislation was delivered on 21 June 2018.
[31] Emphasis by way of italics added.

provisions of the legislation appeared, the decision in *Hudgson* provides considerably more assistance than that in *Gul*. I consider that the use of the word 'circumstances' as opposed to 'reason' in *Hudgson* does not materially detract from the usefulness of that decision for present purposes.

60 In light of the aforementioned matters, and having regard to the text, context and purpose of s.168A(1)(e)(iii) of the CPA, including the context provided by the relevant provisions of the Charter, I have concluded that the phrase 'substantial and compelling reason' employed in that section imposes a test that is more stringent than any test of 'compelling reason' and a somewhat less stringent test than that of 'substantial and compelling circumstances' in the original form of s.10A(2)(e) of the *Sentencing Act* 1991, as interpreted by the majority in *Hudgson*.

61 In light of the Attorney-General's use of the expression 'this is <u>similar to</u>', as opposed to 'this is <u>the same as</u>' the special reason exception available under the statutory minimum sentence provisions of the *Sentencing Act* 1991 in reference to the test of 'substantial and compelling reason' in the CYFA, I consider that the test under the equivalent provision of s.168A(1)(e)(iii) should be viewed as being not equivalent to or identical with the test of 'substantial and compelling circumstances' employed in the original form of s.10A(2)(e) of the *Sentencing Act* 1991, but not too far below it in terms of the stringency of the test. The use of the word 'normally' in sub-s.(3) of s.168A also supports this conclusion. I do not, however, intend to descend any further into an analysis of the test, for example by precisely defining the words employed, other than to say that I consider the test to be a 'relatively high' as opposed to a 'high' or 'very high' one, and that the

relevant provisions impose on an applicant something less than a 'heavy' onus or burden.

Has the test under s.168A(2)(e)(iii) been satisfied?

62 Having reached that conclusion, I now turn to consider whether the particular circumstances relied on by the applicant PT are sufficient to show that there is a substantial and compelling reason why the charge of aggravated home invasion should be heard and determined summarily in the Children's Court.

63 Before listing those circumstances, I should first note that although the test uses the singular 'reason' as opposed to the plural 'reasons', I consider that it is permissible for an applicant to rely on more than one reason or circumstance, in combination, in order to try and satisfy the test of substantial and compelling reason. A similar situation exists with respect to bail applications and I can see no good reason for taking a different approach here.

64 In the course of his application, the applicant's counsel called a number of witnesses to give viva voce evidence. They included the following:

- John Kuot, an African Program Coordinator for Parkville College, a service provider for the Department of Education and Training, within Youth Justice;
- the mother of the applicant; and
- Tiffany Simos, a Youth Justice Case Manager.

65 PT's mother confirmed that she had been subjected to domestic violence at the hands of her partner while in the home that she shared

with her six children.[32] Her housing situation had been somewhat unstable at times. As a result, PT spent more time with other youths while away from home and his offending occurred in that context. She visited him while he was on youth remand and he appeared remorseful. She also visited him while he was in adult remand where he appeared upset and stressed. He told her that in future, he would spend more time at home with his family rather than elsewhere with his friends. Since his release, he has followed through with that promise.

66 Mr Kuot had personal contact with the applicant during the time that PT spent on remand at the Parkville Youth Justice Centre. He ran an African Education Program in which PT participated. He considered PT to have shown leadership capability as well as an ability to mentor some of the younger remandees. In fact, during his contact with PT, he considered him to be one of his most valuable participants and to have significant prospects of rehabilitation.

67 In the case of Ms Simos, she has been PT's supervising officer for the probation order since 10 October 2018.

68 Based on the relevant documentary material and the evidence given by those witnesses, the applicant's counsel was able to rely on the following matters on PT's behalf.

- The prosecution are unable to prove that he was personally armed with a weapon during the subject aggravated home invasion offence;
- He has already served a period of 87 days pre-sentence detention in respect of that offending;

[32] One of whom was the applicant.

- In the context of considering that offending, it is relevant to note that he has no prior convictions;

- He is still only 18 years of age and faces a severe risk of damaging stigma if he receives a custodial sentence, particularly one involving adult imprisonment;

- He comes from a refugee background and, as noted in a Youth Justice Pre-Sentence Report dated 6 July 2018, he has a history of self-harming on occasion, has witnessed his mother being subjected to family violence and has assumed a role within the family where he provides more support to his mother and a higher level of care for his siblings than would ordinarily be expected;

- Whilst on youth remand for the current offences, he impressed Mr Kuot as very remorseful and sorry for what he had done. He was considered to have shown maturity, a good application to study and work, and a high level of engagement;

- Prior to being placed on probation for the earlier offending, he participated in a Children's Court ordered Group Conference, in the course of which he was considered to have engaged well, reflected on his situation and shown remorse, insight and victim empathy;

- Putting to one side his further offending while subject to the probation order, he has complied with all of the requirements of that order. He has attended and engaged in weekly supervision appointments with Ms Simos in which he has

discussed relevant triggers for his past offending. She considers that he has shown remorse and a willingness to assist with any referrals to relevant programs and agencies in order to address his substance abuse and reasons for offending, as well as for the purposes of enhancing his employment prospects;

- Since being placed on a community correction order on 20 December 2018 for the subsequent offences committed on 10 November, which offences included an affray, he has complied with all of the conditions of that order;

- He is now living in the community with the benefit that being on both probation and a CCO provides;

- He also enjoys strong family support, particularly from his mother and an aunt, and currently has a supportive partner; and

- He has very good prospects of rehabilitation.

69 I have had regard to the written submissions prepared by counsel, for which I am grateful.[33] I have also had regard to the evidence given by the various witnesses and will give it what weight I can. Clearly, not all witnesses were aware of the full details of all of PT's offending and to some extent, their observations as to his prospects of rehabilitation and level of remorse need to be tempered to some degree.

70 That said, I accept counsel for the applicant's ultimate submission that his client is still very young with much room for further maturity, and

[33] The Prosecution's submissions were tendered as exhibit A while those from the defence were tendered as exhibit 1.

that his prospects are very good. I would only add the rider that such prospects are also guarded. He will clearly need ongoing and significant support in the future if those prospects are to be realised.

71 I have had regard to the circumstances of PT's prior, current and subsequent offending and the circumstances in which it occurred.

72 I have also taken account of his age and personal circumstances, to the extent that they have been presented to this court. Whilst he is still very young, I also note that he fell at the upper limit of the age range covered by s.168A of the CPA.

73 Similarly, with respect to the matters in mitigation upon which he can likely rely.

74 After paying due regard to all of those matters, as well as to the meaning and effect of the test contained in s.168A(1)(e), I have concluded that the applicant PT has failed to discharge the onus that rests upon him. I do not consider that any of the matters relied on by his counsel, either alone or in combination are sufficient to meet the relatively high test of 'substantial and compelling reason'. They are matters which not infrequently arise in offending of this type and must be considered alongside other relevant factors, one of which is the applicant's preparedness to commit further serious offences while on bail for the current offences and probation for the earlier offences.

75 Accordingly, the application by PT to transfer the Category A serious youth offence of aggravated home invasion (and associated charges) to the Children's Court for summary hearing and determination is refused.

76 I will now hear from counsel as to what further orders need to be made

before the Court adjourns, including the fixing or confirmation of any date for the plea hearing and the terms of any extension of bail.

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