

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

CHIHEB ESSEGHAIER

AMICUS'S WRITTEN SUBMISSIONS ON SENTENCE

A. Introduction

1. This Court is charged with the sentencing of an offender with a recently diagnosed profound mental disorder: likely schizophrenia with psychotic delusions.
2. This mental illness has a significant impact on the issues of the offender's moral culpability and the effect of the sentence to be imposed.
3. *Amicus* submits that given the likelihood that Esseghaier's offending behaviour and "radicalization" were substantially driven by his emerging mental illness, this Court ought not to sentence him until the connection between his offending behaviour and his mental illness can be further explored and understood. This can only occur if Esseghaier's mental illness is treated. *Amicus* submits that the sentencing should be adjourned to permit this treatment and an appropriate order made to facilitate Esseghaier's hospitalization.

4. Should this Court proceed with sentencing at this time, *amicus* submits that the following factors tend to mitigate sentence in this case:

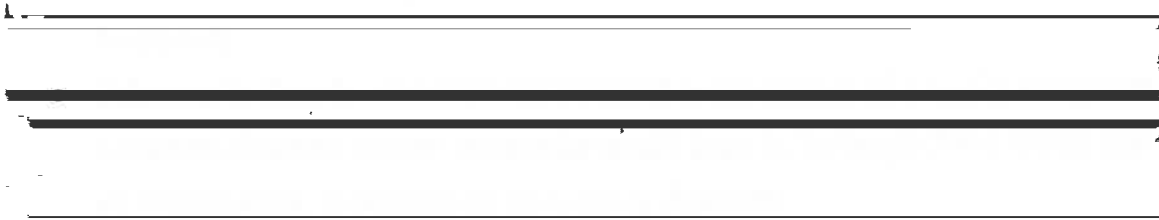
- Profound and debilitating mental illness affecting both:
 - The expected impact of a prison sentence on Esseghaier, and;
 - Esseghaier's reduced moral culpability for the offences
- Youth and inexperience;
- Lack of criminal record;
- Absence of injury to others or damage to property;
- Lack of concrete steps taken to pursue the object of the conspiracy;
- Lack of connection to terrorist groups;

B. Mental Illness

5. Based on the evidence called at the sentencing hearing, the report of Dr. Klassen and Esseghaier's continued deterioration as demonstrated by his outbursts in court, the following facts are now undeniable:

- Esseghaier suffers from a major mental illness;
- That major mental illness is likely schizophrenia; no other major mental illness fits the symptoms he has displayed;
- Esseghaier is currently psychotic, which means that he has suffered a break from reality and is delusional;
- Esseghaier has exhibited delusional thinking that is both religiously based (e.g. a belief that his birthdate is a religious message) and non-religiously based (e.g. that his fellow prisoners are "fake" and are there to make a movie about him);
- Religiously-based delusions are a common symptom of schizophrenia;
- Esseghaier would have been either delusional or in the "prodromal" phase of his mental illness at the time the offences were committed;

- The prodromal phase is characterized by changes in thought, judgment, and behaviour. The sufferer generally does not know that he is becoming mentally ill and does not know the reason for the changes he is experiencing;
- The social changes exhibited by Esseghaier starting in or around 2009 – argumentativeness, poor hygiene, problems with colleagues, becoming homeless – were “more likely than not” the result of the prodromal phase of his schizophrenia;
- It is common for schizophrenics in the prodromal period to become more religious, even before the onset of noticeable delusions;
- It is not possible to know **with certainty** if Esseghaier’s increased religiosity in the period leading up to the offences was itself a symptom of his major mental illness; the only way to determine this **with certainty** would be to treat Esseghaier’s schizophrenia and see if those beliefs subside with treatment;
- Without treatment with anti-psychotic medication, Esseghaier’s mental health will continue to deteriorate;
- Esseghaier has no insight into his mental illness and is unlikely to consent to



treatment;

Prisoners in Ontario are not treated pursuant to the consent of a legally-designated substitute decision maker; Esseghaier would have to be hospitalized before such an avenue could be pursued by his treating physician.

1. Adjournment of Sentencing to Allow for Treatment and Further Assessment

6 *Amicus* submits that the following steps should be taken:

- 1) The sentencing of Esseghaier should be adjourned;
- 2) This Court should make an order under s. 22 of the *Mental Health Act* that Esseghaier be involuntarily hospitalized at a secure mental health facility for

- 3) Once hospitalized, Esseghaier's treating psychiatrist will determine what treatment is medically indicated and if Esseghaier has the capacity to consent to or refuse treatment. If he lacks that capacity, which he apparently does, he can be treated on the consent of a substitute decision maker;
- 4) Once treatment has begun, two further assessments should be conducted:
 - a. An NCR assessment, and;
 - b. A further assessment in aid of sentencing.

7. As elaborated on below, Esseghaier's mental health is of paramount importance, both to the determination of a fit sentence and his future well-being.

8. Both Dr. Klassen and Dr. Ramshaw are of the view that it is likely that Esseghaier's major mental illness began to develop as early as 2009. They are further of the view that it is likely that his "radicalization" and subsequent offending behaviour were brought about, wholly or in part, by his mental illness. The precise extent to which Esseghaier's extreme views and dangerousness are the result of mental illness can only be determined by observing the results of treatment.

9. Esseghaier's mental status continues to deteriorate. Immediate treatment is clearly in his best interest and in the interests of justice. Dr. Klassen and Dr. Ramshaw make clear that treatment in the penitentiary after sentencing would be significantly delayed if it were to occur at all. This delay could affect the efficacy of treatment.

10. *Amicus* proposes that the Court order that Esseghaier be hospitalized pursuant to s. 22 of the *Mental Health Act* so as to allow Esseghaier's treating psychiatrists to treat him according to their professional expertise. In other words, this is not a request that the

Court order treatment, but rather a request that Esseghaier be transferred to a facility appropriate to his medical needs, where treatment can occur if it is indicated.

11. Furthermore, we expect that Dr. Klassen will testify that he has concerns as to whether Esseghaier was criminally responsible at the time of the commission of the alleged offences. He will further testify that an assessment of the NCR issue would be facilitated by treatment. *Amicus* thus submits that the Court should also order an NCR assessment, but that the NCR assessment order should be delayed until treatment has begun.²

2. *Mental Illness in Mitigation of Sentence*

12. Should this Court reject the suggestions offered above and choose to sentence Esseghaier now, *amicus* submits the following regarding the impact of Esseghaier's mental illness on sentencing:

13. Mental illness mitigates sentence in two ways. First, it means that a prison sentence is likely to be a harsher and more severe punishment on a mentally ill person than on a person who is mentally well. Second, when criminal conduct is brought about in part by mental illness, even short of a finding of "not criminally responsible," the conduct will be rendered less morally blameworthy and merit a shorter sentence than conduct that was entirely the result of rational deliberation.

² As this was a jury trial, this Court lacks jurisdiction to adjudicate Esseghaier's s.16 criminal responsibility at this stage. However, this Court does have the jurisdiction to order an NCR assessment pursuant to s.672.11 of the *Criminal Code*. Should the assessment support an NCR finding, the appropriate remedy would be a mistrial.

i) Prospective impact on the severity of sentence

14. Esseghaier has been in segregation throughout his pre-sentence custody. It is likely that that situation will continue when he is a sentenced inmate, as his deteriorating mental health would make him vulnerable in the general prison population. It is therefore very likely that Esseghaier will remain in segregation for an extended period. Isolation is the harshest form of punishment permitted by Canadian law.

15. Furthermore, it is probable that as a result of his worsening mental state, Esseghaier is not competent to provide (or refuse) consent regarding treatment with anti-psychotic medication. He lacks insight into his condition and does not believe himself to be ill. If he were not a prisoner and were adjudicated incompetent by the Consent and Capacity Board, he could be treated on the consent of a legally-designated substitute decision maker. However, as Dr. Ramshaw testified, prisons are not permitted to treat inmates pursuant to the consent of a substitute decision maker. Esseghaier would only receive such treatment if he were hospitalized. There is therefore a real concern that, once sentenced, Esseghaier's condition will go untreated for a significant period of time.

16. This court should, of course, take all steps possible to ensure that Esseghaier's diagnosis and mental condition are brought to the attention of prison staff after he is sentenced. Copies of Dr. Ramshaw's and Dr. Klassen's reports and any other relevant psychiatric information should be attached to his warrant of committal so they are available when he is transferred to the penitentiary. This court should consider making a recommendation that he be seen by a psychiatrist as soon as possible upon his arrival at the penitentiary. However, none of these steps can ensure that Esseghaier will receive psychiatric treatment.

17. A life sentence would provide no motivation to prison authorities to ensure that Esseghaier's condition is ever treated. The risk that he would simply be "warehoused" is very real. A release date, however distant it may be, could provide that motivation. As the Supreme Court made clear in *Khawaja*, rehabilitation plays a role in all sentencing, including for terrorism offences. Treatment offers Esseghaier's best and likely only hope for rehabilitation.

R. v. Khawaja, 2012 SCC 69 at para. 124

ii) Impact of mental illness on Esseghaier's moral culpability

18. In ordering an assessment under the *Mental Health Act*, this court posed the question: is there something about Esseghaier's personality structure which left him more vulnerable to radicalization? The answer to that question is now clear: yes there is, and that 'something' is schizophrenia.

19. Mental illness short of a finding of NCR can mitigate sentence by reducing the offender's moral culpability for his actions. The evidence in this case demonstrates that Esseghaier should receive such mitigation of his sentence.

R. v. Ellis, 2013 ONCA 739 at para. 117

20. It may be suggested that while Esseghaier has clearly developed delusions (e.g. his belief that it is currently the autumn of 2014), his religious beliefs are unconnected to those delusions. In other words, regardless of his mental illness, he would still have been an extremist. In fact, it is **impossible to know with certainty** if this is the case unless Esseghaier is treated.

21. Of course, a **mitigating** factor need not be established with certainty or beyond a reasonable doubt. It can be established by a preponderance of the evidence, including circumstantial evidence. This Court must not ignore the clear evidence of mental illness that has developed since Esseghaier's arrest, which constitutes strong circumstantial evidence that the dramatic change in Esseghaier around 2009 was related to the early stages of this mental illness. Esseghaier must not be sentenced on the basis of a fanciful idea: that Esseghaier was in the prodromal period of schizophrenia with all the resulting mental changes which affected his ability to relate to others and his self-care and, **in an unrelated development, at exactly the same time, but purely by coincidence**, adopted radical Islam.

22. The only reasonable interpretation of the evidence as a whole is that Esseghaier's turn to radical Islam was **likely related** to his developing mental illness, given the proximity in time and the dramatic change described by his acquaintances. This does not necessarily mean that Esseghaier had no control over his behaviour or that he bears no moral responsibility for his choices. However, it does suggest that it would be wrong to sentence Esseghaier in the same manner as those who embrace radical Islam and plan terrorist acts with clear-headed rationality, without the mental stress of a developing major mental illness.

C. Other Mitigating Factors

1. Youthful First Offender

23. Esseghaier has no prior criminal record.

24. The offences occurred when Esseghaier was about 30 years old. While Esseghaier was clearly an adult, he was also described by family and acquaintances as immature and naïve. He was still in school, studying for a PhD, and had evidently never supported himself. He had never been in a relationship. He had always focused on his studies and had little ‘real-world’ experience or insight. He therefore fits the broad category of youthful first offender.

2. Lack of concrete steps toward the object of the conspiracy

25. A conspiracy is, of course, an offence regardless of whether **any** steps are taken towards its fulfillment. However, the conduct of an offender who takes real steps toward the commission of the crime must be considered more serious than that of an offender who takes fewer or no concrete steps. And of course a conspiracy that actually results in injury or damage to property or has serious potential to cause such harm, is also more serious.

R. v. Ahmed, [2014] O.J. No. 4952 (Sup. C.J.) at para. 90

26. Throughout the timeframe of the conspiracy, Esseghaier spoke often of the idea to derail a train and what steps would be necessary to accomplish this goal. However, very few concrete steps were ever taken. A “safe-house” was rented **by the agent**. Locations were considered and the tracks examined. Esseghaier attempted to recruit others when

[REDACTED]

ever obtained. No video was ever produced, provided to the agent, or uploaded to the Internet. No property damage occurred nor was any attempted. At the time of his arrest, Esseghaier was no closer to reaching the object of the conspiracy than he was when the agent first became involved. At no time was there any real danger of the conspiracy being put into practice.

27. This must be contrasted with other terrorist conspiracies on which the Crown relies as sentencing precedents. In the “Toronto 18 bomb plot,” the leaders of the plot selected buildings in Ontario to be targeted for bombing. They devised a plan to use ammonium nitrate truck-bombs. They rented an industrial unit in which to store the chemical and actually took delivery of what they believed to be several tonnes of ammonium nitrate. Amara also constructed a working detonator.

R. v. Amara, 2010 ONCA 858
R. v. Amara, 2010 ONSC 441
R. v. Abdelhaleem, 2011 ONSC 1428

28. In *Khawaja*, the accused received terrorist training overseas, provided money and supplies to overseas terrorist groups, and constructed a detonator.

Khawaja (SCC), *supra*

29. The Crown suggests that the same sentence is appropriate for Esseghaier as was ordered for Amara, Abdelhaleem, and Khawaja, despite their conduct being very different. *Amicus* submits that Esseghaier’s culpability in this sense is more akin to Fahim Ahmad, who was a leader within the “Toronto 18”, held terrorist training camps in Ontario and planned to obtain assault rifles to carry out attacks in Canada. He also took few concrete steps toward this plan. Ahmad received a sentence of 16 years imprisonment.

R. v. Ahmad, 2010 ONCA 860 at paras. 13, 14, 22, 50, 53

3. *No connection to terrorist groups*

30. Esseghaier believed that he had made contact in Iran with a group of “mujahedeen” including “the responsible one” who provided him with the idea for the train plot. That the people Esseghaier met were really members of Al Qaeda was a dubious claim even before the more recent revelations about Esseghaier’s mental health. Esseghaier’s identification of a Palestinian terrorist as the Farsi-speaking “responsible one” adds more doubt.

31. In any event, the development of Esseghaier’s mental illness and the idiosyncratic and delusion-based religious views he has adopted as a result make it most unlikely he would ever again have any connection to a Muslim terrorist group either in Canada or abroad. Esseghaier has expressed suspicion of ISIS and Al Qaeda, not support, and said that no one other than he is correctly practising Islam.

32. This fact is relevant to any calculation of Esseghaier’s future dangerousness.

D. The Appropriate Sentence

33. While multiple sentences for terrorism offences must be served consecutively to each other, the principle of totality still applies to terrorism sentences.

Khawaja (SCC), *supra*, at para. 115

34. While Esseghaier was convicted of three counts of “participation in the activities of a terrorist group”, all these counts relate to participation in the same terrorist group working to the same end. The Crown’s decision to charge Esseghaier with three counts,

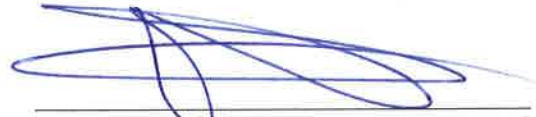
covering three rather arbitrarily defined periods of time, rather than one global count cannot aggravate the total sentence.

35. Terrorist conspiracies that have as their object death or injury attract lengthy penitentiary sentences. However, special circumstances can result in lower sentences. In *Khawaja*, the Ontario Court of Appeal suggested cooperation with authorities as a circumstance that could substantially mitigate sentence in terrorism cases. The Court states that this is an example only, and that other circumstances could also result in lower sentences because “sentencing remains a highly individual process and [...] the punishment imposed must be proportional to the overall culpability of the offender.” *Amicus* submits that for all the reasons set out above, Esseghaier’s profound and debilitating mental illness is also a special circumstance which tends to mitigate sentence in this case. Perhaps a life sentence would have been appropriate for an offender who engaged in this conspiracy while of sound and rational mind, but a life sentence is not proportionate for Esseghaier, who acted while afflicted by the early stages of a major mental illness.

R. v. Khawaja, 2010 ONCA 862 at para. 221

36. *Amicus* therefore submits that a total fixed sentence of 13-15 years is appropriate for Esseghaier.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28th day of August, 2015



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