IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-389
[2022] NZHC 3188

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	BRETT DAVID GRINDER Applicant
AND	NEW ZEALAND PAROLE BOARD First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing: 18 October 2022

Counsel: D A Ewen for the Applicant
First Respondent abides
C A Griffin for the Second Respondent

Judgment: 30 November 2022

JUDGMENT OF GWYN J

Solicitors:
Ord Legal, Wellington
Ms Owen, Wellington
Crown Law, Wellington

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[1] This is an application for judicial review of a decision by the Parole Board (Board) to refuse to vary the applicant's conditions of parole and confirmation of that decision by a Parole Board Panel Convenor (Convenor) on review.

Background

[2] Mr Grinder, the applicant, is on life parole, having been sentenced to preventive detention by the High Court at Auckland in 2003, for sexual offending against children and young people between 1976 and 2001.

[3] The applicant was released on parole by the Board on 1 April 2019, subject to a range of standard and special conditions of release. The special conditions will expire on 31 March 2024.

[4] Mr Grinder had previously been released from prison in 2011 and subsequently recalled to prison for non-compliance on 5 July 2012, for breaching a non-association order.

Application to vary

[5] On 9 February 2021 Mr Grinder applied under s 56 of the Parole Act 2002 (the Act) to vary his conditions of parole by deleting three of the special conditions (application to vary). Two are electronic monitoring (EM) conditions and the third is a "whereabouts" condition.

[6] Mr Grinder had previously sought to vary or discharge the whereabouts condition and the EM conditions, at monitoring hearings held at six and 12 months after his release in April 2019. The Board's decision at the six months hearing (22 October 2019) was that there was good reason to retain the whereabouts condition, which the Board said remained both relevant and necessary "until we can be satisfied that Mr Grinder is both established in the community and demonstrates sustained compliance with release conditions that mitigate his risk." The Board also concluded that electronic monitoring of the whereabouts release condition remained an essential condition "supporting Mr Grinder's transition from prison to the community."

[7] In its 12 month progress hearing on 12 March 2020, the Board noted that Mr Grinder was "an opportunistic offender" and it did not want to provide him with the opportunity to offend out in the community currently when he is not appropriately restricted from areas where children are likely to be. For that reason, it refused the application for variation.

[8] When the Board convened to hear the application to vary on 27 May 2021 it had before it written submissions from Mr Grinder's counsel, an 11 May 2021 assessment from David Riley, a psychologist and former Director of the Department of Corrections Psychological Service, and a memorandum from Mr Grinder's probation officer, who advised that Community Corrections did not oppose Mr Grinder's application.

[9] The Board noted that the Riley report "did not tailor it to Mr Grinder's dynamic risk factors". The Board said that the report from Mr Grinder's probation officer did not fully address the risk issues, including those arising from his current employment. The Board sought a psychological assessment of Mr Grinder's current risk, with recommendations as to how that risk could be managed. It adjourned the application until October 2021 for that purpose.

[10] The Board reconvened on 14 October 2021, having received a psychological report from Dr Sheree Crump, dated 6 September 2021. Dr Crump assessed Mr Grinder as at a low risk of offending.

[11] Further written submissions were provided by Mr Grinder's counsel and an updating assessment from Mr Riley, dated 27 September 2021. The Community Probation Service also provided an updated memorandum, which again did not oppose the application to vary.

[12] The Board also had before it past assessments contained in reports from psychologists Marilyn Farmer, dated 13 April 2017, and Sarah Ellis, dated 20 September 2018, both of which had been prepared while the applicant was still in prison.

[13] The Board heard and, in a decision dated 14 October 2021, refused the application to vary (the decision). On 11 November 2021 the applicant applied under s 67 of the Act for a review of the decision.

[14] On 27 January 2022 the Convenor reviewed the Board's refusal and upheld the decision for materially the same reasons as given by the Board.

The special conditions

[15] The special conditions which Mr Grinder sought to have varied are:

(a) Special condition (6) – to comply with the requirements of electronic monitoring and provide unimpeded access to your approved residence by a probation officer and/or representatives of the monitoring company for the purposes of maintaining the electronic monitoring equipment as directed by probation officers.

(b) Special condition (7) – to submit to electronic monitoring as directed by a probation officer in order to monitor your compliance with any conditions relating to your whereabouts.

(c) Special condition (10) – not to enter or loiter near any school, early childhood centre, park, library, swimming pool, other recreational facility, church or other area specified in writing by a probation officer, unless you have the prior written approval of a probation officer, or unless an adult who has been approved by a probation officer in writing is present.

Grounds of review

[16] The applicant says that in refusing the application to vary, and in confirming that refusal on review, the Board and the Convenor exercised statutory powers of decision which are amenable to review by this Court.

[17] The applicant pleads five grounds of review. He says that the Board erred in that it:

(a) Applied the wrong legal test when considering whether to discharge the EM conditions;

(b) Inferentially made an unreasonable assessment of the applicant's risk to the community, by placing weight on outdated psychometric assessments of risk, in preference to contemporaneous assessments, and gave no reasons for doing so;

(c) Made an unreasonable assessment of the applicant's risk by reference to a hypothetical offending scenario that had no evidential foundation;

(d) Took into account irrelevant considerations, namely public confidence in the operation of parole in general; and

(e) Failed to consider a mandatory consideration, namely whether the continuation of the conditions would increase the applicant's risk profile.

The respondents

[18] The Board, as the decision-maker, abides the decision of the Court in the usual way. The Attorney-General appears as a contradictor.

First ground of review - wrong legal test

[19] The first ground of review is that the Board applied an incorrect legal test.

Submissions

[20] The applicant says that in considering the application to vary, the Board was required to apply the principle that parolees must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community. That principle required the Board to assess whether the applicant

presented as an undue risk to the safety of the community if the conditions that were the subject of the application to vary were deleted.

[21] Mr Ewen's submission is that, as well as being subject to the limitations within the Act itself, the exercise of s 15 powers must also be consistent with the New Zealand Bill of Rights Act 1990 (Bill of Rights).

[22] The applicant says that, instead of applying an undue risk test, the Board applied a "no risk" standard. Mr Ewen points to the Board's decision which said:

> 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.

[23] On review, the Convenor determined that the undue risk test did not apply to an application for the discharge of the special conditions of parole. Inferentially, the Convenor said the undue risk test was confined to decisions regarding the grant of parole. Having noted the Board's statement that "Whatever the current accurate assessment of risk is, it is not no risk", the Convenor said:

> 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.

[24] Ms Griffin's overarching submission for the Attorney-General is that the proceeding involves review of a specialist, evaluative discretion of the Board and the decision discloses no reviewable error. While the Attorney-General acknowledged that the position taken by Community Corrections of not opposing Mr Grinder's application was a reasonable and considered position, notwithstanding that, the Board was not constrained by that position from reaching its own view on the application to vary and the evidence before it. The Board's decision was lawful and open to it and the Board was entitled to take a careful approach to the proposed removal of protective

special conditions designed to ensure the safety of vulnerable children from harm in the community. It considered, and was entitled to consider, the application against the background of Mr Grinder's offending, the specialist reports as a whole, the previous parole history and Mr Grinder's overall risk to children of further offending on parole.

[25] Specifically in response to the first ground of review, the Attorney-General says there was no error of law in the legal standard adopted by the Board. On an application to vary or discharge special conditions of parole the Board did not have to establish that without the special conditions Mr Grinder was an undue risk, in order to justify those conditions continuing. The Board's statement "Whatever the current assessment of risk is, it is not no risk" was stated as a factual finding not a legal standard.

[26] Ms Griffin submits that the starting point is the "guiding principles" of the Act, set out in s 7; with particular emphasis on s 7(3), which specifically refers to "undue risk".

[27] Ms Griffin says that the Act deliberately uses the phrase "undue risk" when that is the assessment that is required. The concept of "undue risk" and "risk" are not interchangeable within the scheme of the Act. The requirement to assess "undue risk" appears in those sections of the Act which govern the process for making decisions about either releasing an offender from prison or putting an offender back into prison (recall decisions).

[28] There is no reference to "undue risk" in the power to set special release conditions under s 29AA; nor under s 29B(2) which is the Board's power to oversee conditions at monitoring hearings. Further, s 15 itself, which is the provision allowing the Board to impose any one or more special conditions, does not prescribe "undue risk" as the threshold for the imposition of conditions.

[29] There is no reference to "undue risk" in s 56 which is the provision allowing an application for variation or discharge of conditions. Sections 57 and 58 which set out the procedure for the Board in determining an application for variation or discharge allow for the exercise of the Board's discretion.

[30] Ms Griffin relies on the Court of Appeal decision in *Gilmour v Chief Executive of the Department of Corrections*.[1] *Gilmour* concerned a parole assessment report to be provided to the Board under s 43(1)(c) of the Act and the question whether that provision required the Department of Corrections to address the issue of "undue risk". The Court of Appeal said it did not, holding: "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".[2]

[31] Counsel for the Attorney-General also relied on *Ryder v Parole Board*.[3] There the appellant had been released on parole but became susceptible to recall to prison, under s 61(e)(iii) of the Act, for non-compliance. An order for interim recall was made and then the Board had a hearing as to whether a final recall order should be made. The Board determined that Mr Ryder should be recalled to prison.

[32] On appeal to the High Court counsel for Mr Ryder submitted that the "undue risk" standard from s 7(3) was engaged when the Board was considering a final recall decision under s 66. The Court referred to a number of provisions in the Act which use the undue risk standard and noted that on many occasions the standard of undue risk must be applied by the Board, but s 66 does not expressly refer to the undue risk test.

[33] Justice Fogarty said:[4]

> …the question resolves to this: was the Board required by the terms of s 66 or any provision of the Parole Act to assess whether Mr Ryder posed an undue risk if placed with his partner …?

[34] The Judge concluded that s 7(3) was not engaged when making a decision under s 66, stating "… s 7(3) only applies when the Board is required to assess whether the offender does pose an undue risk."[5]

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1 *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250 (the CA judgment).
2 At [34].
3 *Ryder v Parole Board* HC Christchurch CRI-2006-409-67, 7 April 2006.
4 At [18].
5 At [18].

Analysis

[35] The relevant provisions of the Act for this purpose are ss 7, 15, 28, 29AA, 61 and 66.

[36] The guiding principles are set out in s 7:

> **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
>
> …
>
> (3) When any person is required under this Part to assess whether an offender poses an undue risk, the person must consider both—
>
> (a) the likelihood of further offending; and
>
> (b) the nature and seriousness of any likely subsequent offending.

[37] The exercise of the Board's discretion to release must be informed by s 7.[6]

[38] Section 15 of the Act provides the power for the Board to impose special conditions and sets certain limitations: a special condition must not be imposed unless it is designed to reduce the risk of reoffending by the offender; or facilitate or promote the rehabilitation and reintegration of the offender; or provide for the reasonable concerns of victims of the offender.[7]

[39] Section 28 allows the Board to direct release of an offender on parole:

> **28 Direction for release on parole**
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> (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.

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6 Part 1 of the Act applies to all offenders: Parole Act 2002 (Act), s 8.

7 Act, s 15(2).

(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.

…

[40] Section 29AA of the Act provides for special release conditions and prescribes how the special conditions under s 15 may be imposed when the Board is releasing an offender on parole:

29AA Special release conditions

(1) In releasing an offender on parole, the Board may impose any special conditions on that offender that the Board specifies.

(2) Special conditions imposed under subsection (1) are in force for the period that the Board specifies.

…

[41] Section 56 of the Act allows for an application for variation or discharge of conditions. Section 57 sets out the procedure for determining such applications and s 58 provides for the Board's determination of an application. None of these provisions refer to the criteria on which release conditions may be varied or discharged.

[42] Section 61 of the Act provides for a prisoner to be recalled to prison:

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

(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.

[43] Section 66 allows for the Board to make a final recall order, recalling an offender to continue serving his or her sentence in prison, if satisfied on reasonable grounds that one or more of the grounds for recall in s 61 have been established.

[44] I consider first ss 56, 57 and 58, regarding the application for, procedure in relation to, and determination of, an application for variation or discharge of conditions. These are essentially procedural provisions. Nothing turns on the absence of a reference to undue risk in those provisions.

[45] Ms Griffin put some reliance on s 7(3), but I think that provision is directed at a different issue. It defines mandatory considerations in any assessment of what constitutes "undue risk", but does not purport to define or limit *when* the undue risk test applies. It seems to me that the passage in *Ryder*,[8] relied on by the Attorney-General, is relevant only on the limited point of what is entailed when a person is required to assess undue risk.

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8 *Ryder v Parole Board*, above n 3, at [18].

[46] Even if *Ryder* were authority for the broader proposition advanced by Ms Griffin, it predates the Court of Appeal's decision in *Miller v New Zealand Parole Board*.[9] *Miller* arose in the context of a recall decision under s 61 of the Act. While recall under s 61(a) explicitly requires the Board to be satisfied that the offender poses an undue risk to the safety of the community, the grounds for recall in s 61(b)-(d) do not state a risk threshold. Notwithstanding, the Court of Appeal found that, on the scheme of the Act, the "undue risk" test was equally applicable to those provisions where a threshold of risk was not stated (on the basis of the paramount consideration of public safety).

[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 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".[10] 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,[11] and the imposition, variation or discharge of conditions requires an evaluation of risk. The Court of Appeal's decision in *Miller*[12] 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

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9 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [129].
10 See heading to s 29AA.
11 Section 7(1).
12 *Miller v New Zealand Parole Board*, above n 9, at [129].

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.[13] 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.[14] If it is the "no risk" threshold, that is plainly the wrong threshold.

[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.[15] The combined effect of s 8(g) of the Sentencing Act 2002[16] and s 15 of the Parole Act is—as Justice Williams put it in *Patterson v R*[17]—similar to that which a Bill of Rights approach would require. That is, a rational nexus to the legislative purpose and to be reasonably necessary and proportional when considered with other conditions to be imposed.[18]

[52] The Court of Appeal's decision in *Gilmour* does not assist the Attorney-General's submission that the "undue risk" test does not apply here. It does not define the circumstances under which the Board is required to apply an undue risk test. *Gilmour* arose under s 43 of the Act, which sets out the information that the Department of Corrections must provide to the Board when an offender is due to be released at his or her statutory release date, or to be considered by the Board for parole. Subsection 43(1)(c)(3) provides for provision to the Board "in the case of an offender detained in a prison, a report by the Department of Corrections". That case was brought by Mr Gilmour, a probation officer employed in the Community Corrections

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13 *Aicken v New Zealand Parole Board* HC Dunedin CRI 2006-412-000010, 12 April 2006 at [11].
14 At [10]-[11], in the context of a recall decision under s 61(a).
15 *Patterson v R* [2017] NZCA 66 (CA Judgment) at [18].
16 Sentencing Act 2002, s 8(g) provides: "In sentencing or otherwise dealing with an offender the court – must impose the least restrictive outcome that is appropriate in the circumstances ...".
17 *Patterson v R* [2017] NZHC 49 (HC Judgment) at [38].
18 *Patterson v R* (CA Judgment), above n 15, at [18] discussing s 93(3) of the Sentencing Act 2002.

Service. Mr Gilmour was initially involved in the preparation of a Parole Assessment Report (PAR) for a Mr P, but his work was effectively overridden. Mr Gilmour sought a declaration that a probation officer who is charged with preparing a PAR is required to express an opinion about the risk posed by a particular prisoner if released.[19] Although the Act is silent on the content of a PAR, Mr Gilmour submitted that the required content can be inferred from other provisions in the Act.

[53] The High Court held that a PAR provided to the Board for a parole hearing is not required to address whether the offender might pose an undue risk to the safety of the community. Rather, it is the Board "and no other" who is expressly charged with assessing risk and making parole decisions.[20] The purpose of s 43 is to ensure that the Board has before it the information it needs to make that risk assessment:[21]

> … there is nothing to suggest that the Department, probation officers or any of the other persons or entities required to report under s 43 have either an advisory or recommendatory role in that regard.

[54] Mr Gilmour's primary ground of appeal was that the High Court was wrong to find that s 43(1)(c) does not require the Department to address the issue of undue risk in the report it provides under that paragraph. The submission for Mr Gilmour was that if the Board may only make a decision to release an offender on parole if satisfied that the offender will not pose an undue risk (s 28(2)), it is clear that all relevant "risk" information available on the issues of "safety of the community or person or class of persons" should be included in the PAR.

[55] The Court of Appeal acknowledged that assessment of risk lies at the heart of the Board's task, but it is the Board, not the Department, nor any individual parole officer or case manager, that must undertake that risk assessment.[22] The Court said:[23]

> There are two scenarios in which it is envisaged that parole officers may make an assessment of "undue risk". These circumstances are explicitly defined and are limited in nature. They are in no way relevant to the s 43(1)(c) report.

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19 *Gilmour v Chief Executive of Department of Corrections* [2016] NZHC 1352 (the HC Judgment) at [3].
20 At [48].
21 At [49].
22 *Gilmour v Chief Executive of Department of Corrections* (the CA Judgment), above n 1, at [33].
23 At [34] (footnotes omitted).

[56] I agree with Mr Ewen that the Court of Appeal's decision in *Gilmour* is authority only for the proposition that a PAR is not required to focus on undue risk. The decision is not definitive on the question of whether the Board in this case ought to have applied an undue risk test.

[57] I uphold the first ground of review.

Second ground of review - unreasonable finding of fact/wrong weight on expert assessments

[58] The second ground of review is that the Board acted irrationally in placing greater weight on the risk assessments from Ms Farmer and Ms Ellis, dated 2017 and 2018 respectively, which were prepared when the applicant was still a serving prisoner, than it did on the two contemporaneous reports from Dr Crump and Mr Riley. The applicant says the Board did not have a reasoned basis for doing so.

[59] On review, the Convenor determined that weight was a matter entirely for the Board.

Submissions

[60] Mr Ewen notes that at the October 2021 hearing the Board had two contemporary assessments of Mr Grinder's risk profile, from Mr Riley and Dr Crump, both of which concluded that he was at a low risk of reoffending. However, the Board relied principally on the September 2018 report from Ms Ellis which assessed Mr Grinder as posing a medium-high risk of sexual offending. The Board omitted reference to the context in which that opinion from Ms Ellis was given – her medium-high risk assessment was limited by the circumstances of the assessment, that is, the prison environment.

[61] While Mr Ewen acknowledges that the Board could accept or reject evidence and was not bound uncritically to accept the opinions of Dr Crump or Mr Riley, if it was to depart from the 2021 reports in favour of the 2018 report, the passage of time alone required it to provide cogent reasons for using a risk assessment from the older

report. It did not do so. Mr Ewen says that failure in itself rendered the Board's decision unreasonable.

[62] Ms Griffin in response says that the Board was familiar with Mr Grinder's background from his three attempts to vary his conditions from the early months of his parole. The whereabouts and EM conditions were time limited and set to expire on 31 March 2024. At the time Mr Grinder's s 56 application was made in February 2021 he had not yet completed two years of the specified term. By the time of the hearing in October 2021, half of the term had lapsed. A cautious and steady approach to easing of conditions at the halfway point meant that the Board's decision was open to it.

[63] Ms Griffin says Mr Grinder's offending history against children was extremely serious over an undetected period of 25 years. His offending was described as "opportunistic and manipulative". The offence history details the opportunistic means by which Mr Grinder gained access to children not all of whom he knew well. The whereabouts and monitoring conditions were tailored to prevent Mr Grinder meeting and forming new relationships over any periods of time with children he did not yet know. This risk was not fully articulated in the Riley and Crump reports.

[64] Further the Board did evaluate risk as it was required to do by referring to s 15(2)(a) and the overarching principle in s 7(2)(a) of the Act. It concluded there was risk which was mitigated by the conditions. This did not require the Board to conduct the assessment required by s 7(3) to form the view that the continuation of the special conditions was a reasonable and proportionate response to Mr Grinder's risk.

[65] For those reasons, the Attorney-General says the Board's decision was not irrational.

Analysis

[66] The Board had to consider the ongoing need for the conditions that Mr Grinder sought to discharge and, in doing so, to assess his current risk. In light of my finding under the first ground of review that the Board had to assess risk in terms of "undue

risk", that required consideration of both likelihood and nature and seriousness of any risk (s 7(3)).

[67] It is clear from s 7(2)(c) ("decisions must be made on the basis of all the relevant information that is available to the Board at the time") that the Board must have before it relevant information in order to make properly informed decisions.

[68] That statutory duty reflects the common law principle that a public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the *Tameside* duty since it derives from Lord Diplock's speech in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*:[24]

> … the question for the court is, did the [decision-maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

[69] What is a sufficient inquiry in *Tameside* terms is highly contextual, but here the Board had itself identified what was necessary or "sufficient" to enable it to answer the question before it. When the Board convened to consider Mr Grinder's application on 27 May 2021, the expert reports it had before it (other than the Riley and Probation Officer's reports that accompanied the application) were from Ms Farmer, dated 13 April 2017 and Ms Ellis, dated 20 September 2018. Ms Farmer's assessment predated Mr Grinder's release from prison by a year and Ms Ellis's report by approximately six months. Both the Farmer and Ellis assessments concluded that, considering both static and dynamic risk factors, Mr Grinder was assessed as posing a medium-high risk of sexual offending.

[70] The Board correctly identified that it did not have sufficient information and that Mr Grinder's then-current dynamic risk profile was an essential consideration for the Board. It adjourned the hearing of the application specifically for the purpose of obtaining such a report, saying:

> The Board is not satisfied that we have sufficient information before us to determine the application. Mr Riley's report, though helpful in providing background information as to relevant assessment tools, did not tailor it to

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[24] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] 3 All ER 665 (HL) at 696.

> Mr Grinder's dynamic risk factors. Nor did the probation officer's report fully address the risk issues, including those arising from his current employment.
>
> …
>
> The application is adjourned until October this year. The Board requests a psychological assessment of Mr Grinder's current risk with recommendations as to how that risk could be managed.

[71] By the time the Board reconvened in October 2021, it had before it the 6 September 2021 report from Dr Crump and an addendum report from Mr Riley. Both of those assessments, taking into account the dynamic risk factors, assessed Mr Grinder as at a low risk of reoffending. Dr Crump reached her assessment having first canvassed in some detail Mr Grinder's "current functioning" in the community, since his release on 18 April 2019. Both reports also included recommendations as to how the current risk could be managed.

[72] Under the heading "Assessment of current risk/potential to re-offend", Dr Crump concluded:

> In summary, using the multi-method approach to risk assessment, clinical opinion, and combining rules for the STATIC-99R and the STABLE 2007, Mr Grinder is assessed as being in the low risk range (relative to other individuals with similar offending) of committing further sexual offending while in the community over the next five years.

[73] The Riley addendum notes that Mr Grinder's last assessment on the Violence Risk Scale – Sex Offender Version (VRS-SOV) was conducted immediately prior to his release from prison. Mr Riley notes that, for that reason, none of the structured assessment of change on the various items which make up that scale was possible. Since his release, Mr Grinder has functioned well and, Mr Riley notes, he would "have considerable difficulty regarding Mr Grinder's risk currently as being any greater than average, and I would anticipate his risk of further sexual recidivism to progressively decrease further over time."

[74] Both Dr Crump and Mr Riley noted the evidence of decreasing risk with age and as a function of increasing time offence-free in the community.

[75] I agree with Mr Ewen's submission that the difference between the 2018 report and the 2021 reports was more than the mere passage of time. The 2018 Ellis report was completed while Mr Grinder was still in prison and specifically noted:

> Overall, Mr Grinder's management of risk appears to have been stable over time since his recall to prison and further change in terms of risk reduction is unlikely to occur until he had the opportunity to be tested across different contexts.

[76] Similarly, the Farmer report had noted:

> However it is noteworthy that due [to] the restricted environment in the prison, Mr Grinder's ability to demonstrate change on some of the dynamic factors related to his sexual reoffending risk will be limited.

[77] What is plain from both earlier assessments is that the medium-high risk assessment would not change whilst Mr Grinder was in the prison environment.

[78] The corollary of the Ellis and Farmer observations, was that Mr Grinder's dynamic risk factors were likely to change on release, when he was in an entirely different environment. Mr Grinder's release into the community was a fundamental change in circumstances that altered what was, and could be, assessed in terms of risk. Dynamic risk is a situational phenomenon; a radical change in Mr Grinder's personal circumstances rendered prior assessments of limited value. The 2018 report necessarily did not assess Mr Grinder using the STABLE-2007 and ACUTE-2007 which, as Mr Riley explained, are instruments specifically developed to enable the structured ongoing assessment of sex offenders in the community.

[79] However, the additional report that the Board had itself commissioned from Dr Crump, together with the Riley addendum, did provide the contemporaneous risk assessment that took into account all developments in Mr Grinder's circumstances post-release in a way that Ms Ellis recognised her assessment could not.

[80] The question was not ultimately what weight the Board should have given to the Ellis report, compared to the Crump report and the Riley addendum. The 2018 Ellis assessment may well have remained relevant for certain purposes (such as the

general background of Mr Grinder's offending).[25] The issue was rather that the Ellis report did not address current dynamic risk and thus was not, on its own, an adequate or proper basis on which the Board could make its assessment about risk. For reasons which are not apparent from the decision, the Board did not consider and engage with the expert assessment of current likelihood of Mr Grinder reoffending as at October 2021, bearing in mind that at that date he had been living in the community for close to two and a half years. That was a critical aspect of the assessments before it.

[81] The Board did not state that it found the 2021 Crump report and Riley addendum deficient on the very point for which the Crump report had been sought. Nor did it explain whether and why it thought the 2018 Ellis assessment addressed this issue. The decision simply did not engage with what the new material said about the likelihood of reoffending, focusing almost exclusively on the nature of the risk (the "target group").[26]

[82] By failing to adequately consider the Crump report and Riley addendum in relation to current likelihood of risk, the Board failed to meet its obligation under s 7(2)(c) to make a decision on the basis of all relevant information available to it or, in *Tameside* terms, to acquaint itself with the relevant information to enable it to correctly answer the question before it (what was Mr Grinder's current risk – both likelihood and nature – and what conditions were necessary to manage that risk).

[83] I conclude that the Board failed to consider Mr Grinder's post-release risk factors, in particular the likelihood of his reoffending (as compared to the nature of any possible reoffending). Whether it is framed as an issue of rationality (*Tameside*) because the Board did not acquaint itself with the highly relevant information it had sought or, as Mr Ewen also described it in oral submissions, a failure to consider a mandatory relevant consideration, I conclude that the Board did act unreasonably.

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25 The Board decision of 27 May 2021 had said only this about the September 2018 assessment: "In contrast [to Mr Riley's report] the summary of risk contained in the psychological report dated 20 September 2018 identified factors and likely future offence pathways, which along with other information assisted the Board in setting his release conditions".

26 Addressed under the third ground of review below.

[84] For completeness, I also note the Convenor's finding on this issue. The Convenor stated that the Board:[27]

> … will have noted[28] the reasons why Dr Crump's assessment of Mr Grinder's risk was lower than that contained in the 2018 risk assessment. However the Board could still have regard to the 2018 risk assessment without that amounting to "basing its decision on "erroneous" or "irrelevant" information. The existence of risk assessments later in time, which contain a different risk assessment …does not make the 2018 assessment either erroneous or irrelevant. The 2018 risk assessment simply formed part of the matrix of documentation that was before the Board when it considered the application. The weight to be given to the 2018 assessment was a matter for the Board.

[85] For the reasons set out above in relation to the Board's decision, that analysis cannot be sustained.

[86] I uphold the second ground of review.

Third ground of review – unreasonable assessment of applicant's risk based on hypothetical scenario

[87] Given my findings on the first and second grounds of review, it is, strictly speaking, unnecessary to consider the other grounds advanced by the applicant. However, for the sake of completeness I address the third – fifth grounds below.

[88] The third ground of review is that the Board erroneously assessed Mr Grinder's risk by reference to a hypothesised offending scenario which involved him going to places where children might congregate and developing a relationship with them independently of any adults and out of contact with any of those supervising him.

Submissions

[89] The applicant says that in order to determine whether maintenance of the special conditions under challenge was unduly onerous, or for longer than necessary, the Board had to first determine the applicant's likelihood of reoffending (assessed risk).

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27 At [26].
28 The Board's decision did not include the reasons why.

[90] In order to determine assessed risk the Board was required to, but did not, determine it by reference to:

(a) The applicant's particular circumstances, including the nature of his offending (circumstantial risk); and

(b) The current expert evidence on risk profile (psychometric risk).

[91] Instead, the applicant says, the Board assessed Mr Grinder's risk based on a hypothetical scenario not grounded in the evidence before it.

[92] The Board's decision said, referring to the 2018 psychological report prepared six months before Mr Grinder's release, "… the psychologist assessed Mr Grinder as posing a medium high risk of sexual offending and that the likely sexually offending would include children only recently or briefly known to Mr Grinder."

[93] The Board went on to say that:

> While we accept that some of his sexual offending was against children who were very well known to him, some of the offending was, as this psychologist noted, relating to children who he had only known relatively recently or briefly.

[94] The applicant says that the Board was constrained to act on evidence, not on surmise or speculation. The Board had no evidence of the likelihood of any such offending and the available evidence before it of the circumstances of the applicant's past offending contraindicated such a finding.

[95] Mr Ewen says there was no evidence before the Board to suggest that Mr Grinder would embark on what would have been a novel mode of offending, previously having offended in the security of his own home, not in public places. Further, Mr Ewen says that the Board exceeded its powers in imposing restrictions to prevent the "opportunity" of Mr Grinder developing relationships with children. That, he says, is not alleviating risk, but risk elimination, which is more than the Board is empowered to do.

[96] Mr Ewen also notes that the Board misquoted Ms Ellis's opinion in a material respect. The report said:

> Should Mr Grinder reoffend sexually in the future this would most likely be against male or female children known to him. This **could** include children only recently or briefly known to him.

[97] The Board however said in its report that the applicant's likely target group "**would** include children only recently or briefly known to Mr Grinder". Mr Ewen says the difference is not merely semantic – the Board has translated the risk into a certainty.

[98] Mr Riley did not share Ms Ellis's target group assessment and Dr Crump expressed the view that "[a]ny risk to victims would most likely be prepubescent or pubescent male or female children". That was premised on the likelihood that those victims were "either known to him via a relationship or via association". This was consistent with Mr Grinder's offending modus operandi of abusing children exclusively in his own home environment, once the relationship had been developed with their parents or their children.

[99] Mr Ewen submits that, because of its failure to assess risk, the Board could not rationally determine the application to vary. It acted irrationally by assessing risk by reference to an offending scenario that had no evidential foundation.

[100] The response for the Attorney-General is that there is nothing "hypothetical" in Mr Grinder's offence history also targeting children he had known only relatively recently or briefly. That history shows the opportunistic means by which Mr Grinder gained access to children, not all of whom he knew well. He was described as someone who created opportunities to offend by "putting himself into situations where he would meet children".

[101] Ms Griffin says that the particular risk to young children which the Board found was mitigated by the EM condition had a basis in the psychological assessment from Ms Ellis in 2018. That risk had not been fully articulated in the Riley and Crump reports.

[102] Ms Griffin says the apparent "transcription" error in the decision ("would", rather than "could") is of no moment.

Analysis

[103] The Board had before it expert evidence as to the nature and likelihood of Mr Grinder's offending. As to the nature of any likely offending, this included the observation from the Ellis report about the possibility of Mr Grinder offending against children only recently or briefly known to him. Ms Ellis flagged this as a possibility only by writing, "[t]his *could* include children only recently or briefly known to him".

[104] As noted above, Mr Riley and Dr Crump did not share Ms Ellis's view on target group assessment. They considered that, if Mr Grinder were to reoffend, the nature of his offending would follow a similar pattern to his past offending, that is, occur in the home environment and against children who had been known to him either through a relationship or via association.

[105] The Board concluded it was necessary to maintain the whereabouts condition (and related EM conditions) to prohibit Mr Grinder from being where children might congregate and, therefore, forming relationships with them. The basis for maintaining the conditions was the Board's assessment of the nature of Mr Grinder's risk.

[106] In view of the differing assessments as to the likely target group, if Mr Grinder were to offend, the Board was entitled to bring to bear its general expertise and experience, as well as its familiarity with Mr Grinder's history, and to conclude that there was a degree of risk of Mr Grinder offending against children only recently or briefly known to him.

[107] In the context of a brief, oral decision it is impossible to know whether, in recording "would", the Board believed that to be Ms Ellis's assessment, or it was, as Ms Griffin submits, a simple transcription error. There is nothing to be gained by this Court speculating, without any clear indication either way.

[108] I dismiss the third ground of review.

Fourth ground of review - Irrelevant consideration (public confidence)

[109] The Board's decision said:

> 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.

[110] The fourth ground of review is that the Board took into account irrelevant considerations when it said that the imposition of GPS tracking would reassure the public that the applicant was deprived of the opportunity to offend.

Submissions

[111] The applicant says that public reassurance was irrelevant to any proper assessment of the safety of the community. Public "reassurance" in the efficacy of the parole regime is an inherently political consideration and is a matter for the Ministers of Justice and Corrections. Mr Ewen says that for the Board to give the appearance of decision-making of a quasi-political character is impermissible. Mr Ewen also questioned by what objectively ascertainable standard "public reassurance" is to be measured and points to the fact that in a particularly contentious policy area such as the paroling of sex offenders there are too many legally unanswerable questions inherent in this issue, such as which members of the public require reassurance and to what level.

[112] Mr Ewen submits that the Board was clearly influenced in its decision to maintain the EM conditions by this irrelevant consideration.

[113] For the Attorney-General, Ms Griffin says the words "reassure the public" could readily be substituted with "ensure the safety of the community". While the Board may have inelegantly expressed the principle in s 7(1) of the Act, it is not a credible basis to quash the special conditions.

Analysis

[114] I agree that it is not appropriate to put undue weight on the wording. While, as Ms Griffin put it, the Board may have inelegantly phrased the principle in s 7(1) of the Act, it did so in the context of delivering an oral decision in busy circumstances. I do not consider that the mis-phrasing amounts to a proper basis on which to quash the Board's conclusion.

[115] I dismiss the fourth ground of review.

Fifth ground of review – failure to consider relevant matter (increased risk by maintenance of EM)

[116] The applicant submits that the Board was required to take into account any evidence that the applicant's risk was *increased* by the continued use of EM monitoring. In order to do so it had to properly characterise the consequences of the conditions.

[117] The information before the Board was that Mr Grinder is reportedly enjoying his current employment and housing situation. He is employed as a truck driver and lives alone. He works full-time and engages in out of work activities, including four-wheel driving and photography.

[118] Dr Crump was asked by the Board to provide an expert opinion on "whether Mr Grinder's whereabouts condition and his wearing of a [GPS] device are mitigating his risk of reoffending sexually."

[119] Dr Crump's conclusion on the conditions was that "the electronic monitoring and whereabouts conditions at this point in time are unlikely to contribute substantially to mitigating his risk and may in fact hinder prosocial opportunities and perusal [sic] of healthy goals". This conclusion was based on the various practical and social problems that have arisen for Mr Grinder as a result of having to wear a bulky GPS anklet. The practical impacts have included trouble climbing in and out of his truck, difficulty fitting the anklet in work boots and concerns about the battery running out during a long workday or when Mr Grinder is pursuing his hobbies. The social impacts

have included Mr Grinder's concern at "being outed" if he is observed wearing the device when he is attempting to develop new, pro-social relationships or in his work-related interactions, and thus having to disclose his history in unsafe circumstances, or before he is ready to do so.

[120] Mr Riley's report of 11 May 2021 records that Mr Grinder is at a point where he is seeking to develop his vocational opportunities and circle of social supports. Mr Riley's addendum report of 27 September 2021 addressed the efficacy of the GPS conditions, noting that the GPS monitoring equipment has the potential to impact on Mr Grinder's social interactions within both the wider vocational sphere and within a social context where it is potentially conspicuous to those with whom he comes in contact.

[121] Mr Riley concluded on this point:

> Given his level of risk, it is doubtful to what extent any residual risk mitigation is achieved by GPS monitoring and restrictions on movement, and in reality the impact which they may have on his personal, vocational, and social progress may outweigh any perceived benefit likely to accrue from them.

[122] The Board's decision said:

> 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.

Submissions

[123] Mr Ewen says this was a categorical error: the EM conditions were not an "inconvenience", as was clear from Dr Crump's expert evidence. Rather, maintenance of the EM conditions risked *creating* the very scenarios envisaged in Ms Ellis's September report which the Board repeated and relied on. The limitation on undertaking pro-social activities was likely to create the sort of difficulties in relationships, loneliness and feelings of inadequacy which would destabilise Mr Grinder's life and elevate his risk. That was accepted by the Board as a risk but on the other side of the ledger it characterised the consequences as an "inconvenience".

[124] In response, Ms Griffin's primary submission is that, taken as a whole, the Board decision does acknowledge the limitations imposed on Mr Grinder's daily life and fairly describes his explanations of the difficulties the EM creates for him. It does not criticise or doubt that evidence. Isolation of the particular words used in the Board's decision does not lead to a reviewable error.

Analysis

[125] While the Board's words might be read as minimising the impact on Mr Grinder and the potential risk thereby created, the Board did not overlook this issue. Although there was evidence on which the Board could have concluded that continuing with the special conditions in itself created a risk, there was a basis on which it could have concluded that was outweighed by the potential risk Mr Grinder posed to young children. Overall, this was a question of weight and the Board's conclusion was not untenable.

[126] The fifth ground of review is dismissed.

Outcome

[127] Mr Grinder's application for review has succeeded on the first and second grounds.

Relief

[128] Mr Ewen submitted that the Board's decision should be quashed and this Court should also quash the special conditions under challenge.

[129] Ms Griffin noted that much time has lapsed since the Board's decision in October 2021. Instead of the Court discharging the conditions, Mr Grinder's application should be remitted back to the Board for fresh consideration with an updated and current risk assessment. This would allow for the Board to exercise its specialist power and jurisdiction in determining whether the special conditions under challenge should be discharged, taking into account Mr Grinder's current risk profile and community safety.

[130] For the reasons advanced by Ms Griffin**,** I think it is appropriate that the application to discharge the conditions be remitted back to the Board, with the following directions as to the scope of its enquiry. Those directions are:

(a) Is the continuation of the special conditions a reasonable, necessary and proportionate means of ensuring the applicant does not represent an undue risk to the community?

(b) In assessing undue risk to the community, the Board must assess the risk of future offending by reference to contemporary evidence as to the applicant's likelihood of further offending and the nature and seriousness of any likely future offending.

Costs

[131] Mr Ewen advises that the applicant is legally-aided, but seeks 2B costs, subject to the Legal Services Commissioner's determination of the final renumeration authorised and recoverable under s 105 of the Legal Services Act 2011. I find that costs on a 2B basis are appropriate.

Gwyn J