IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA23/2023
[2023] NZCA 596

BETWEEN	ATTORNEY-GENERAL First Appellant
	NEW ZEALAND PAROLE BOARD Second Appellant
AND	BRETT DAVID GRINDER Respondent

Hearing:	30 May 2023
Court:	Collins, Mallon and Wylie JJ
Counsel:	C A Griffin for First Appellant M S Smith and V J Owen for Second Appellant D A Ewen and E T Blincoe for Respondent S Thode and J W Wall for Criminal Bar Association of New Zealand as Intervener
Judgment:	24 November 2023 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court decision is set aside.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] This appeal concerns the correct test for determining whether, when a person subject to preventive detention is granted release on parole, any special conditions on which that release is granted may be varied or discharged. In particular, it concerns whether a special condition can only be maintained if, without that condition, the person will be an "undue risk" to the community.[1] It also concerns whether the purpose of special conditions is to take a parolee "from [an] undue risk to something less than that".[2]

[2] These issues arose in relation to the special conditions of Brett David Grinder, the respondent on this appeal. He remains subject to one of the special conditions that gave rise to the issues that are before us. The correct approach to these issues is important for the decision-making of the New Zealand Parole Board (the Parole Board) beyond Mr Grinder's case. For that reason, we heard from the Parole Board and the Criminal Bar Association of New Zealand Inc (CBANZ) as well as from counsel for Mr Grinder and the Attorney-General (the parties who took an

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[1] Parole Act 2002, s 7(3).

[2] *Grinder v New Zealand Parole Board* [2022] NZHC 3188 [High Court judgment] at [47].

active role in the judicial review proceeding in the High Court that is subject to the appeal before us).[3]

Background

[3] Mr Grinder was sentenced to preventive detention in 2003 for sexual offending against 13 young victims between 1976 and 2001. He was therefore required to remain in prison unless granted release on parole by the Parole Board. Release could be granted only if the Parole Board was satisfied on reasonable grounds that, if released on parole, Mr Grinder would not pose an "undue risk" to the safety of the community or any person or class of persons.[4] If released on parole, he would be subject to standard release conditions and any special conditions imposed by the Parole Board.[5] He would also be subject to the possibility of recall by the Parole Board to prison for the rest of his life.[6]

[4] Mr Grinder was first released on parole on 15 August 2011 subject to standard and special conditions. He was recalled to prison on 5 July 2012 for breaching his conditions — the concerns were that he had engaged in relationships with vulnerable adults and had not engaged well with his probation officer or been open and honest about his relationships.

[5] Mr Grinder was released on parole for a second time on 1 April 2019, subject to standard and special conditions. The special conditions were imposed for a period of five years. That is, until 31 March 2024. They included a special condition not to enter or loiter near specified places where children might congregate (such as schools, early childhood centres, parks, libraries and swimming pools) without prior written approval from a probation officer or unless in the presence of an approved adult (a whereabouts condition). They also included a special condition requiring

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3 The New Zealand Parole Board was a party to the judicial review proceeding in the High Court but, as the decision-maker whose decision was being reviewed, it did not take an active part in that Court. On 17 January 2023 the Parole Board filed a notice of appeal against the High Court decision. The Attorney-General filed a notice of cross-appeal on 18 January 2023. In a minute dated 8 February 2023 Goddard J directed, by consent, that the appeal be case managed as a single appeal with the Attorney-General as the lead appellant. The Criminal Bar Association of New Zealand was granted leave to intervene on this appeal.

4 Parole Act, s 28(2).

5 Sections 29(4)(b) and 29AA(1).

6 Section 6(4)(d).

GPS monitoring so as to monitor his compliance with the whereabouts condition (the GPS condition).[7]

[6] Due to Mr Grinder's risks and his earlier unsuccessful parole, the Parole Board held two monitoring hearings at six month and 12 month intervals following his release on 1 April 2019.[8] At both hearings, Mr Grinder unsuccessfully sought to vary or discharge the whereabouts and GPS conditions:

(a) At the first of these hearings, on 22 October 2019, the Parole Board described the whereabouts condition as remaining "relevant and necessary" until it could be satisfied that Mr Grinder was established in the community and had demonstrated sustained compliance with release conditions that mitigated his risk. Strict compliance with them was considered necessary so that he could safely remain in the community.

(b) At the second hearing, on 12 March 2020, the Parole Board noted the reasonably permissive approach of Mr Grinder's probation officer to the whereabouts condition which provided Mr Grinder with "plenty of opportunity" for recreation as part of a balanced life without creating risks. It noted that the conditions had been imposed for "compelling reasons".

[7] Mr Grinder subsequently made a formal application to vary his special conditions.[9] He sought the discharge of the whereabouts and GPS conditions. The Parole Board declined this application on 14 October 2021. Mr Grinder applied for a review of that decision. This was dismissed by the Panel Convenor on 27 January 2022. It is these decisions (discussed further below at [19]–[25]) that led Mr Grinder to file an application for judicial review in the High Court. His application

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7 There were two electronic monitoring conditions: to comply with electronic monitoring and provide unimpeded access to Mr Grinder's residence for the purpose of maintaining the equipment; and to submit to electronic monitoring as directed by a probation officer to monitor compliance with any conditions relating to Mr Grinder's whereabouts. We refer to these two conditions collectively as the GPS condition.

8 Parole Act, s 29B(2)(b).

9 Section 56(1).

sought orders quashing these decisions and directing that the Parole Board reconsider his application to vary his conditions.

[8] In the High Court, Gwyn J granted the judicial review application.[10] The Judge directed the Parole Board to consider whether the special conditions were a "reasonable, necessary and proportionate means of ensuring [Mr Grinder] does not represent an undue risk to the community".[11] The Judge also directed this reconsideration to be carried out with reference to updated information as to the likelihood Mr Grinder would reoffend and the nature and seriousness of any likely future offending.[12] It is this judgment (discussed further below at [26]–[28]) that is the subject of the appeal before us.

[9] On 25 January 2023, following the judicial review, the Parole Board reconsidered Mr Grinder's application (discussed further below at [29]–[35]). It discharged the GPS condition but declined to discharge the whereabouts condition.

Statutory provisions

[10] Section 7 of the Parole Act 2002 sets out guiding principles that apply to decisions of the Parole Board. As relevant here, s 7 provides:

> **7 Guiding principles**
>
> (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
>
> (2) Other principles that must guide the Board's decisions are—
>
> (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and
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> …
>
> (3) When any person is required under this Part to assess whether an offender poses an undue risk, the person must consider both—

[10] High Court judgment, above n 2.
[11] At [130(a)].
[12] At [130(b)].

(a) the likelihood of further offending; and

(b) the nature and seriousness of any likely subsequent offending.

[11] Section 28 provides for release on parole as follows:

28 Direction for release on parole

(1AA) In deciding whether or not to release an offender on parole, the Board must bear in mind that the offender has no entitlement to be released on parole and, in particular, that neither the offender's eligibility for release on parole nor anything else in this Act or any other enactment confers such an entitlement.

(1) The Board may, after a hearing at which it has considered whether to release an offender on parole, direct that the offender be released on parole.

(2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—

(a) the support and supervision available to the offender following release; and

(b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

…

[12] Section 14 sets out the standard conditions that apply to every offender released on parole.[13] They include requirements to report to the probation officer as and when required, not to move to a residential address in a different "probation area" without the prior written approval of the probation officer, not to leave New Zealand without the prior written approval of a probation officer, and to take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.[14]

[13] Section 29AA provides for the Parole Board to impose special conditions. The power is broadly worded, providing, as relevant here, that "[i]n releasing an offender on parole, the Board may impose any special conditions on that offender that the Board specifies" and that they apply "for the period that the Board specifies".[15]

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13 Parole Act, ss 14 and 29(1).
14 Section 14(1)(c), (fa) and (i).
15 Section 29AA(1) and (2).

[14] Further detail of this power is set out in s 15 which provides (as relevant):

15 Special conditions

(1) The Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on an offender.

(2) A special condition must not be imposed unless it is designed to—

(a) reduce the risk of reoffending by the offender; or

(b) facilitate or promote the rehabilitation and reintegration of the offender; or

(c) provide for the reasonable concerns of victims of the offender; or

(d) comply, in the case of an offender subject to an extended supervision order, with an order of the court, made under section 107IAC, to impose an intensive monitoring condition.

(3) The kinds of conditions that may be imposed as special conditions include, without limitation,—

(a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:

(ab) residential restrictions:

(b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:

(ba) conditions prohibiting the offender from doing 1 or more of the following:

(i) using (as defined in section 4(1)) a controlled drug:

(ii) using a psychoactive substance:

(iii) consuming alcohol:

(c) conditions that the offender not associate with any person, persons, or class of persons:

(d) conditions requiring the offender to take prescription medication:

(e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:

(f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:

(g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

…

[15] Section 29B provides the Parole Board with the power to monitor the offender's compliance with release conditions through asking Ara Poutama Aotearoa | Department of Corrections (Corrections) for a progress report on the offender's compliance or requiring the offender to attend a hearing.[16] At a hearing that an offender is required to attend, the Parole Board "may, if it considers it appropriate to do so" vary any special conditions previously imposed, impose new special conditions on the offender, and make an order with the same effect as an interim recall order.[17]

[16] Section 56 permits an offender who is subject to release conditions imposed by the Parole Board, or a probation officer, to apply to the Parole Board at any time for the variation or discharge of any of the release conditions.[18] Section 58(1) provides that, on any such application, "the Board may direct the variation or discharge of any release condition".

[17] Section 61 provides the grounds for the recall of a parolee by the Parole Board:

61 Grounds for recall

The grounds for recall are that—

(a) the offender poses an undue risk to the safety of the community or any person or class of persons; or

(b) the offender has breached his or her release conditions; or

(c) the offender has committed an offence punishable by imprisonment, whether or not this has resulted in a conviction; or

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16 Section 29B(1) and (2).

17 Section 29B(5).

18 Sections 56(1) and (2). Mr Grinder's applications to vary his whereabouts and GPS conditions were made under s 56 of the Parole Act.

> (d) in the case of an offender who is subject to residential restrictions,—
>
> > (i) the offender is jeopardising the safety of any person at his or her residence; or
> >
> > (ii) a suitable residence in an area in which a residential restriction scheme is operated by the chief executive is no longer available; or
> >
> > (iii) the offender no longer wishes to be subject to residential restrictions; or
>
> (e) in the case of an offender who is subject to a special condition that requires his or her attendance at a residential programme,—
>
> > (i) the offender is jeopardising the safety of any person at the residence, or the order or security of the residence; or
> >
> > (ii) the offender has failed to remain at the residence for the duration of the programme; or
> >
> > (iii) the programme has ceased to operate, or the offender's participation in it has been terminated for any reason.

[18] Section 66(1) provides for the Parole Board to make a final recall order if satisfied that one or more of the grounds in s 61 have been established. Section 62(1) provides for the Parole Board to make an interim recall order on grounds that include being satisfied on reasonable grounds that the offender poses an undue risk to the safety of the community or to any person or class of persons.

Parole Board decisions and review

14 October 2021 decision

[19] Mr Grinder submitted to the Parole Board that there was no longer any reason for him to be subject to the GPS and whereabouts conditions. He said that the GPS monitoring at times created difficulties for his employment, it was sometimes difficult to charge the GPS monitor, and more generally the conditions limited his capacity to meet people and to undertake recreation and to travel as he would like to.

[20] The Board noted that:

(a) Mr Grinder was currently doing well on parole. He had good employment and accommodation and had recently received a promotion.

(b) The most recent psychologist report had concluded that, over the next five years, he was in the low risk range of committing further sexual offending while in the community having regard to his static and dynamic risk factors. The risk would most likely be to children known to him either via a relationship or association. This risk could be increased in the context of loneliness, rejection or emotional collapse. An unbalanced lifestyle including overworking might also increase his risk.

(c) The above report contrasted with the 2018 report prepared six months before Mr Grinder's release. That report assessed Mr Grinder as posing a medium-high risk of further sexual offending. Any offending would likely include children only recently or briefly known to Mr Grinder. Difficulties in relationships, loneliness and feelings of inadequacy would be potential triggers of reoffending.

(d) Mr Grinder stressed to the Parole Board that his past offending was very much related to children with whom he had spent time developing a relationship.

[21] In declining the application, the Parole Board described the conditions that Mr Grinder sought to have removed as providing a "significant protective factor". It took into account: that his extensive sexual offending included some children whom he had known only recently or briefly; Mr Grinder having acknowledged that he was "very clever" at understanding children to get them onside and knew how to offend when the chance of complaint was modest; and that his offending involved deception of parents and caregivers.

[22] The Parole Board concluded:

> 15. Whatever the current accurate assessment of risk is, it is not no risk. We consider that ensuring that Mr Grinder does not offend against children by the imposition of a GPS monitoring device to reassure the public that Mr Grinder is not going to places where children on their own might congregate and so providing him with an opportunity of developing relationships with those children out of sight of adults and out of contact with any of those supervising him is a reasonable protection against the risk of him doing so.
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> 16. While we appreciate that the presence of the monitoring device may limit some of Mr Grinder's prosocial opportunities we consider that is modest. In the circumstances we do not consider that changes our assessment of risk to any significant degree. While we acknowledge the inconveniences of having a GPS monitoring device, that inconvenience in our view pales into insignificance when compared with the potential risk that Mr Grinder has toward young children.

27 January 2022 review

[23] Mr Grinder applied for review of the Parole Board's decision.[19] One of the grounds was that the Parole Board was in error in noting that Mr Grinder was not "no risk" as the correct test was whether he was an "undue risk".

[24] The Panel Convenor rejected this for the following reasons:

> 30. The Board did not have to form a view about whether that was a low risk or the higher risk as contained in the 2018 risk assessment. It also did not have to establish that without the special conditions Mr Grinder was an undue risk. Special conditions mitigate risk. Sometimes they are necessary to ensure that an offender is no longer an undue risk. Sometimes they simply enhance risk mitigation for an offender who is already assessed as falling well below the undue risk threshold.
>
> 31. Section 15(2) simply requires the Board to consider whether the special conditions that were at issue remained designed to reduce the risk of offending by Mr Grinder. The Board had to make that decision with regard to the paramount consideration of community safety in section 7(1).
>
> 32. In Mr Grinder's case the Board concluded that the conditions remained designed to reduce Mr Grinder's risk of reoffending. The Board's reasons were clearly stated and included the following:

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[19] Section 67.

a) the very extensive sexual offending committed by Mr Grinder, some of which was in relation to children that he had only known relatively recently or briefly;

b) Mr Grinder's recorded acknowledgment (apparently during the hearing) that he was very clever at understanding children, how to get them onside to manipulate them and their [parents'] feelings, how to approach and maintain a relationship and undertake sexual offending when he felt the chance of complaint was modest; and

c) that at this time the special conditions provide a reasonable protection against the risk of Mr Grinder going to places where children might congregate and developing a relationship with those children out of sight of adults and out of contact with any of those supervising him.

33. Inherent in the reasons set out in the Board's decision was an assessment that, at this time, the special conditions were not more onerous, and were not being imposed for longer[,] than was consistent with … the safety of the community. The continuation of the conditions was proportionate to the risk posed by Mr Grinder (for the reasons set out in paragraph 32 above).

[25] The Panel Convenor also rejected other grounds raised in Mr Grinder's review application but they are not relevant for present purposes.

High Court decision

[26] In the High Court, Mr Grinder pleaded four grounds of review.[20] Most relevantly they included that the Parole Board had applied the wrong test when considering whether to discharge the GPS and whereabouts conditions that were the subject of Mr Grinder's application. For Mr Grinder, it was argued that the Parole Board was required to assess whether he presented an undue risk to the safety of the community if the conditions that were the subject of the application to vary were deleted.[21]

[27] The key part of the High Court decision on this ground of review is as follows:[22]

> [47] While neither of ss 15 or 29AA, which relate to special conditions, refer to "undue risk", I agree with Mr Ewen that the concept and application

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20 High Court judgment, above n 2, at [17].
21 At [20].
22 Footnotes omitted.

> of the undue risk test is not limited to those provisions of the Act where the term is expressly used. Those provisions do not arise, and are not to be interpreted, in a vacuum. Plainly, decisions that relate to special conditions of release are decisions that relate to the release of an offender, whether made before release or after. Conditions imposed under s 15 are "special conditions of release". Decisions as to their variation or discharge are inextricably linked to the terms of release. The undue risk test informs the Board's assessment at the time of imposition of conditions. Conditions are designed to take the parolee from undue risk to something less than that. The paramount consideration of community safety is engaged, and the imposition, variation or discharge of conditions requires an evaluation of risk. The Court of Appeal's decision in *Miller* gives support to that approach.
>
> [48] In my view, it would be artificial if the "undue risk" test applied to release and recall decisions, but not to special conditions of release. The same test – undue risk – must necessarily apply when the Board is deciding whether to continue, vary or discharge the special conditions.
>
> [49] I also reject the conclusion of the Convenor that undue risk questions are limited to release decisions only and that post-release conditions could be applied to mitigating risks less than "undue". As Mr Ewen put it, there will always be *a* risk of offending by any parolee, but the Act delineates the acceptable risk threshold. It is not "any" risk and, if not any risk, then what is the threshold? Logically, it is undue risk.
>
> [50] An undue risk analysis requires some judgement as to whether or not the offender can (in this case) have certain special conditions removed without that risk threshold being triggered. The closest the Board came to a risk assessment was its statement: "Whatever the current accurate assessment of risk is, it is not no risk." At no point does the Board set out explicitly what risk threshold it was applying or undertake an analysis of that risk. If it is the "no risk" threshold, that is plainly the wrong threshold.
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> [51] I accept Mr Ewen's submission that assessment of risk must be sufficient to ensure that the special conditions imposed (or retained) have a rational nexus to the s 15(2) purposes and are reasonably necessary and proportionate. …

[28] The Judge therefore upheld this ground of review and directed the Parole Board to reconsider Mr Grinder's application.[23]

Subsequent Parole Board decision

[29] The Parole Board reconsidered Mr Grinder's application at a hearing on 25 January 2023. The Board noted that Mr Grinder had been subject to the GPS condition since his release from parole and had been fully compliant with it. Nor was there any indication that he had breached the whereabouts condition. While

23 At [57] and [130]. The directions are set out at [8] above.

Mr Grinder had earlier convictions for not complying with release conditions, these were unrelated to the GPS or whereabouts conditions. The Parole Board was satisfied that GPS monitoring was no longer required having regard to the positive report from Mr Grinder's probation officer and Mr Grinder's unblemished compliance.

[30] As to the whereabouts condition, the Parole Board noted that there was no evidence that Mr Grinder had approached children at any of the specified areas. His pattern of offending in the past had been quite different. His offending had largely followed his befriending of parents and caregivers and grooming them as a precursor to offending against children. If the purpose of the condition was to limit the opportunity for direct contact with children, the Parole Board would not regard this as having a sufficient nexus with the offending to justify the condition.

[31] The Parole Board, however, considered that the purpose of the whereabouts condition was to limit the opportunities for contact with adults accompanying their children in places where children gather. It was satisfied that this had a nexus to his pattern of offending that had occurred over a 25-year span and to the wider public interest in reducing the pool of future victims. It considered the condition met the purposes of s 15(2) of the Parole Act in that reducing the pool of future victims reduced Mr Grinder's risk of reoffending.

[32] The Parole Board also considered that the condition was proportionate to the risk. It was a condition directed at risk management. And it was not an unreasonable limit having regard to his offending history, and the facts that he could obtain approval to enter the specified areas in some circumstances and had obtained approval in respect of one of his activities.

[33] The Parole Board acknowledged the psychologists' assessments that Mr Grinder shared the characteristics of offenders with a low risk of reoffending. However, that risk related to offending that was serious in nature. While Mr Grinder's living and social circumstances were stable and his thinking processes and approach to risk had reportedly changed, this change was relatively recent when measured against his 25-year history of offending and the period of time since being recalled

from his initial release. A relatively cautious and stepped view of his progress on parole was necessary and warranted. In the Parole Board's view:

> 16. … external measures or controls supplementing the personal changes he referred to are, in our view, an essential part of the framework to keep both the community and Mr Grinder safe.

[34] As to the issue on this appeal, the Parole Board said:

> 17. Finally, the Panel had paid particular attention to the High Court decision of Justice Gwyn in Mr Grinder's case, by approaching the application and viewing our assessment of the whereabouts condition through a lens of undue risk. We accept Ms Iggulden's point that other special conditions address risk issues more directly – for example restricting contact with children under 16. But that is not to say we should discharge the whereabouts condition on that basis. Similarly, we do not think it right to approach our task by asking ourselves the question whether Mr Grinder's presence in the community would pose an undue risk without the whereabouts condition. A similar argument could be made of other release conditions. We cannot approach risk management on a condition-by-condition basis. Rather, we approach the application to discharge the whereabouts condition on the basis of whether the condition is a reasonably necessary part of the framework of conditions directed to ensuring that his presence in the community will not pose an undue risk to the safety of children under the age of 16. In our assessment it does. We regard it as a reasonable, necessary and proportionate curtailment of his freedom of movement.

[35] The Parole Board discharged the GPS condition but declined to discharge the whereabouts condition. The whereabouts condition, along with all other special conditions to which Mr Grinder is subject, will expire on 31 March 2024.

Discussion

Submissions

[36] The Attorney-General and the Parole Board submit that Gwyn J in the High Court was incorrect to treat decisions on release, recall and conditions as the same. They submit the absence of "undue risk" from ss 15, 29B and 56 to 58 of the Parole Act is important. Undue risk is the test for release and recall decisions but the purpose of conditions is to reduce risk; and the correct approach to conditions is a proportionality analysis guided by s 7(2)(a) of the Parole Act, requiring that the

condition have a rational nexus to the legislative purpose, and be reasonably necessary and proportionate when considered with the other conditions imposed.[24]

[37] Mr Grinder, supported by the submissions of the CBANZ, submits that the Parole Act must be read subject to the New Zealand Bill of Rights Act 1990 (NZBORA). He agrees a proportionality analysis is required. He says that, because risk implies a continuum, there must be a measure of risk against which proportionality is assessed and the appropriate measure is undue risk. He says that, even if a condition can be justified in isolation, it will offend the requirement of least impairment to his rights if the other conditions as a package are sufficient to take his risk profile to below the undue risk standard.

Analysis

[38] The High Court decision is somewhat nuanced. It is capable of being read as requiring that a condition can only be maintained if, without it, a person will be an undue risk in the community. That is, it requires an assessment of undue risk in relation to the imposition or maintenance of each individual special condition (the first reading).[25] It is also capable of being read as the Parole Board approached the matter in its 25 January 2023 decision. That is, on the basis of whether the condition is a reasonably necessary part of the framework of conditions directed to ensuring that the person's presence in the community will not pose an undue risk (the second reading). If the first reading is what was intended by the Judge, then we do not agree with it for the following reasons.

[39] First, the statutory wording does not require an undue risk assessment on a condition-by-condition basis. Section 7 distinguishes between:

(a) "decisions about, or in any way relating to, the release of an offender" (s 7(1)), in respect of which the paramount consideration "in every case" is the safety of the community;

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24 This was accepted by Gwyn J: see High Court judgment, above n 2, at [51], which we have quoted at [27] above.

25 Mr Grinder submits this is not the correct interpretation, although aspects of his submission nevertheless appeared to support it. The Attorney-General and the Parole Board are concerned to ensure that is not how it is to be read.

(b) "the Board's decisions" (s 7(2)), which must be guided by the principles set out in s 7(2)(a)–(d), which include that offenders "must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community"; and

(c) when "any person is *required* under [pt 1] to assess whether an offender poses an *undue risk*" (s 7(3)),[26] the person must consider the person's likelihood of further offending and the nature and seriousness of any likely subsequent offending.

[40] The section therefore mandates an undue risk assessment only when it is required under pt 1 (which concerns parole and other release from detention). Under pt 1, an "undue risk" assessment is required when the Parole Board makes its decision under s 28 (whether or not to release an offender on parole) and is also a basis for recall (s 61).[27] Importantly, an undue risk assessment is not specified in relation to the special conditions that the Parole Board may impose (ss 29AA and 15), nor when considering whether to discharge or vary conditions (ss 29B and 57).

[41] Rather, the Parole Board's power to impose special conditions or to vary or discharge them is broadly framed as decisions it "may" make. These decisions are subject to the paramount consideration of the safety of the community (s 7(1)) and that release conditions must not be more onerous or last longer than is consistent with the safety of the community (s 7(2)). They are not covered by s 7(3) — the undue risk assessment.

[42] Moreover, the kind of special conditions that may be imposed is set out in s 15(2). None of them are specifically stated to be to bring an offender's risk down from one that is an undue risk of reoffending to something less than that:

(a) Of them, only s 15(2)(a) relates directly to reducing the offender's risk of reoffending on parole. It does not, however, specify that any such

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[26] Emphasis added.

[27] Undue risk assessments also appear in pt 1 in relation to early referral for parole (s 25), early release for deportation (s 55) and interim recall orders (s 62).

condition must reduce the risk of offending from one that is undue to something less than that.

(b) Section 15(2)(b) (facilitating or promoting the offender's rehabilitation and reintegration) is indirectly about the offender's risk, but is more directed to stabilising the offender for the ongoing safety of the community (rather than reducing an offender's risk of reoffending from one that is undue to something less than that).

(c) Section 15(2)(c) (providing for the reasonable concerns of victims of the offender) is directed to victim concerns rather than directly about the offender's risk of offending and whether any such risk is undue.

(d) Section 15(2)(d), relating to the imposition of intensive monitoring conditions where an offender is subject to an extended supervision order under a different part of the Parole Act, is not relevant here.

[43] Secondly, the use of "undue risk" in relation to release and recall decisions but not in relation to special conditions, is consistent with the parole scheme under the Parole Act. The "undue risk" wording relates to decisions that are directed to custodial detention as a possible outcome (either in terms of a release from or a return to custody). Custodial detention is not a possible outcome on an application to vary or discharge release conditions. Instead, the issue is on what basis an offender should remain outside of custodial detention.

[44] In other words, decisions on release and special conditions (or their discharge and variation) are linked but different. Release on parole can only be directed if the offender will not pose an undue risk to the safety of the community. While special conditions may in some cases bring a high-risk offender down from a level of undue risk to a risk that is not undue (so that they may be released), they may also be imposed and maintained when an offender is considered a low risk of reoffending and is not considered an undue risk, having regard to the nature and seriousness of any likely subsequent offending. That is because they may assist with stabilising the offender so that their risk level does not rise to an undue one and so trigger a recall. Conditions

directed at the offender's rehabilitation and reintegration may even assist to reduce an offender's risk to a negligible or de minimis level, and conditions with this purpose may still be imposed as consistent with the ongoing safety of the community.

[45] This is demonstrated by Mr Grinder's case. Although Mr Grinder was assessed as sharing the characteristics of offenders with a low risk of reoffending, there were other factors that warranted a cautious and stepped approach for the reasons the Parole Board explained. His offending was serious, and his progress in his thinking processes and risk were relatively recent when measured against his 25-year history of offending and the period of time since being recalled from his initial release. These were matters relevant to whether the whereabouts condition was necessary for the safety of the community, without it being necessary to evaluate whether Mr Grinder would be an undue risk of reoffending without that condition.

[46] Thirdly, a condition-by-condition approach to undue risk may have practical implications which suggest that this approach cannot have been intended. The Parole Board is concerned that, if an individualised approach to imposing, varying and discharging each special condition against an undue risk threshold is required, it would contemplate multiple individualised assessments, may involve an element of circularity (as undue risk for the purposes of a release decision is assessed having regard to the support and supervision available in the community (s 28(2)(a)), would not be consistent with the fact that special conditions are often interrelated, and would suggest an element of precision that is not consistent with the nature of risk assessment (where conditions are carefully calibrated so that offenders who are subject to them sit just below the undue risk threshold).

[47] Fourthly, existing authority does not require a condition-by-condition approach to undue risk. The High Court Judge relied on this Court's decision in *Miller v New Zealand Parole Board* where it was said:[28]

> [129] Given the overall scheme of the [Parole] Act and the human rights jurisprudence as to arbitrariness of detention, we conclude that the discretion under s 66 to make a final recall order ought only to be exercised where public safety is in issue. Where the ground specified in s 61(a) is made out, the Board will necessarily be satisfied that the offender poses an undue risk to public

[28] *Miller v New Zealand Parole Board* [2010] NZCA 600.

> safety. The same is likely also to be true in respect of s 61(d)(i) and (e)(i). The issue arises more acutely in relation to the other grounds provided for in s 61. We are of the view that when those grounds are made out, the Board should address public safety directly. If the Board, having done so, is of the view that further detention of the offender is not required for purposes of consistency with the public safety of the community (cf s 7(2)(a)) and is satisfied that the offender can remain in the community without posing an undue risk to public safety (cf s 28(2)), the discretion to recall should not be exercised. In putting the test in this slightly awkward and labourious way, we are trying to ensure an approach which is aligned as closely as possible to the statutory language. …

[48] However, this passage is about how the grounds for recall (some of which are more directly related to public safety than others) should be assessed. This Court was making the point that all grounds should be assessed against the criteria in s 7(2)(a) (an offender must not be detained any longer than is consistent with the safety of the community). As noted earlier,[29] this reflects the fact that s 7(2)(a) applies to all decisions of the Parole Board. This Court was also making the point that the discretion to recall should not be exercised unless the Parole Board is satisfied the offender will pose an undue risk. This reflects that, under s 28(2), release on parole is available if the Parole Board is satisfied that the offender does not pose an undue risk. In other words, release and recall should be subject to the same threshold because they are counterparts to one another. The decision in *Miller* was not about whether the undue risk threshold applied to the imposition, discharge or variation of special conditions, the issue in this case.

[49] The Attorney-General referred us to *Gilmour v Chief Executive of the Department of Corrections* as the more apposite authority.[30] That case concerned the content of parole assessment reports from Corrections. It was argued that these reports needed to address the issue of undue risk.[31] This Court did not accept that argument. It noted that the Parole Act "is explicit in respect of those who are required to assess the issue of undue risk and when they are required to do so".[32] An undue risk assessment was not specified as applying to the content of the reports and the overall statutory scheme was inconsistent with such a requirement.[33]

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[29] Above at [39(b)].
[30] *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250.
[31] At [2].
[32] At [34].
[33] At [34]–[36].

[50] We agree that *Gilmour* provides some support for the view, albeit that it was in a different context, that the "undue risk" assessment applies to decisions to release and recall because that is where the Parole Act explicitly requires that assessment, and is not the threshold against which each special condition is to be tested because the Parole Act has not explicitly required that. More importantly, we consider that the passage the Judge relied on in *Miller* does not support the view that conditions are designed only to take the parolee from undue risk to something less than that. Nor does it suggest it would be artificial if the undue risk test applied to release and recall decisions, but not to special conditions of release.

[51] Finally, we consider that an NZBORA consistent interpretation of the Parole Act does not require that the necessity of special conditions be tested against the undue risk threshold.[34] We accept that special conditions can have NZBORA implications. In particular, as relevant here, the whereabouts condition limits the rights to freedom of association and freedom of movement.[35] It is the very nature of release on parole, subject to conditions that address the offender's risk, that the offender's rights typically will be curtailed. For the reasons we have discussed, that may occur even when an offender is assessed as a low risk of offending and does not present an undue risk of reoffending. The Parole Act seeks to ensure that this curtailment is a reasonable limit, as is required by s 5 of NZBORA, through the proportionality requirement in s 7(2)(a) that conditions must not be "more onerous, or last longer, than is consistent with the safety of the community". An NZBORA-consistent approach to conditions is therefore already inbuilt into the Parole Act scheme.

[52] In short, the undue risk assessment applies to release on parole and recall decisions. Special conditions are part of the framework in which the Parole Board makes its undue risk assessment for release and recall decisions. However, special conditions can be imposed or maintained even if they are not necessary for the purpose

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34 Section 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that where an enactment can be given a meaning that is consistent with the rights and freedoms contained within NZBORA, that meaning "shall be preferred to any other meaning". The effect of s 6 was discussed in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [44]–[73] per Winkelmann CJ, [174]-[185] per O'Regan and Arnold JJ and [287]–[302] per William Young J. Glazebrook J considered it was unnecessary to decide on the limits to the use of s 6, because parliamentary purpose coincided with the proper interpretation of the relevant provision: at [244], n 348.

35 NZBORA, ss 17 and 18.

of taking a parolee down from an undue risk to something less than that. They may address the offender's risk of reoffending even when that risk is not an undue one provided they are not "more onerous, or last longer, than is consistent with the safety of the community"[36] and are for the purposes specified in s 15(2)(a)–(d).

[53] This means that we have found that, if and in so far as the High Court found that a special condition can only be maintained if, without that condition, the person will be an undue risk, and that the purpose of special conditions is to take an offender from undue risk to something less than that, the decision was in error.

Result

[54] The appeal is allowed.

[55] The High Court decision is set aside.

[56] As Mr Grinder is in receipt of a grant of legal aid, we make no order for costs.

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36 Parole Act, s 7(2)(a).