MENTAL HEALTH COURT

CITATION:	*Re SWZ* [2019] QMHC 2
PROCEEDING:	Appeal
DELIVERED ON:	27 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 December 2018
JUDGE:	Flanagan J
ASSISTING PSYCHIATRISTS:	Dr J J Sundin and Dr R E Phillipson
DETERMINATION:	**1. Appeal allowed.** **2. The decision of the Mental Health Review Tribunal made 3 October 2018 revoking the forensic order is set aside.** **3. [Redacted]** **4. [Redacted]**
COUNSEL:	P M Clohessy for the appellant S J Hamlyn-Harris for the Chief Psychiatrist J D Briggs for the respondent
SOLICITORS:	Crown Law for the appellant Legal Aid Queensland for the respondent

NOTE: This judgment is published pursuant to s 790 of the *Mental Health Act 2016.* It has been anonymised and several redactions have been made to preserve anonymity.

[1] [Redacted] On [redacted], the Mental Health Court made the respondent subject to a forensic order on the basis that he was of unsound mind [redacted]. On 3 October 2018, upon review, the Mental Health Review Tribunal (**Tribunal**) decided to revoke the forensic order. The appellant, the Attorney-General for the State of Queensland, appeals against the Tribunal's decision.

[2] The sole ground of appeal is that the Tribunal erred in law when it concluded that s 442(1) of the *Mental Health Act* 2016 (**MHA 2016**) required the respondent to have a current existing "mental condition" before the Tribunal could confirm the forensic order. The Tribunal revoked the forensic order on the basis that the respondent had no "mental condition".

[3] The appeal to this Court is by way of rehearing.[1]

The Tribunal's Statement of Reasons

[4] The Tribunal considered a number of psychiatric and psychological reports. These included a clinical report prepared by Dr Purushothaman dated 18 September 2018 to which was annexed the Assessment and Risk Management Committee (**ARMC**) meeting minutes of 2 August 2018 and a second opinion of Dr Frances Dark dated 21 February 2018. The Tribunal also had before it a report of Dr Schramm dated 20 August 2018 which had been produced by him pursuant to a Tribunal Examination Order. There was also a report dated 2 March 2018 from the Community Forensic Outreach Service (**CFOS**) by Dr Garrick Anderson, psychiatrist, and Ms Annette Vasey, psychologist.

[5] Both Dr Purushothaman and Dr Schramm gave oral evidence before the Tribunal. The evidence of Dr Purushothaman was that the respondent did not have a diagnosable mental illness or intellectual disability. According to Dr Purushothaman the respondent was not taking any medication and did not require any. He saw Dr Purushothaman every two months and Ms Martin, who was a part of the treating team, every three weeks. Neither clinician had any concerns, or had seen any symptoms of mental illness. In Dr Dark's opinion the respondent's period of mental illness was relatively brief and there had been no evidence of diagnosable mental illness for over six years and no need for psychopharmacology.

[6] The Tribunal referred to Dr Schramm's opinion that the respondent does not have a mental condition, neither intellectual impairment nor a mental illness. Dr Schramm's opinion was that the respondent does not have a mental illness in remission (meaning a disease in partial or full abeyance, but with reasonable chance of return). Dr Schramm confirmed in evidence that a predisposition to depression in the future did not mean that the respondent had a present mental condition.

[7] The Tribunal identified that on a periodic review it must decide either to confirm or revoke the forensic order for the person. It referred to s 442(1) which requires the Tribunal to "confirm the forensic order if the [T]ribunal considers the order is necessary, because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property."[2] The Tribunal then reasoned that if the elements of the test posed by s 442(1) are satisfied, the forensic order must be confirmed and unless all elements of the test are satisfied the forensic order must be revoked.[3]

[8] The Tribunal then considered the meaning of "mental condition" in s 442(1).[4] The Tribunal referred to the recent decision of Dalton J in [2018] QMHC 3,[5] concluding that

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1 MHA 2016 s 546(2).
2 Tribunal's Statement of Reasons, page 6.
3 Tribunal's Statement of Reasons, page 6.
4 Tribunal's Statement of Reasons, page 6.
5 This is an unpublished restricted access decision pursuant to s 790 of the MHA 2016.

the definition of "mental condition" is narrower than had been previously considered by the Tribunal.

[9] The Tribunal then considered at what point in time is the existence of a "mental condition" to be assessed, noting that the Tribunal makes a decision as to whether the elements of the test are met at the time of conducting the particular review.[6] The Tribunal referred to the decision of Justice Holmes (as the Chief Justice then was) in *Re AKB*[7] where her Honour considered s 203 of the MHA 2000 which provided that on the review, the Tribunal must decide to confirm or revoke the forensic order for the patient. Her Honour observed:[8]

> "… The whole point of the s 203 discretion is to recognise that the mental condition underlying a forensic order is not necessarily immutable. It does not amount to an attack on the original finding to consider whether the condition continues to exist … In my view, the proper construction of s 203 is that the decision to confirm or revoke must be based on the factors set out in s 203(6), as applied to the current set of circumstances. …"

[10] The Tribunal considered that while this decision was made under the previous legislation, the principle is directly referable to the decision required by the Tribunal under s 441 of the MHA 2016.[9]

[11] The Tribunal then reasoned that as the respondent does not have a present mental illness, the Tribunal was in effect bound to revoke the forensic order:[10]

> "The Tribunal now has unanimous relevant and reliable evidence of Dr Purushothaman, a second opinion from Dr Dark, and a detailed report from Dr Schramm that [the respondent] does not have a mental illness. It is not the case that he has an illness of which there are no active symptoms, it is not the case that he has an illness in remission. The propensity or vulnerability to develop a future illness is not a current mental illness. …
>
> The Tribunal has sufficient evidence to find on the balance of probabilities that [the respondent] does not have a mental condition as defined in the Act. The Tribunal relies on Justice Dalton's interpretation of 'mental condition' and its own interpretation of that term, and of the test in s442, and finds the forensic order cannot be confirmed. It is accordingly revoked.
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> As risk deriving from a mental condition is a necessary condition for the making of a treatment support order, on the same reasoning, the Tribunal cannot make a treatment support order."

[12] After referring to the Victim Impact Statement that had been filed [redacted] urging the Tribunal to confirm the forensic order, the Tribunal further observed:[11]

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6 Tribunal's Statement of Reasons, page 7.
7 [2005] QMHC 005.
8 *Re AKB* [2005] QMHC 005 at [18].
9 Tribunal's Statement of Reasons, page 8.
10 Tribunal's Statement of Reasons, page 12.
11 Tribunal's Statement of Reasons, page 11.

> "The Tribunal has read this statement with empathy for the family [redacted]. The Tribunal must apply the law as set out in the Act, and the risks relevant to the Tribunal's consideration are those arising from a mental condition. Having found [the respondent] does not have a mental condition, [the family's] submissions, whilst acknowledged, could not be given significant weight in the Tribunal's decision."

The Tribunal's Decision is Stayed

[13] On 2 November 2018 Dalton J granted a stay of the decision of the Tribunal pursuant to s 544 of the MHA 2016 pending the disposition of the present appeal.

The Appellant's Submissions

[14] The appellant identifies the question for determination on appeal as "whether the Tribunal erred in its conclusion that s 442(1) of the [MHA 2016] required [the respondent] to have a current existing 'mental condition' as a prerequisite to confirming the forensic order."[12]

[15] In answering that question, the appellant submits as follows:[13]

> "The Tribunal erred in concluding the test for confirming the forensic order in s 442 of the [MHA 2016] could not be satisfied because the need for the order to protect the safety of the community must derive from the person's present and existing mental illness. The reasoning applied being, if there is no present and existing mental illness, then there can be no order….
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> The forensic order regime under the [MHA 2016] is first and foremost a risk protection mechanism serving one of the main objects of the [MHA 2016], that is, protecting the community from harm by persons have been diverted from the criminal justice system.
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> As part of that risk management scheme, orders can, not only mandate involuntary treatment, but also provide a level of oversight, support and monitoring to protect the community from harm. Orders may also contain other conditions not associated with treatment of the patient but with the protection of others (for example, conditions relating to driving, the use of substances and contact with victims).
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> If the Tribunal's reasoning is accepted as correct, then any patient afforded a defence of unsoundness of mind due to a transient or episodic mental illness, despite a risk of recurrence, cannot be supervised under the forensic order or treatment support order regime because they do not have a current mental illness. The Tribunal's approach placed far too great an emphasis on the conditions of the forensic order mandating involuntary psychiatric treatment, including the ability to prescribe medication, and failed to consider that the forensic order regime is primarily a risk protection

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12 Outline of Submissions on Behalf of the Attorney-General, paragraph [1].
13 Outline of Submissions on Behalf of the Attorney-General, paragraphs [22]-[26].

> mechanism for the community, of which involuntary treatment only forms part."

[16] The effect of treating the existence of a mental condition at the time of review as a jurisdictional fact resulted in the Tribunal not undertaking the necessary risk assessment mandated by the MHA 2016 prior to it revoking the forensic order and declining to impose a treatment support order.[14]

The Chief Psychiatrist's Submissions

[17] The Chief Psychiatrist generally supports the construction of s 442(1) of the MHA 2016 advanced by the appellant.

[18] The Chief Psychiatrist "submits that the use of the words 'because of the person's mental condition' in section 442(1)… does not mean that, for the forensic order to be confirmed, it is necessary for the person currently to have 'some form of diagnosable illness' as the [T]ribunal concluded".[15]

[19] According to the Chief Psychiatrist, "[i]n assessing risk to the community as required by s 442(1), it is appropriate to take into account a previously suffered mental illness and to consider whether it might recur.[16] Such a construction promotes the clear purpose of s 442(1), which is to protect the safety of the community". [17] This is reflected in one of the main objects of the MHA 2016 stated in s 3(1)(c) which is, "to protect the community if persons diverted from the criminal justice system may be at risk of harming others". Further, s 442(1) does not expressly require that the person have an existing mental illness as a precondition to the confirmation of a forensic order by the Tribunal . This is to be contrasted with the statutory regime under the MHA 2016 for the making and review of treatment authorities for involuntary treatment under s 28(1)(a). Section 421(1) relevantly mandates that "[o]n a review of a treatment authority the [T]ribunal must revoke the authority if the [T]ribunal considers— (a) the treatment criteria no longer apply to the person subject to the authority". In turn, s 12 sets out the matters constituting the "treatment" criteria for a person, one of which is that "the person has a mental illness". The legislature has therefore used clear and unequivocal language in relation to treatment authorities to the effect that, if, at the time of reviewing the treatment authority, the person does not have a mental illness, the Tribunal must revoke the authority. This is to be contrasted with the wording of s 442(1), which neither expressly nor by necessary implication, mandates a similar outcome where the Tribunal is reviewing a forensic order.

The Respondent's Submissions

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[14] Outline of Submissions on Behalf of the Attorney-General, paragraph [27].
[15] Submissions on Behalf of the Chief Psychiatrist, paragraph [3] citing Tribunal's Statement of Reasons, page 9.
[16] Submissions on Behalf of the Chief Psychiatrist, paragraph [3].
[17] Submissions on Behalf of the Chief Psychiatrist, paragraph [3].

[20] The respondent seeks to support the Tribunal's decision by submitting that the term "mental condition" in s 442(1) refers to an existing mental state.[18] The respondent makes reference to the definition of "mental condition" in Schedule 3 to the MHA 2016, which includes a mental illness and an intellectual disability.

[21] The respondent submits that the word "condition" in the expression "mental condition" should be given its plain meaning, consistent with the purposes of the MHA 2016[19] and the same meaning throughout the whole Act.[20] By reference to the plain meaning of the word, the respondent submits that the word "condition" within the expression "mental condition" refers to an existing state, and not a state which may in future occur.[21] This interpretation according to the respondent is consistent with the objects of the MHA 2016 and in particular s 3(2)(a) which states that the main objects of the Act identified in s 3(1)(a) to (c) are to be achieved in a way that safeguards the rights of persons. The term "mental condition" in s 442(1) should therefore be construed so as not to impute to the legislature an intention to interfere with "fundamental rights".[22] The respondent therefore submits that nothing in the MHA 2016 either expressly or by necessary implication "allows the erosion of the fundamental right to personal liberty on the basis of a *speculation* that a person may be *at risk of* suffering a mental illness or natural mental infirmity in the future or *at risk of* a recurrence of such a condition."[23]

Consideration

[22] Section 3(1) of the MHA 2016 identifies the three main objects of the Act as follows:

> "(a) to improve and maintain the health and wellbeing of persons who have a mental illness who do not have the capacity to consent to be treated; and
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> (b) to enable persons to be diverted from the criminal justice system if found to have been of unsound mind at the time of committing an unlawful act or to be unfit for trial; and
>
> (c) to protect the community if persons diverted from the criminal justice system may be at risk of harming others."

[23] Section 3(2) provides that these three main objects are to be achieved in a way that:

> "(a) safeguards the rights of persons; and
>
> (b) is the least restrictive of the rights and liberties of a person who has a mental illness; and

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18 Outline of Submissions on Behalf of the Respondent, page 1.

19 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ; *Acts Interpretation Act* 1954 s 14A.

20 *Acts Interpretation Act* 1954 s 32AA.

21 Outline of Submissions on Behalf of the Respondent, pages 5-6.

22 *Coco v The Queen* (1994) 179 CLR 427 and *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ.

23 Respondent's Outline of Submissions, page 8.

(c) promotes the recovery of a person who has a mental illness, and the person's ability to live in the community, without the need for involuntary treatment and care."

[24] In the present case the respondent was diverted from the criminal justice system. [Redacted] The Mental Health Court was satisfied on the balance of probabilities that the respondent's mental illness deprived him of the capacity to understand the nature and quality of his actions, and of the capacity to control his actions.

[25] [Redacted] Since being made, the forensic order has been reviewed by the Tribunal according to statutory requirements. As the respondent has already been diverted from the criminal justice system, the primary object of the MHA 2016 that is relevant to these reviews is the object of protecting the community if persons (such as the respondent) diverted from the criminal justice system may be at risk of harming others.

[26] Under the MHA 2000 the Tribunal was required to review a forensic patient's mental condition within six months after the forensic order was made and thereafter at intervals of not more than six months. The Tribunal was also required to review a forensic patient's mental condition on application for review made under s 201 of the MHA 2000. Similarly, under s 433 of the MHA 2016 the Tribunal must review the forensic order within six months after the order is made and thereafter at intervals of not more than six months. The Tribunal must also review a forensic order on application made pursuant to s 433(2). The Tribunal may at any time on its own initiative also review the forensic order: s 433(3). Unlike the MHA 2016, the MHA 2000 did not identify as one of its main objects the protection of the community. Section 4 of the MHA 2000 identified the purpose of the Act as being to "provide for the involuntary assessment and treatment and the protection of persons (whether adults or minors) who have mental illnesses while at the same time— (a) safeguarding their rights and freedoms; and (b) balancing their rights and freedoms with the rights and freedoms of other persons." This is not the specific language of protection of the community as provided for in s 3(1)(c) of the MHA 2016. The MHA 2000 in s 5 did, however, identify how the purpose of the Act was to be achieved. This included s 5(e), which provided that "when making a decision under [the MHA 2000] about a forensic patient", "the protection of the community" was to be taken into account. One of the primary differences therefore between the MHA 2000 and the MHA 2016 is that the protection of the community, rather than being a means by which the purpose of the MHA 2000 was to be achieved, has been elevated to being one of the main objects of the MHA 2016. The primacy of this main object is evident not only by being expressly enacted in s 3(1)(c) of the MHA 2016, but also by the legislature imposing a number of limitations on the Tribunal's power to revoke a forensic order or alter the category of a forensic order made by the Mental Health Court.

[27] Before I discuss these limitations it is important to note that what is being reviewed by the Tribunal is a forensic order made by the Mental Health Court. While the present order was made on [redacted] under the MHA 2000, by operation of the transitional provisions of s 836 of the MHA 2016, the order is taken to be a forensic order (mental health) under the MHA 2016. Under Chapter 12 Part 3 of the MHA 2016 what the Tribunal reviews is either a forensic order (mental health) or a forensic order (disability) made by the Mental Health Court. Both types of forensic orders are made by the

Mental Health Court under s 134(1), which adopts the test set out in to s 442(1). Section 431 of the MHA 2016 defines "review" of a forensic order to include a periodic review of the order. Accordingly, what the Tribunal was reviewing in the present case was a forensic order (mental health), which was an order that could only be made by the Mental Health Court, but thereafter periodically reviewed by the Tribunal.

[28] Pursuant to s 441(1) on a periodic review of the forensic order, the Tribunal must decide either to confirm the order or revoke the order. The first limitation on the Tribunal revoking an order is where the Mental Health Court, pursuant to s 137(2), has ordered a non-revocation period. During this period the Tribunal may not revoke the order, other than under s 457 irrespective of whether the person has an existing mental condition or not. Section 457 only applies to circumstances where a person has a dual disability and is subject to a forensic order (mental health). In those limited circumstances, if the Tribunal is satisfied that the person no longer requires involuntary treatment and care for the person's mental illness, the Tribunal must revoke the forensic order (mental health) and make a forensic order (disability) for the person.[24] In circumstances where there is a non-revocation period for a forensic order, the Tribunal is taken for the purposes of s 443 to have confirmed the order.[25]

[29] Another limitation is not so much a restriction on the Tribunal's power to revoke a forensic order but rather a practical consequence of the mandatory requirement that, pursuant to s 442(1), the Tribunal must confirm the forensic order if the Tribunal considers the order is necessary, because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property. As I have already observed, the language of s 442(1) is similar to the mandatory language used in s 134(1) in respect of the Mental Health Court making a forensic order.[26] Further, where the Tribunal confirms a forensic order, it must apply a similar test in deciding whether to change the category of a forensic order. Section 444(2), for example, provides that "the [T]ribunal may change the category of the forensic order to community, or confirm the category of the order as community, only if the [T]ribunal is satisfied there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property." To similar effect, under s 445(2)(b), if the forensic order is confirmed as or changed to inpatient, the Tribunal may "approve that an authorised doctor under section 212 or a senior practitioner under the Forensic Disability Act, section 20 may, at a future time – (i) authorise limited community treatment for the person, to the extent and subject to the conditions decided the [T]ribunal; or (ii) change the category of the order to community, subject to the conditions decided by the [T]ribunal."

[30] In some circumstances the Tribunal may make an order under s 445(2)(b) "only if the [T]ribunal is satisfied there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property": s 445(3).

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[24] MHA 2016 s 457(2).
[25] MHA 2016 s 442(2).
[26] Paragraph [27] of these Reasons.

[31] As part of the relevant test each of these sections refers to a person's "mental condition" which is defined to include "a mental illness and an intellectual disability".[27] Each of these terms are also defined. Section 10(1) of the MHA 2016 defines "mental illness" as "a condition characterised by a clinically significant disturbance of thought, mood, perception or memory". This is subject to s 10(2), which provides that "a person must not be considered to have a mental illness merely because" of an enumerated attribute or circumstance. The term "intellectual disability" is defined in Schedule 3 to the MHA 2016. The term "mental condition" as used throughout the Act is therefore simply a shorthand way of referring to both mental illness and intellectual disability. As the term is a composite phrase already defined by the Act, it is wrong to further refine the construction of "medical condition" by emphasising the apparent plain meaning of "condition", as contended by the respondent.

[32] The review being undertaken by the Tribunal is a review of an existing forensic order made by the Mental Health Court. In deciding to either confirm or revoke the forensic order, the Tribunal must have regard to those matters stated in s 432. These matters are similar to those to which the Mental Health Court must have regard under s 133 in making a forensic order. Both ss 133 and 432 require the Tribunal and the Mental Health Court respectively to have regard to "the relevant circumstances of the person". The "relevant circumstances" of a person is a defined term in Schedule 3 to the MHA 2016:

> "***relevant circumstances***, of a person, means each of the following—
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> (a) the person's mental state and psychiatric history;
>
> (b) any intellectual disability of the person;
>
> (c) the person's social circumstances, including, for example, family and social support;
>
> (d) the person's response to treatment and care and the person's willingness to receive appropriate treatment and care;
>
> (e) if relevant, the person's response to previous treatment in the community."

[33] The word "treatment" is also defined in Schedule 3:

> "**treatment,** of a person who has a mental illness or other mental condition, includes anything done, or to be done, with the intention of having a therapeutic effect on the person's illness, including the provision of a diagnostic procedure."

[34] Both the definition of "relevant circumstances" and "treatment" support the proposition that in conducting a review the Tribunal must have regard not only to the person's existing mental state, but also to the person's psychiatric history and the history of the person's response to treatment. The matters to which the Tribunal must have regard in conducting a review of a forensic order indicate that a longitudinal assessment should be made of the person's mental condition, psychiatric history and treatment history.

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[27] MHA 2016 schedule 3.

[35] When one considers the meaning of "mental condition" in the context of s 442(1), the objects of the Act, and the role of the Tribunal in reviewing a forensic order made by the Mental Health Court, the Tribunal, in my view, erred in finding that a current existing mental illness was a prerequisite to the confirmation of a forensic order or the making of a treatment support order. A person's existing mental condition is, of course, relevant in any review. But there is nothing in the wording of s 442(1) which makes the current existence of a mental condition a prerequisite to the Tribunal exercising its power to confirm a forensic order. In undertaking a review with regard to the matters in s 432, the Tribunal must consider not only the person's existing mental condition but also the person's psychiatric and treatment history, as well as the nature of the relevant unlawful act and the period of time that has passed since the act happened and any victim impact statement relating to the relevant unlawful act. It is apparent from the reasons of the Tribunal outlined above that the Tribunal felt constrained in giving proper consideration to the victim impact statement and whether a treatment support order should be made because of its finding that the respondent did not have a current existing "mental condition".

[36] By treating the current existence of a mental illness as a prerequisite, the Tribunal has impermissibly limited its review role in a way not contemplated by s 442(1). There is no threshold requirement in the MHA 2016 that a person must have a current mental illness in order for the Tribunal to undertake a review of a forensic order.

[37] This interpretation of s 442(1) and the MHA 2016 as a whole is validated by considering the potential consequences resulting from the Tribunal's interpretation. There may be instances where a person's mental condition is in remission at the time of a review by the Tribunal yet there is clinical evidence that the chance of remission – and consequent risk to the community – is high. If the Tribunal's interpretation is correct, then it would be obliged to revoke the forensic order and thereby remove the protective measures secured by the order. Indeed, the Tribunal would be obliged to revoke even where the risk presented by such a person was greater than other persons with an existing mental condition at the time of review. That outcome is at odds with the protective purpose of the MHA 2016, which is plainly expressed to be one of the main objects: s 3(1)(c).

[38] Contrary to the respondent's submission, an interpretation of s 442(1) that does not require there to be an existing mental condition at the time of review should not be viewed as allowing an unjustifiable deprivation of fundamental rights. Before confirming a forensic order, it remains for the Tribunal to satisfy itself that the order is necessary to protect the safety of the community and that such necessity is because of the person's mental condition. The test propounded by s 442(1) is one to be applied to many and varying circumstances. A person's current existing "mental condition", while an important consideration, is but one of a number of matters, including those mandated in s 432, which must be considered by the Tribunal in applying the test.

[39] As to *Re AKB*,[28] that decision is readily distinguishable. *Re AKB* was decided under the MHA 2000. As I have already observed, unlike the MHA 2016, the MHA 2000 did not specifically identify as either an object or a purpose the protection of the community if

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[28] [2005] QMHC 005.

persons diverted from the criminal justice system may be at risk of harming others. Further, under the MHA 2000 there was a difference as to what the Tribunal actually reviewed. What is now reviewed by the Tribunal is the forensic order originally made by the Mental Health Court.[29] What was previously reviewed by the Tribunal, pursuant to s 200 of the MHA 2000, was the "forensic patient's mental condition". The MHA 2000, unlike the MHA 2016 did not define the term "mental condition" but did define the term "forensic patient" to mean a person who is, or is liable to be, detained in an authorised mental health service under a forensic order.

[40] In addition, as is evident from the reasoning of Holmes J, her Honour identified a number of flaws in the reasoning of the Tribunal. First, the forensic order in *AKB* was not made by the Mental Health Court "in the exercise of its discretion under s 288(2) of the MHA 2000, nor with regard to the factors set out in [s 288(4)]", which referred to the Court having regard to the seriousness of the offence, the person's treatment or care needs and the protection of the community.[30] The forensic order in *Re AKB* was, as observed by her Honour, "mandated by s 33A(1) of the *Mental Health Act* 1974, which required an order for detention, as a restricted patient in a hospital, of a person charged with an offence and found by the Mental Health Tribunal to be suffering from unsoundness of mind."[31] The error identified by her Honour was "the [T]ribunal's notion that it could decide confirmation or revocation by reference to whether [s 288(4)] factors had changed or remained operative".[32] The second error was that the Tribunal in *Re AKB* failed to have regard at all to the existing mental state of AKB. This is to be contrasted with the present case where the error of the Tribunal was to treat the existence of a current existing mental illness as a prerequisite to the confirmation of a forensic order.

[41] In the result, the Tribunal's decision made 3 October 2018 revoking the forensic order must be set aside. Rather than remit the matter to the Tribunal, having had the benefit of advice from the Assisting Psychiatrists, it is appropriate for the Court to substitute its own decision pursuant to s 546(3)(b) of the MHA 2016.

[42] [Redacted]

[43] [Redacted]

[44] [Redacted]

[45] [Redacted]

[46] [Redacted]

[47] [Redacted]

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29 MHA 2016 ss 430-433.
30 *Re AKB* [2005] QMHC 005 at [17]: her Honour's reference to s 288(3) should be a reference to s 288(4).
31 *Re AKB* [2005] QMHC 005 at [17].
32 *Re AKB* [2005] QHMC 005 at [17].

[48] [Redacted]

[49] [Redacted]

[50] [Redacted]

[51] [Redacted]

[52] [Redacted]