Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

BRETT DAVID GRINDER v ATTORNEY-GENERAL AND ANOTHER

(SC 147/2023) [2025] NZSC 165

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

Under the Parole Act 2002, the Parole Board (the Board) may release an offender on parole only if it is satisfied on reasonable grounds that the offender will not pose an "undue risk" to the safety of the community or any person or class of persons within the term of the offender's sentence. The Board may also impose special conditions of release for the purpose of (among other things) reducing the risk of reoffending. The offender, however, has a right to apply for the variation or discharge of a condition or conditions following their release. This appeal concerns the test to be applied by the Board when deciding whether to impose, vary or discharge special conditions, and the relevance of "undue risk" to that assessment.

Background

The appellant was sentenced to preventive detention in 2003 in connection with an extensive history of sexual offending against children and young people. He was released on parole in April 2019, subject to a variety of conditions. The special conditions imposed included a "whereabouts" condition prohibiting the appellant from entering or loitering near specified places where children might congregate, such as schools or recreation facilities, without a probation officer's prior approval or unless accompanied by an approved adult. They also included electronic monitoring conditions, which were imposed to monitor the appellant's compliance with the whereabouts condition.

In 2021, the appellant applied to the Board for the discharge of the whereabouts and electronic monitoring conditions. An updated psychological report assessed the appellant as being at a low risk, relative to other individuals with similar offending, of further sexual offending in the

next five years. The Board, however, declined the application, noting in particular that "[w]hatever the current accurate assessment of risk is, it is not no risk." The panel convenor upheld the Board's decision on review.

The appellant commenced the present proceedings in the High Court, seeking to judicially review the decisions of the Board and of the reviewer. The appellant argued that the Board had applied the wrong legal test, in substance applying a "no risk" threshold rather than a threshold of "undue risk". In other words, the Board ought to have assessed whether the conditions were necessary to manage an undue risk to the safety of the community.

Lower courts

The High Court upheld the application for judicial review, finding that the "undue risk" test applied not just to release and recall decisions but also to special conditions of release. The Judge remitted the application to the Board for reconsideration, directing that the question for the Board was whether "the continuation of the special conditions [was] a reasonable, necessary and proportionate means of ensuring the applicant does not represent an undue risk to the community". On the directed reconsideration, the Board discharged the electronic monitoring conditions but maintained the whereabouts condition.

The Court of Appeal allowed an appeal by the Attorney-General and the Board and set aside the High Court decision.

The Supreme Court granted the appellant leave to appeal against the Court of Appeal's decision. The approved question was whether the Court of Appeal was correct to allow the appeal and, in particular, the proper approach to the imposition, variation or discharge of special conditions when a person subject to preventive detention is granted release on parole.

The Law Association of New Zealand Inc and the Criminal Bar Association of New Zealand Inc were granted leave to intervene.

Supreme Court decision

By a majority comprising Winkelmann CJ, Ellen France and Williams JJ, the Supreme Court has allowed the appeal. The majority has found that the High Court's formulation of the test was correct: the Board was required, using contemporary information as to the likelihood of further offending and the nature and seriousness of any likely further offending, to ask itself whether the continuation of the special conditions was a reasonable, necessary and proportionate means of ensuring that the appellant does not represent an undue risk to the community.

The majority identified the issues on appeal as follows:

(a) Is undue risk the measure to be applied by the Board when deciding on the imposition, variation and removal of special conditions that are principally concerned with managing risk?

(b) How must the Board decide whether to continue special conditions? In particular:

(i) Is it necessary for the Board to undertake a proportionality analysis under s 5 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) in respect of the conditions?

(ii) Is the Board required to address the question of imposition or continuation on a condition-by-condition basis?

(c) Did the Board err in its approach?

Is undue risk the measure?

The majority began by reviewing the relevant provisions of the Parole Act, noting that undue risk was not expressly prescribed as the threshold for the imposition or continuation of special conditions designed to manage reoffending risk. Nevertheless, the majority considered that an interpretation of the Act that requires the Board to address undue risk when considering the imposition and continuation of such conditions was consistent with the scheme and purpose of the Act. They gave three reasons:

- First, it was consistent with the undue risk assessment for release on parole and recall from parole. While community safety is the paramount consideration for the Board under s 7(1) of the Parole Act, Parliament has treated the release and management in the community of offenders who do not pose an undue risk as consistent with community safety (at [42]–[43]).

- Second, it was consistent with the proportionality that underlies the Act's provisions. Section 7(2)(a) of the Parole Act provides that conditions must not be more onerous, or last longer, than is consistent with community safety. This is a concept of proportionality which, in the majority's view, finds further statutory expression in the notion of undue risk (at [44]).

- Third, it was consistent with the rehabilitative purpose of the Act, in that it allows rehabilitation to continue in the community where there is a risk to the community but not an undue risk, thereby supporting successful reintegration (at [45]).

This interpretation was further supported by the Bill of Rights and the direction in s 6 that statutory provisions be interpreted as rights-consistent, if they can be. The majority considered that requiring an assessment of "undue risk" was the most rights-consistent approach, as that expression most accurately captures the concept of proportionality which decision makers must apply under s 5 of the Bill of Rights (at [49]–[52]).

How must the Board decide whether to continue special conditions?

The majority found that the direction given by the High Court, as set out above, was consistent with the requirements of the Parole Act and of s 5 of the Bill of Rights. With regard to the latter, the majority did not consider that a full *R v Hansen* proportionality analysis was required.[1] Rather, the Parole Act has a built-in proportionality analysis. It requires that

[1] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

conditions not be more restrictive, or imposed for longer, than is consistent with community safety and, in the majority's view, contemplates the Board using the measure of "undue risk" in making this assessment. This requires the Board to assess the proportionality between the risk and the restriction on the offender's rights. It contemplates that special conditions imposed primarily for the purpose of risk reduction are justified if necessary to manage undue risk (at [57]–[59]).

In assessing proportionality, the Board is entitled to consider the work that a condition does within the broader framework of conditions, as it would be artificial to require assessment of conditions in isolation from each other. Nevertheless, the majority considered that this pragmatic reality did not remove the Board's obligation to undertake the proportionality assessment in respect of each condition (at [60]–[63]).

Mr Grinder's appeal

The majority found that the Board did not undertake the proportionality analysis as set out above. Given the Board had already reconsidered the appellant's application as directed by the High Court, the appropriate relief was to set aside the decision of the Court of Appeal and reinstate the finding of the High Court that the issue for the Board on any subsequent reconsideration of the appellant's conditions is as set out at [130(a)–(b)] of the decision of the High Court (at [64]–[68]).

Dissent

Kós and Miller JJ dissented. They took the view that the undue risk standard is not the measure for the imposition or maintenance of individual release conditions. Instead, when the Board decides to grant parole with a special condition, that limit on the offender's rights will likely be justified for purposes of s 5 of the Bill of Rights if the Board correctly applies the relevant criteria in the Parole Act. In particular, the Board will have been guided by the principle that release conditions should not be more onerous, or last longer, than is necessary. The Board must also undertake a simple proportionality assessment to weigh the condition's purpose and efficacy against its impact on the offender. If done correctly, release conditions will not result in the community or any part of it, including victims, being exposed to undue risk from parolees during the terms of their sentences (at [71]–[72]).

In the appellant's case, Kós and Miller JJ found that the Board did not expressly undertake the simple proportionality assessment required by the Parole Act. Nonetheless, they would have dismissed the appeal because, in their view, the Court of Appeal reached the correct outcome and because subsequent events appeared to have vindicated the Board's opinion that the whereabouts and monitoring conditions were reasonably necessary (at [141]–[143]).

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