

IN THE CHILDREN'S COURT OF VICTORIA
CRIMINAL DIVISION

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

v

THOMAS CARRICK*

JUDGE: HIS HONOUR JUDGE VANDERSTEEN

DATE OF HEARING: 27 April 2022

DATE OF DECISION: 3 May 2022

CASE MAY BE CITED AS: CDPP v Carrick (a pseudonym) [2022] VChC 3

REASONS FOR DECISION

Catchwords: CRIMINAL LAW – accused charged with terrorism offences – child aged 13 at start of alleged offending and turned 14 – application for uplift opposed by accused – whether charges unsuitable by reason of exceptional circumstances to be determined summarily – excellent compliance on bail with onerous conditions – accused with complex disability support needs – presumption of *doli incapax* – rarity of charges of such nature against children should not be confused with exceptional circumstances – accused's circumstances – sentencing options available – Children's Court does have adequacy of sentences available – application refused.

APPEARANCES: Counsel

For the CDPP: Mr. A Sprague (written submissions Mr. B Sonnet & Mr. A. Sprague)

For the accused (TC): Mr N. Jane

* This pseudonym mirrors that used by the Supreme Court in *DPP (Cth) v Carrick (a pseudonym)* [2021] VSC 696.

HIS HONOUR:

Application

1. This is an application by the Commonwealth Director of Public Prosecutions (CDPP) pursuant to s356(3) of the *Children, Youth and Families Act 2005* (Vic) (CYFA) to conduct a committal hearing into the charges before the Court.
2. The CDPP submit the charges are unsuitable by reason of exceptional circumstances to be determined summarily.
3. Thomas Carrick (TC) opposes the application.

Charges

4. TC has been charged with two offences namely:
 - I. *Between 16 April 2021 and 6 October 2021 in the State of Victoria the accused was, contrary to section 102.3(1) of the Criminal Code (Cth), intentionally a member of an organisation, namely Islamic State, knowing that the organisation was a terrorist organisation.*
 - II. *Between 19 September 2021 and 6 October 2021, in the State of Victoria, the accused did engage in advocating terrorism, contrary to section 80.2C(1) of the Criminal Code (Cth).*
5. The maximum penalty for charge 1 is imprisonment for 10 years¹ and charge 2 imprisonment for 5 years.²
6. Section 4G of the *Crimes Act 1914* (Cth) states: “*Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.*”
7. No “*contrary intention appears*” in either ss102.3 or 80.2C of the *Criminal Code* (Cth).
8. Accordingly, the offences before the Court are indictable.

The Applicable Legislation – s356(3) of the *Children, Youth and Families Act 2005* (Vic)

9. Section s356(3) of the *Children, Youth and Families Act 2005* states:

¹ S 102.3(1) *Criminal Code* (Cth)

² S 80.2C(1) *Criminal Code* (Cth)

(3) If a child is charged before the Court with an indictable offence, other than murder, attempted murder, manslaughter, child homicide, homicide by firearm, an offence against section 197A of the Crimes Act 1958 (arson causing death) or an offence against section 318 of the Crimes Act 1958 (culpable driving causing death), the Court must hear and determine the charge summarily unless—

(a) before the hearing of any evidence the child objects; or

(ab) subsection (6) applies; or

(b) at any stage the Court considers that the **charge is unsuitable by reason of exceptional circumstances**³ to be determined summarily—

and the Court must conduct a committal proceeding into the charge and, in the circumstances mentioned in paragraph (b), must give reasons for declining to determine the charge summarily.

Exceptional Circumstances – *K v Children’s Court of Victoria & Anor* [2015] VSC 645

10. Justice T Forrest in *K v Children’s Court of Victoria & Anor* [2015] VSC 645 at [26] & [27] stated the following in relation to exceptional circumstances within the context of s356 of the CYFA:

26 The Children’s Court has considered the meaning of ‘exceptional circumstances’ in the context of s 356 of the CYFA in various matters. The issue has come before both this Court and the Court of Appeal. Relevant principles that can be extracted from these cases include:

(a) the Children’s Court should relinquish its embrative jurisdiction only with great reluctance;

(b) the gravity of the conduct and the role ascribed to the accused are important matters but are not the only factors to be considered;

(c) other factors for consideration may include the maturity of the offender, the degree of planning or its complexity, and the antecedents of the alleged offender or particular features peculiar to him or her;

(d) the most important criterion is the overall administration of justice – that is, justice as it affects the community as well as the individual;

(e) the nature of the evidence to be called may render a matter unsuitable for summary determination – evidence about political motivation, or forensic or scientific evidence, may fall within this class;

(f) ‘exceptional’, in this statutory context means more than special, it means very unusual.

27 The authorities resound that each case of ‘exceptional circumstances’ must be determined on its own facts. I note that this is not only the first case of alleged terrorism offences to be uplifted, but is in fact the first instance of a child charged with ss 101.4 or s 101.6 terrorism offences before a Victorian court. Historical analysis of the facts of alleged offending in matters uplifted is thus of limited assistance to this proceeding.

³ Emphasis added

CDPP Submissions

11. The CDPP rely upon the following matters to submit that the charges are unsuitable by reason of exceptional circumstances to be determined summarily:

- (a) The charges are terrorism offences, there is a greater public interest in the matter being heard in the Supreme Court.⁴ Terrorism offences it was submitted are inherently serious⁵, that TC is charged with membership of ISIS who have a record of “*committing the worst terrorist acts imaginable*”⁶ and the offending was protracted and continuous.⁷
- (b) Further, it was submitted that the offending before the Court is in a “*very unusual*” category, beyond what is normally dealt with in the Children’s Court and is more appropriate to be dealt with in the higher courts.⁸
- (c) The charges are serious⁹ and complex.¹⁰ Evidence will be called in relation to ISIS membership, terminology, ideology, language/interpretation, and digital forensic evidence. Further, the CDPP expect to call evidence in relation to TC’s mental and cognitive functioning.¹¹
- (d) There exists some doubt about the adequacy of sentencing options in the Children’s Court;¹² and
- (e) There have been no convictions of children for the offences TC faces, however other cases where children have been convicted of terrorism offences have resulted in “lengthy” sentences.¹³

⁴ CDPP Submissions, 4.a. & 19.

⁵ Ibid, 14.a.

⁶ Ibid, 14.b.

⁷ Ibid, 14.c.

⁸ Ibid, 17.

⁹ Ibid, 4.b.

¹⁰ Ibid, 4.c. & 20.

¹¹ Ibid, 19

¹² Ibid, 4.d.

¹³ Ibid, 14.j.

TC Submissions

12. TC relies upon the following matters to submit that the charges are suitable by reason of exceptional circumstances to be determined summarily:

- (a) The Children's Court has adequate sentencing power.¹⁴ The "*relatively low*" maximum sentences for the charges before the Court ought be compared to those of more serious terrorism offences;¹⁵
- (b) TC is young. He was 13 at the start of the offending and turned 14. He has been diagnosed with autism spectrum disorder, has a very low range of intelligence with an IQ of 74.¹⁶ Any child under 14 has a presumption of *doli incapax*;¹⁷
- (c) TC has no prior criminal history, there has been no subsequent offending, he has fully complied with very strict conditions of bail and has a supportive family;¹⁸
- (d) "*the overall administration of justice is the most important criterion when assessing whether exceptional circumstances exist*" and that there is no reason why TC's charges, if heard summarily, would impinge on this principle. Parliament by permitting some terrorism charges to be heard summarily "*mean...that the administration of justice can be achieved in the Children's Court*";¹⁹
- (e) The nature of the evidence would not suggest that the matter could not be heard summarily.²⁰ The offending is captured by communications between TC and a covert operative.²¹ The Children's Court with its unique jurisdiction is more suitable to hear about TC's cognitive and mental functioning;²² and

¹⁴ TC Submissions, 16

¹⁵ Ibid, 22 & 23

¹⁶ Ibid, 25

¹⁷ Ibid, 26

¹⁸ Ibid, 28-32

¹⁹ Ibid, 33-35

²⁰ Ibid, 36

²¹ Ibid, 37

²² Ibid, 38

- (f) The Children’s Court should only relinquish its jurisdiction with “*great reluctance*”²³ and that rarity should not be confused with exceptional circumstances.²⁴

Analysis

13. I accept that the allegations before the Court are serious. They involve TC conversing with an online covert operative (‘OCO’) in relation to:
- (a) terrorist events across the world, some of which were historical in nature and others current; a preparedness to engage in acts of violence, numerous discussions involved ISIS and TC on various occasions described himself as wanting to be a martyr engaging in a jihad and that he was willing to act alone or with others;
 - (b) young people that TC had attended primary school with and an individual that he attended high school with;
 - (c) on two occasions TC sent to the OCO images of him holding a weapon. The first was on 7 August 2021 where TC was in his bathroom holding a silver knife; written crudely, as described by the police, on the blade was lettering which TC informed the OCO that it said ‘Islamic state’.²⁵ The second occasion was on 5 October 2021 where TC sent another image to the OCO of him holding a large sword;
14. On 6 October 2021 police executed a search warrant at TC’s residence and seized, amongst other items, two swords, a laptop, an iPhone 6, pieces of paper with a sketch of an ISIS flag, and notebooks.²⁶
15. TC was deemed unsuitable for interview by two doctors. However only one has made a statement that appears in the brief.²⁷ This was communicated to several police officers including Forde, Cunha, Redwood and Arceri. I note in the application for bail PO Redwood gave evidence that the doctors informed police that TC presented as suggestible and that

²³ Ibid, 39

²⁴ Ibid, 40

²⁵ Statement of Facts [45], the knife was seized by police on 13 August 2021

²⁶ Ibid, [113] [a]-[l] & [114]

²⁷ Dr B, statement dated 6 October 2021

he would answer questions by agreeing even if the response was not true or against his self-interest. This explanation does not appear in any material within the brief.

16. The maximum penalty for charge 1 is 10 years, charge 2, 5 years. No child has been charged with the offences TC faces, therefore there are no comparative cases.
17. “*Exceptional circumstances*” must be determined on its own facts.²⁸
18. TC was granted bail by the Children’s Court sitting at Melbourne on 8 October 2021.
19. The CDPP appealed the granting of bail to the Supreme Court.
20. The appeal was dismissed on 15 October 2021.²⁹
21. Since that time TC has been subject to the following bail conditions:
 - (a) *Not leave the State of Victoria;*
 - (b) *Not contact witnesses for the prosecution other than the informant;*
 - (c) *Obey all lawful directions of Youth Justice;*
 - (d) *Not be absent from [redacted] unless accompanied by a parent or as agreed to by Youth Justice;*
 - (e) *To attend at the front door of the premises if requested to do so by any police officer;*
 - (f) *Not to attend any school other than the school in which he is enrolled or approved to do so by Youth Justice;*
 - (g) *Not to go or remain within 1 kilometre of [redacted] save unless in the company of a parent and only for the purpose of attending upon [redacted] of [redacted];*
 - (h) *Not to go or remain within 5 kilometres of [redacted] unless in the company of a parent or approved by Youth Justice;*
 - (i) *Not to own, access or use any mobile telephone or laptop other than those authorised by Youth Justice;*
 - (j) *Not to access the internet (including any social media or messaging website, application or platform) or cause any person to access the internet on his behalf except for the purpose of schooling, attending court, attending medical appointments, obtaining legal advice or as agreed by Youth Justice;*
 - (k) *Not communicate and associate with or attempt (directly or indirectly) to communicate or associate with any of the following:*

²⁸ Justice T Forrest, *K v Children’s Court of Victoria & Anor* [2015] VSC 645, [27]

²⁹ Justice Lasry, *DPP (Cth) v Carrick (a pseudonym)* [2021] VSC 696

(i) Any person incarcerated in any gaol or detention;

(ii) Any person whom it is believed to be a member associate (sic) of a terrorist organisation;

(iii) Any person he knows to be or purports to be in Turkey, Iraq or Syria.

(l) Not to acquire or attempt to acquire any firearm, knife and any other weapon like device;

(m) Not to acquire or attempt to acquire any substance, material, chemical or other item capable of being used to manufacture a prohibited weapon, a chemical weapon, explosive or explosive device except if that item is for reasonable domestic use;

(n) Not to access, acquire, possess or distribute any literature, recording, image or thing depicting or relating to:

(i) Explosives, explosive devices, engineering of explosives or explosive devices and detonation of explosives;

(ii) Firearms, knives and other weapon like device (sic);

(iii) Anti-surveillance or counter-surveillance

(iv) Executions of natural persons or animals;

(v) Terrorist attacks including suicide attacks;

(vi) Propaganda or promotional material for a terrorist organisation;

(vii) The practices, activities or members of a terrorist organisation;

(viii) Armed conflicts of international or non-international character.

22. TC has been subject to multiple and regular bail reviews. The bail conditions rightly can be described as onerous. TC has complied with every condition. His compliance on bail has been excellent.

23. Youth Justice continue to supervise, monitor and coordinate care services for TC which include a private psychologist, a mental health clinician from [redacted] Child Youth and Mental Health Service, an Imam, a specialist disability advisor from Department of Justice and Community Safety, therapists from OzChild multisystemic therapy, educators, and a private tutor.

24. TC currently attends [redacted school]. TC commenced enrolment at this school following and as a direct result of his arrest and charging. This was facilitated at the highest of levels within the Department of Education and Youth Justice. He has attended school every day this year. TC's teacher provides a weekly update/summary to Youth Justice, no issues

have been identified. He is well settled and informed the Court during one bail review he has made a friend. During the school holidays TC engaged in tutoring and day activities. TC enjoys school.

25. TC is one of four children and resides with his family in [redacted]. Both parents work full time. They have at all times remained supportive of TC and in no way have condoned his behaviour that is the subject of the charges.
26. Further, support is provided to TC and his family by way of a NDIS package. Given TC's complex disability support needs the current package was viewed as being inadequate. A review was sought which was denied. The decision is subject to an AAT review and TC and his family are being assisted by Victoria Legal Aid.
27. TC has been diagnosed as having low intelligence with an IQ of 74 and autism spectrum disorder and Oppositional Defiance Disorder.³⁰
28. The brief of evidence has been filed and served. It contains a transcript of the conversations, exhibits and a small number of statements. The charges are predicated on the conversations and exhibits seized by police. This case is a matter, in my view, of relatively low complexity. The majority of the brief relates to typed conversations between TC and the OCO. I do not accept the CDPP submissions that the matter is complex.
29. Whilst there is no material on the brief as to TC's cognitive functioning, I accept given the presumption of *doli incapax* that that material will be forthcoming from either TC and or the CDPP. This, even in combination with the current state of the prosecution evidence, does not make the matter complex. In fact, by its very nature the Children's Court, more than any other jurisdiction, routinely hears and determines arguments pertaining to *doli incapax*. One of the statutory purposes of the Children's Court of Victoria is "...a specialist court dealing with matters relating to children".³¹

³⁰ Report of Dr R, Clinical Psychologist, 12 October 2021

³¹ *Children, Youth and Families Act 2005*, s.1(d)

30. Further in this regard, I do not accept that the unusual nature of the charges requires them to be dealt with by a superior court. Whilst no child has been charged with these particular offences, I agree with the submission on the behalf of TC that the rarity should not be confused with exceptional circumstances. I have formed this view when considering the unusual nature of the charges themselves both in isolation and in combination with other matters that have been submitted on the behalf of the parties.
31. The CDPP submitted that there is “*some doubt*” as to the adequacy of sentencing in the Children’s Court. Given what is known to the Court at this time, I am of the view that the Children’s Court does have adequacy of sentences available.
32. In forming this view I have taken into account s362 CYFA factors and the sentencing options available³² in respect to TC’s age, low IQ, autism, no prior history, attending a special school, supportive family, compliance with bail conditions, nature of the offences before the Court, the applicable maximum penalties and the need to protect the community.
33. In conclusion, there is nothing before the Court to suggest that the administration of justice, as it affects the community and TC, cannot be served by having the matter heard in the Children’s Court. Accordingly, the application is refused.

³² Ibid, s.360