



BRITISH COLUMBIA REVIEW BOARD

**IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6**

**REASONS FOR DISPOSITION
IN THE MATTER OF**

**BENEDICT NWABU AGBAKOBA
a.k.a.
BENEDICT ADBAKOBA**

HELD BY: Video
April 13, 2022

BEFORE: CHAIRPERSON: B. L. Edwards
MEMBERS: Dr. J. Smith, psychiatrist
P. Cayley

APPEARANCES: ACCUSED/PATIENT: Benedict Agbakoba
ACCUSED/PATIENT COUNSEL: D. Abbey
DIRECTOR, AFPS: Dr. B. Singh, J. Javier,
K. Albrighton
DIRECTOR'S COUNSEL: D. Lovett, QC
ATTORNEY GENERAL: L. Hillaby

INTRODUCTION AND BACKGROUND

[1] On April 13, 2022, the BC Review Board held a mandatory hearing to review the disposition of Benedict Nwabu Agbakoba, also known as Benedict Adbakoba. The hearing occurred by video, with Mr. Agbakoba's agreement. At the conclusion of the hearing, the Board reserved its decision. It subsequently conditionally discharged Mr. Agbakoba. These are our reasons for that disposition.

[2] Mr. Agbakoba is before the Board as a result of receiving a verdict of not criminally responsible on account of mental disorder (NCRMD) rendered on January 24, 2018, at the Provincial Court in Vancouver, British Columbia. The verdict related to a single count of aggravated assault, contrary to section 268(2) of the *Criminal Code*.

[3] The circumstances of the index offence are that on January 5, 2017, Mr. Agbakoba, armed with a knife, knocked on the door to a neighbour's basement suite in the early morning hours searching for a friend. He spoke nonsensically to the victim (GM) and was crying. When GM turned his back on the accused to call a mutual friend for advice, Mr. Agbakoba attacked him. GM barricaded himself in a room in an effort to protect himself. Mr. Agbakoba broke down the door and stabbed the victim in the back, neck, stomach and face. When GM attempted to disarm Mr. Agbakoba, the latter repeatedly banged the victim's head on the floor. The victim sustained serious injuries that included stab wounds, lacerations and broken and dislodged teeth. Mr. Agbakoba fled to his own residence where he reportedly told his landlord, "I'm never trying the white powder again," "Don't take away my electricity," "Don't give me more of the weed," and "I didn't kill him; I didn't do it."

[4] Mr. Agbakoba is a 25 year old man of Nigerian heritage. He was born and raised in Lagos, Nigeria. In 2014, at 17 years of age, Mr. Agbakoba arrived in Canada on a student visa. By age 18 he was using cannabis daily, consuming alcohol socially, and experimenting with hallucinogenic mushrooms and ecstasy. In 2016, Mr. Agbakoba's mental state deteriorated in the context of the dissolution of a romantic relationship, financial stress and the emergence of depressive symptoms. In the fall of 2016, he dropped out of school and began working at a retail store. He subsequently reported that it was around this time that he began to experience auditory hallucinations and feelings that his safety was at risk. He quit his job abruptly on the day of the index offence.

[5] Following his NCRMD verdict, Mr. Agbakoba was released on bail pending disposition by the Review Board. On February 27, 2018, the Board held an initial hearing and conditionally discharged Mr. Agbakoba. Less than a week later, on March 5, 2018, Mr. Agbakoba was directed to the Forensic Psychiatric Hospital (FPH) after breaching a term of his conditional

discharge. The Board convened a restriction of liberties hearing on April 13, 2018, and made a custodial disposition. That order was extended on April 5, 2019, at Mr. Agbakoba's request. The Board has since made successive custodial orders.

EVIDENCE AT THE HEARING

[6] The new evidence added to the disposition information hearing consisted of documentary evidence including:

- a report (including a risk assessment) that was prepared by Dr. B. Singh, Mr. Agbakoba's treating psychiatrist at FPH, dated February 28, 2022;
- a report dated February 4, 2022, that was prepared by K. Albrighton, registered social worker at FPH;
- a Health and Wellness Review of Progress Report dated February 7, 2022, prepared by R. Thompson, counsellor and group clinician, BC Mental Health & Substance Use Services;
- a report dated February 8, 2022, prepared by J. Javier, Review Board liaison to FPH;
- a letter dated April 8, 2022, from H. Park, legal counsel to Canada Border Services Agency, regarding Mr. Agbakoba's legal status in Canada;
- a letter from D. Abbey, counsel to Mr. Agbakoba, dated April 12, 2022, attaching an article entitled "9,000 doctors moved to UK, US, Canada in 2 years - NMA" by J. Erunke in the online publication, Vanguard.

[7] The Board also received oral evidence from Dr. Singh, Ms. Javier, and Ms. Albrighton on behalf of the Director. The Board also had the benefit of hearing from Mr. Agbakoba and his mother, JA. The Crown did not call any evidence.

Preliminary matter

[8] After reviewing the previous disposition information and the reports submitted by the Director, I asked that the Registrar contact the parties (with notice to Canada Border Services Agency) and ask that they be prepared to address the following in their submissions at the hearing:

What is Mr. Agbakoba (a.k.a. Adbakoba)'s current legal status in Canada?
Specifically, I ask the Parties to address:

- a. Has Mr. Agbakoba been found to be inadmissible to Canada or lost his temporary residency status after a hearing under the *Immigration and Refugee Protection Act* (e.g., s.45)?
- b. Has Mr. Agbakoba been made the subject of a valid removal order made under the *Immigration and Refugee Protection Act* (s.45).
- c. If there is such an order, has Mr. Agbakoba appealed the removal order?

- d. If so, when is that appeal is likely to be heard? (Previous documents in the disposition material suggest an appeal was scheduled for the summer of 2021)
- e. What is the status of the removal order pending an appeal, i.e., has the removal order been stayed pending the appeal?
 - i. is it considered to be stayed under s.50 (a) because of the Review Board's current order?
 - ii. Has it otherwise been stayed by the Immigration Appeal Division or a court of competent jurisdiction under s. 50?
- f. If an appeal of a removal order has been filed, has it been heard?
 - i. If so, what is the result of that appeal?
 - ii. Are the results of an appeal final – is there another level of appeal or judicial review?
 - iii. Does any further appeal or judicial review stay the removal order?
- g. What is the Minister's stated intention / instruction with respect to enforcing any valid removal order?
- h. Is enforcement of the removal order dependent on a Review Board order? If so, how?

In terms of discharge planning for Mr. Agbakoba:

- i. Is discharge planning, at present, dependent on Mr. Agbakoba's *mother's* legal status in Canada, i.e., are visit leaves or discharge planning dependent on her support and supervision of Mr. Agbakoba?
- j. What is the mother's present legal status in Canada? i.e., does she continue to hold a visitor's visa? Another visa?
- k. When does the mother's temporary status expire?
- l. If it is nearing expiration, has she applied for a further visitor or work visa?
 - i. If so, when is she likely to have a decision regarding that application?

[9] As Mr. Agbakoba's immigration status forms a backdrop to this hearing, the Board will describe that status first, before turning to the evidence regarding his progress in the community, risk assessment and discharge planning for him.

Mr. Agbakoba's immigration status

[10] H. Park, senior counsel for Canada Border Services Agency (CBSA), did not attend the hearing but wrote the Board with information regarding Mr. Agbakoba's immigration status. Ms. Park described Mr. Agbakoba's legal status in Canada at pages 1-2 of her letter, as follows:

Benedict Agbakoba is a citizen of Nigeria born on November 17, 1996. He arrived in Canada April 14, 2014 and he obtained a temporary resident study permit valid for 3 years.

On January 5, 2017, he came to the attention of CBSA after he was charged with aggravated assault. Upon investigation, in January 6, 2017, a CBSA officer reported Mr. Agbakoba inadmissible to Canada because he failed to comply with the requirement of his study permit as he had not been enrolled at or attending a designated learning

institute since August 2016, and he failed to leave Canada. He was also in poor academic standing while enrolled at Columbia College. A Minister's delegate issued an Exclusion Order on February 24, 2017, which means that Mr. Agbakoba must leave Canada immediately and he is prohibited from returning to Canada within 1 year after [sic] departs Canada. As a foreign national, he does not have a right to appeal the removal order to the Immigration Appeal Division of the Immigration and Refugee Board. Mr. Agbakoba did seek to judicially review the exclusion order at the Federal Court pursuant to s. 72 of the *Immigration and Refugee Protection Act (IRPA)*.

When the exclusion order was issued, CBSA notified Mr. Agbakoba that he was entitled to make an application to IRCC for a Pre-Removal Risk Assessment (PRRA) to determine if he is a Convention refugee or person in need of protection. Mr. Agbakoba applied for PRRA with the assistance of counsel. On December 5, 2018, a Senior Immigration Officer denied his PRRA application.

On March 27, 2019, Mr. Agbakoba applied for permanent resident status in Canada seeking an exemption to the requirements of the *IRPA*, on humanitarian and compassionate grounds (H&C application). On January 21, 2021, a Senior Immigration Officer refused his H&C application. Mr. Agbakoba filed an application for leave and for judicial review of the H&C decision of the Federal Court which dismissed his leave application on April 27, 2021.

[11] Ms. Park further informed the Board that while Mr. Agbakoba has been the subject of a BC Review Board detention order, the exclusion order (also referred to as a removal order) has been stayed under s. 50(a) of the *IRPA*. However, it is CBSA's position that if the Board were to release Mr. Agbakoba into the community under either an absolute or conditional discharge, the stay would no longer apply and CBSA would have a statutory duty under s. 48 of the *IRPA* to enforce the removal order. Ms. Park advised the Board that CBSA would make arrangements for his removal from Canada. (CBSA will need to apply for travel documents on his behalf, since his Nigerian passport expired in September 2021.)

[12] Ms. Park further informed the Board that Mr. Agbakoba's mother entered Canada on March 31, 2020, on a visitor's visa which has been extended several times. She currently has an outstanding extension application which was submitted to IRCC on April 1, 2022.

[13] In his written submissions, Mr. Abbey accepted that Ms. Park's description "appears to accurately describe the current state of (Mr. Agbakoba)'s immigration matters."

[14] Ms. Albrighton reported that she spoke with R. Lewis, Enforcement Officer, CBSA, about Mr. Agbakoba's status. Mr. Lewis advised Ms. Albrighton that CBSA intends to proceed to enforce the Exclusion Order and deport Mr. Agbakoba if he receives a conditional discharge. At present, CBSA has seized Mr. Agbakoba's (expired) Nigerian passport, and he has no valid government-issued identification documents. His lack of legal status in Canada has barred him

from opening a bank account, applying for a disability pension, bus pass, or medication coverage. He is also prevented from returning to school or obtaining work.

Mr. Agbakoba's progress at FPH and in the community

[15] Dr. Singh reported that Mr. Agbakoba has been more stable mentally than in the past. She opined that Mr. Agbakoba's mother appears to be a good influence on him both in terms of his mental and physical health. For example, he has lost weight and his anxiety-induced tremor is less pronounced since he has been residing with her. Dr. Singh assessed Mr. Agbakoba prior to preparing her report in February 2022. At the time, she found no evidence of persecutory, grandiose, bizarre or referential delusions and he denies same. Unfortunately, his insight remained "partial and superficial." In her oral testimony, Dr. Singh stated that Mr. Agbakoba's presentation remains unchanged. He is able to state that he has a diagnosis of schizophrenia, and he recognizes that cannabis used played a role in contributing to his paranoia at the time of index offence.

[16] Mr. Agbakoba reportedly told Dr. Singh that at the time of the index offence, he was "scared of the aliens who were attacking." He believed the victim to be an alien until he shouted, "Benedict, it's me." Mr. Agbakoba told Dr. Singh that he was suffering from "grandeur delusions of telekinesis."

[17] Dr. Singh reported that Mr. Agbakoba continues to be diagnosed with schizophrenia, in remission; cannabis use disorder, in sustained remission in a controlled setting (his mother's home); and alcohol use disorder, in sustained remission, in a controlled setting. She further reported that her treatment plan for Mr. Agbakoba consisted of an injectable antipsychotic medication (flupentixol 30 mg. intramuscularly every two weeks) as well as an oral mood stabilizer (valproic acid, 500 mg. twice daily).

[18] The Board was reminded by Ms. Albrighton that the Community Transitional Care program (CTC) had previously decided that Mr. Agbakoba would not be a suitable candidate for the program as a result of his precarious immigration status. As a result, he began the reporting period (February 2021 to February 2022) at the Hawthorne unit at FPH before transitioning to his mother's home in April 2021.

[19] Ms. Javier reported that on April 13, 2021, during a room search at FPH, Mr. Agbakoba was found to be in possession of contraband (i.e., pornographic material on a USB stick). The treatment team noted that this was the second occurrence, the first occurring seven to eight months prior while also in treatment at FPH. His privileges were briefly suspended, and his visit leave commenced as planned. In addition, Dr. Singh noted that Mr. Agbakoba had been found on several occasions to be smoking on grounds at FPH, including in his Hawthorne

residence. Mr. Agbakoba has had approximately 46 urine drug screens collected over the reporting period, and all have been negative for illicit substances.

[20] On April 22, 2021, the treatment team placed Mr. Agbakoba on the first of a series of 28-day visit leaves to his mother's rented basement suite in Surrey. Apart from returning to FPH for his injectable medication, to attend monthly treatment planning conferences and to provide urine samples for drug screening, Mr. Agbakoba has remained in the community. In the fall of 2021, Mr. Agbakoba and his mother moved to an apartment where they continue to reside. Mr. Agbakoba's mother reportedly keeps a close watch on her son but for when he is attending the gym or grocery shopping.

[21] Ms. Albrighton reported that Mr. Agbakoba has an assigned case manager, D. Pirie, at the Surrey Forensic Outpatient Clinic who has attended treatment planning meetings over the past year. Mr. Agbakoba was scheduled to meet with Dr. Riley at the clinic on February 17, 2022, in anticipation of the Board conditionally discharging him following this hearing. Neither Ms. Albrighton nor Dr. Singh could say if that meeting had occurred or what may have resulted.

Oral evidence at the hearing

[22] At the hearing, Ms. Albrighton was very frank with the Board. In response to a question from Mr. Abbey, she said that she is not currently assigned as Mr. Agbakoba's social worker and that, at present, "no one is checking on him." She said that she offered to provide a report to the Board when she learned that Mr. Agbakoba had a Review Board hearing coming up and no assigned social worker. Ms. Albrighton said that Mr. Agbakoba does not benefit from a full interdisciplinary team. If he had an assigned social worker, they would be recommending that he attend programming such as Matrix, SMART recovery, psychology and a 12-step recovery program. Ms. Albrighton opined that Mr. Agbakoba has "too much time on his hands."

[23] Ms. Albrighton said that she has only seen Mr. Agbakoba in the community twice over the past year; first in September 2021 to assess the new residence and then again in January 2022 to provide an updated assessment for this hearing. Ms. Albrighton told the Board that it was her impression that Mr. Agbakoba's mother "watches [his] every move" other than permitting him to go, unattended, to the gym and grocery store.

[24] In her oral evidence, Dr. Singh opined that Mr. Agbakoba has done "quite well" in the community. He attends FPH once or twice weekly for random urine drug screens that continue to be negative for the presence of illicit substances. He is "fully compliant" with his injectable medication. Dr. Singh opined that Mr. Agbakoba's mother is stricter with him than the hospital treatment team.

[25] In response to questions from Crown counsel, Dr. Singh stated that she is not recommending that the Board absolutely discharge Mr. Agbakoba as she believes that he still requires support in the community and because he is receiving his intramuscular medication at the hospital and will receive it at the Surrey Forensic Clinic if he were to be conditionally discharged. She opined that he might decide that he is doing well, might discontinue treatment and might not continue to live with his mother if he were to be absolutely discharged. That said, Dr. Singh agreed with Mr. Abbey's suggestion that Mr. Agbakoba's mother has not expressed any concerns regarding his compliance with the rules of her home, attending FPH, or taking his oral medication.

[26] Asked by Mr. Abbey if she had any concerns that, if he were to be left to his own devices, Mr. Agbakoba might extend the type of behaviour that he exhibited in February 2018 toward courthouse staff and to others such as people at the Canadian consulate or immigration staff, Dr. Singh said that she believed he "could."

[27] Mr. Abbey further asked Dr. Singh if she was familiar with the mental health and forensic system in Nigeria and the availability of psychiatric care. She said she was not. She opined that Mr. Agbakoba could receive his current antipsychotic medication from anywhere in the world as it is an older antipsychotic medication that is widely available. She said that while a general practitioner could prescribe and administer it, she did not know if there was a doctor that would be willing to do so.

[28] In response to questions from the Board, Dr. Singh said that she continues to hold the opinion that she stated both in her current and prior report to the Board regarding the benefit that Mr. Agbakoba has received from individual psychotherapy, and the need for ongoing treatment to assist him to reach the "level of insight required for self-driven sustainable internal change." However, on further probing, Dr. Singh said that the treatment team has not recommended any further psychological treatment for Mr. Agbakoba because he has seemed to be doing well in the community, his anxiety has improved, he has not asked for counselling, and the treatment team did not think it was necessary.

[29] Dr. Singh acknowledged that despite her concern that Mr. Agbakoba is at risk of relapse into substance use, the treatment team has not recommended that he attend a 12-step program, peer-based group counselling, the SMART recovery program or any other program to assist him in his recovery. By way of explanation, Dr. Singh said that Mr. Agbakoba has not asked to attend such programming and the treatment team has taken the view that he understands his need to abstain, his urinalysis confirms that he has not been using, he denies cravings, and he is motivated to please his mother who is strongly opposed to substance use.

[30] Dr. Singh agreed with a member of the Board's suggestion that it was unusual for a person to be on visit leaves for a year with so little oversight without the Director seeking a hearing to recommend a conditional discharge. Asked by the Board if the treatment team was maintaining him on a custodial order because of his immigration status, Dr. Singh said that she "tried not to think about it." She said that she had wanted to ensure that Mr. Agbakoba's transition to the community was gradual and that things were going well before she recommended a conditional discharge.

[31] The Board observed that, by Dr. Singh's evidence, Mr. Agbakoba appeared to be doing well and asked what she would want to see before recommending an absolute discharge. Dr. Singh replied that she would want there to be decreased team oversight and Mr. Agbakoba to be living "on his own." She also would like him to have consistent negative urine drug screens, be compliant with treatment, "doing well for at least a year," be open with his treatment team, and motivated to attend programming.

[32] Mr. Agbakoba answered questions from the parties and the Board. He identified his diagnosis (schizophrenia) and explained that it means that he has a different view of reality when he is experiencing psychosis. He said that he becomes "very scared" and that his thoughts "go everywhere." He said that he last experienced psychosis in 2018 when he was returned to FPH and for a short time thereafter, but has been "stable" since. Mr. Agbakoba told the Board that his injectable antipsychotic medication gives him "a clear mind" and prevents psychosis. Without the medication, he said that he could behave erratically, be unable to differentiate between reality and what is not real, and may become scared and aggressive.

[33] Mr. Agbakoba told the Board that he now recognizes that when he previously used cannabis and alcohol, he became paranoid. He said that he thought that his substance use was "the main part of my psychosis" and that he now recognizes that he must abstain from substance use.

[34] Mr. Agbakoba told the Board that he met with D. Pirie on January 29, 2022, and with Dr. Riley on February 17, 2022. He said that he is willing to attend the Surrey Forensic Clinic, participate in peer-to-peer support and is "open to any programs to give me more insight into my illness." He also identified concerns that he has about being removed from Canada. He said that he does not know if he would be able to receive his medication in Nigeria, what it might cost, or if he would have access to the appropriate mental health care. He offered that he is aware that there is a mental health facility in Lagos, but stated that he does not know much about it.

[35] Mr. Agbakoba told the Board that he worries that he might decompensate under the stress of another immigration hearing or deportation. He does not want to hurt anyone. He said that he and his mother read the news and are concerned about the current state of stability in Nigeria; he has heard that doctors are going on strike. That said, he acknowledged that neither he nor his family have made any inquiries about the availability of medical and mental health care for him in Nigeria.

[36] Mr. Agbakoba said that he is working with three legal counsel who are assisting him with his immigration matters. He understands that his counsel may be bringing a new application seeking a medical exception for him in the future but that has not yet occurred.

[37] In response to questions from the Board, Mr. Agbakoba said that his mother is his main support, but he also remains in contact with old friends, and new friends who he met while in hospital but who are now discharged. He acknowledged that he also has contacts at the gym that he attends. When asked about his relationship with his father, Mr. Agbakoba said, "he is not really happy with me."

[38] JA testified on behalf of her son. She told the Board that she came to Canada on a visitor's visa after hearing from her son's friends that he had become unwell. She submitted an application on April 1, 2022, to extend her visa; the application is pending. In response to questions from Crown counsel, JA said that in Nigeria she works as a businesswoman and in the family's hotel. She stressed to the Board that she was "disappointed" to learn of her son's conduct while unwell and that when she informed Mr. Agbakoba, Sr. "he did not take it lightly." She added that her son's relationship with his father is not good at the moment. She explained that "in Africa when the son is doing well, the father shines. When he is not doing well, the problem goes with the mother." At the moment, Mr. Agbakoba's father does not want to hear his son's name.

[39] JA told the Board that she understands that her son needs to take his medication to stay well and that he needs all the support that he can receive from psychiatrists and other professionals. She expressed concern that he might not get the support that he needs in Nigeria where things are "in chaos" and "doctors are always going on strike." She acknowledged that she is not familiar with the mental health system in Nigeria, but knows that healthcare is not free. She added that she has read "lots of stories on the news" which are concerning to her.

[40] In response to a suggestion from Crown counsel, JA denied that her family is trying to have her sons educated in Canada so that the family can have the opportunity to settle here. She was adamant that it is her hope that her sons become educated in Canada or elsewhere

and then return to Nigeria, share their knowledge, and make the country better for the people who live there.

Risk assessment

[41] In her written report, Dr. Singh assessed Mr. Agbakoba's risk for violence. She reported that his historical risk factors remain unchanged from her last report. The Board notes that, in her February 7, 2021, risk assessment, Dr. Singh identified that Mr. Agbakoba's history of violence included the index offence (a serious assault wherein Mr. Agbakoba repeatedly stabbed the victim and hit his face into the ground), followed by an assault on a correctional officer in January 2017. Further, Mr. Agbakoba was involved in a retaliatory attack on a roommate while in the community which resulted in his residence having holes in the wall and bloodstains. While on a conditional discharge, he went to the courthouse and threatened the court and police authorities. He also voiced a desire to "kill his ex-roommate and neighbour." In addition, in March 2018, Mr. Agbakoba returned to his former residence and demanded entry in contravention of his Review Board order. Mr. Agbakoba has a history of difficulty maintaining a therapeutic relationship with his interdisciplinary team. He has experienced significant mental health deterioration in the context of substance use leading up to his psychotic presentation at the time of the index offence. He relapsed into substance use during his brief period in the community on his previous conditional discharge. While at FPH, Mr. Agbakoba tested positive for cocaine use on a urine drug screen (verified on confirmatory testing) in November 2019 though he denies using the substance.

[42] Dr. Singh noted in her prior risk assessment that Mr. Agbakoba's history is consistent with schizophrenia and that his former treating psychiatrist at FPH, Dr. Stingu-Baxter, opined that Mr. Agbakoba has "important features of personality disorders in the antisocial and narcissistic spectrum."

[43] In terms of clinical risk factors, in her current risk assessment Dr. Singh noted that Mr. Agbakoba has not been violent, has been behaviorally stable, and there has been no evidence of a major mood disorder over the reporting period. Neither has there been any evidence of relapse into substance use while living with his mother. He has been compliant with his medications and weekly random urine drug screens. Dr. Singh noted that Mr. Agbakoba is reliant on his parents (his father remains in Nigeria) for financial support.

[44] Given Mr. Agbakoba's history, Dr. Singh opined that the stress associated with his immigration status raises a concern for potential relapse into substance use as a means of coping. Further, he is at a "high risk" of mental deterioration in the context of medication non-

compliance and/or a relapse into substance use. This risk is being mitigated in the community by his mother's strict oversight and Mr. Agbakoba's fear of her disapproval.

[45] Dr. Singh concluded that Mr. Agbakoba's risk to the public is manageable in the community with the support of a treatment team and his mother, and while he is compliant with his medication and abstains from substance use. She opined that the most likely risk scenario, if Mr. Agbakoba were to be left to his own devices, is that he would be highly likely to relapse into substance use and would fail to take his medications. In that event, his risk to the public would increase "significantly." Dr. Singh stressed that it is important that Mr. Agbakoba be supervised in the community.

The parties' submissions:

The Director's submissions

[46] Ms. Lovett, on behalf of the Director, recommended that the Board conditionally discharge Mr. Agbakoba. She submitted that the evidence in the hearing was that Mr. Agbakoba has been living in the community on back-to-back visit leaves since April 22, 2021. All of his urine drug screens since November 2019 have been negative for illicit substances. He has been compliant with his medication; his health has improved since he has been living with his mother with no signs of psychosis and a lessening of his anxiety. Further, Mr. Agbakoba's insight has improved over previous years.

[47] Ms. Lovett further submitted that the risk that Mr. Agbakoba poses to the public has been well-managed in the community by the hospital team and his mother. There is still a risk of Mr. Agbakoba experiencing paranoia or delusions should he relapse into substance use or become non-compliant with his medication. The Director recognizes that Mr. Agbakoba's immigration status may be a source of stress to him and that, left to his own devices, he might use substances to cope. As a result, the Director submitted that the Board's continued oversight is warranted.

[48] Ms. Lovett stated that the Director did not take a position on defence counsel's request for a condition precluding Mr. Agbakoba's detention or removal from British Columbia, absent a hearing of the Board. She did, however, refer the Board to her submissions on the Director's behalf in *Re ZS*, an unreported decision of the Board, dated August 20, 2007 (ZS). In *ZS* at paragraphs 46 and 47, the Board quoted from the Director's submissions, as follows:

[46] ...[t]he only issue for the Review Board is what disposition order should issue, given the medical and other evidence and the Review Board's responsibilities under section 672.54 of the *Criminal Code*.

[47] ...In exercising this mandate it is appropriate for the Board to consider the impact of the prospect of [the] deportation order on the mental condition of [ZS]

(and any corresponding increase of risk to public safety) as the *Criminal Code* directs the Board to consider his mental state in making an appropriate disposition (i.e. custodial, conditional or absolute). It should not be considered for any other purpose, such as defeating the clear intention of the IRPA: Director's, Submissions, page 11.

[49] The Director also referred the Board to the cases of *R. v. Miller* [2003] OJ No. 3455 (C.A.); *Dhanpaul v. Canada (Minister of Public Safety and Emergency Preparedness)* [2018] IADD No. 1029 (Immigration Appeal Division, Immigration and Refugee Board of Canada) (*Dhanpaul*); *Re Benn* [2004] ORBD No. 665 (*Benn*); and *Re Almestadi* [2017] BCRD No. 20 (*Almestadi*).

Crown counsel's submissions

[50] Crown counsel was ambivalent in his submissions to the Board. In his opening comments he suggested that the appropriate disposition would either be a custodial order or a conditional discharge. In closing, he added that the evidence in the hearing justified the Board's ongoing jurisdiction and would typically point clearly to a conditional discharge as the appropriate disposition. That said, he "wondered how safe such an order would be when the burden for oversight will be laid on the shoulders of the family," but did not oppose such an order. Mr. Hillaby pointed out that Mr. Agbakoba does not have the usual access to resources available to a conditionally discharged person.

[51] With respect to the issue of Mr. Agbakoba's immigration status, Crown counsel suggested that the Board could rely on Ms. Park's letter. He submitted that the Board ought to apply the reasoning of the Federal Court in *Perez v. Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No. 1601 (*Perez*). Mr. Hillaby further submitted that Mr. Agbakoba has avenues in other parts of Canadian law to pursue remaining in Canada. It is the purview of other agencies to address that matter. The Board's duty is to ensure that it is safe to have a potentially violent person cared for in the community. If the Board believes that Mr. Agbakoba is able to function safely in the community under a conditional discharge, it ought to make that order and not add a condition that would thwart the jurisdiction of other areas of government.

Defence counsel's submissions

[52] Mr. Abbey, on behalf of Mr. Agbakoba, submitted that the threshold for significant risk has been met on the evidence. He suggests that the least onerous and least restrictive disposition in the circumstances is a conditional discharge. He requested that the Board include the following specific provision in any such order: "THAT the accused not be detained or removed from the Province of British Columbia by any authority without prior notice to, and a hearing of, the British Columbia Review Board."

[53] Mr. Abbey stressed that he recommended the inclusion of such a condition, not to “thwart” the system, but to manage Mr. Agbakoba’s risk to the public despite the fact that neither the Director nor the Crown advocated for such a condition. He stressed that Mr. Agbakoba is concerned that he may become paranoid, aggressive, and potentially violent, if he becomes unwell. He suggested that the issue of risk to the public is not limited by borders. Mr. Abbey further submitted that, in her oral evidence, Dr. Singh acknowledged the potential risk to consulate staff and other officials if Mr. Agbakoba were to be removed from Canada. He submitted that there is no evidence that Mr. Agbakoba will remain stable if he is removed from Canada, that he can manage the stress he will be under, or that he will be able to get the psychiatric care that he needs in Nigeria.

[54] Further, in contrast to the facts in *Almestadi*, Mr. Abbey submitted that, here, there is no plan in place to care for Mr. Agbakoba in Nigeria. Mr. Abbey submitted that the facts are akin to those in *ZS*, in that if Mr. Agbakoba were deported decompensation is very likely. He stated that the requested condition should be imposed to ensure that he cannot be removed from forensic oversight. Mr. Abbey suggested that the decision in *Perez* simply stands for the proposition that the Board’s standard terms do not prevent removal absent forensic oversight. Further, he stressed that Mr. Agbakoba is subject to a removal order, not because of significant criminality, but because he did not comply with the terms of his student visa. In such circumstances, Mr. Abbey cautions that the CBSA does not conduct a risk assessment and may not be aware that Mr. Agbakoba may still be a risk to the public, even outside of our borders.

ANALYSIS AND DISPOSITION

[55] While the Board is assisted by the submissions of the parties, it must reach its own determination of whether Mr. Agbakoba constitutes a significant threat as defined by s. 672.5401 of the *Criminal Code*. A person is a significant threat if they pose “a risk of serious physical or psychological harm to members of the public...resulting from conduct that is criminal in nature but not necessarily violent.” If they do not pose such a threat, they are entitled to be absolutely discharged. If they do pose a significant threat to the safety of the public, the Board must then determine the least onerous and least restrictive disposition (also referred to as the necessary and appropriate disposition).

[56] The Board is mindful that the index offence involved an unprovoked assault on a young man in his own home and in the early morning hours. The result could easily have been fatal. Instead, the victim suffered serious injuries. We considered that Mr. Agbakoba also

assaulted a correctional officer and a staff member at FPH. We are mindful that Mr. Agbakoba was psychotic at the time of these acts and was either untreated or not yet fully treated. We have also considered that, at the time, Mr. Agbakoba was very young and unsupported by any family in Canada.

[57] The Board was satisfied that it could properly dispose of the matter based on the totality of the evidence but had serious misgivings about the Director's evidence. By way of example, the Board's expert witness, Dr. Singh, did not appear to be familiar with her patient and his progress in the community. In her evidence, she referred to Mr. Agbakoba's course in the community following a previous NCRMD verdict and while on a probation order; Mr. Agbakoba has not previously been found NCRMD, nor has he been the subject of a probation order. She implied that Mr. Agbakoba had the personal support of his father due to their frequent telephone contact, yet both Mr. Agbakoba and his mother testified that father and son were estranged.

[58] It was also a concern to the Board that none of the Director's witnesses could provide any update to the Board regarding Mr. Agbakoba's course in the community since February 2022 despite his being on a custodial order. The team appears to rely heavily on JA to supervise and support her son. Dr. Singh was unaware whether a member of the hospital or the proposed community treatment team (Surrey) had seen Mr. Agbakoba, in the community, over the course of the year. Further, Ms. Albrighton expressed concern to the Board that no one was overseeing his care in the community and that he had "too much time on his hands." We appreciated Ms. Albrighton's willingness to provide a report and attend the hearing in circumstances where she was not assigned to Mr. Agbakoba's care. Ms. Javier's report was not of as much benefit as is typical given that she had not been involved in a patient care meeting since February, and had no information regarding his course in the community. Neither could the Director say if Mr. Agbakoba had met with Dr. Riley or Mr. Pirie as anticipated in February (though Mr. Agbakoba said he had met with both).

[59] It was troublesome to the Board to hear that while Dr. Singh remains concerned that Mr. Agbakoba lacks robust insight into his mental illness, need for treatment and his risk for relapsing into substance use to cope with stress, the treatment team has not offered him psychological support, peer support, or any other programming to shift his understanding and improve his insight since he has been in the community. Apart from medication oversight, it is unclear to us what benefit either Mr. Agbakoba or the public has received from the forensic oversight of him over the past year.

[60] Finally, the Board was concerned that the Director did not have a plan for Mr. Agbakoba's care in the community if he were to be conditionally discharged (as the Director recommended) and his mother be required to leave Canada, or should he be deported. In response to our queries about the former, Dr. Singh could only say that Mr. Agbakoba would likely need to be recalled to FPH. In the case of the latter, Dr. Singh had no information to offer the Board. Neither she nor anyone else on the treatment team had made any inquiries about the housing options, psychiatric care or personal support that might be available to Mr. Agbakoba if he were to be removed from Canada as is contemplated by CBSA.

[61] Fortunately, the Board had the benefit of hearing from Mr. Agbakoba and his mother. We accept that Mr. Agbakoba may, like most persons who appear before the Board, have been stressed by the prospect of giving evidence to the Board and with the further uncertainty of what might follow his hearing. We also accept that Mr. Agbakoba's uncertain legal status in Canada is likely an ongoing stress for him, as it would be for anyone in his circumstances. That said, he presented very well to the Board. He appeared to be calm, thoughtful and sincere in his evidence. He impressed the Board as an intelligent, articulate individual who is willing to engage in his own treatment and improve his insight into his illness. His demeanour and his evidence indicated that he has matured since he was last in the community on a conditional discharge. His insight into his illness, need for treatment and the destabilizing effect of substance use on his mental state appears to be more robust than it was previously. He also appears to be managing the stress of his uncertain legal status as well as can be expected of a young man in his circumstances. We accept that he is genuinely remorseful for the harm he inflicted on the victim and has a genuine desire to engage in treatment, refrain from substances and manage his anxiety so as not to present a risk to others.

[62] The Board was very impressed with, and assisted by, JA's evidence. She spoke candidly of her "shame" that her son has been involved in the forensic system in Canada and of her husband's extreme disappointment in his son. It is clear that she is dedicated to her son and committed to doing everything in her power to keep him well. She has shouldered the burden of supervising and supporting her son in the community with little professional or familial assistance. It is also clear that she is not familiar with the mental health and forensic systems in Canada or Nigeria and could benefit from the Director's assistance in learning all that she can to guide her son. While she may not fully understand his illness, it is clear that JA wants what is best for her son and her family and welcomes the care that her son receives in Canada. We appreciate that she would prefer that he stay in Canada and complete his education though she does not know how that might be possible.

[63] Despite the shortcomings in the Director’s evidence, we are satisfied, based on the totality of the evidence, that our ongoing jurisdiction is warranted. We have reached this conclusion as it is clear that there remain gaps in Mr. Agbakoba’s insight into his illness and his addiction which have yet to be addressed by his treatment team. Further, we are concerned that, through no fault of his own, Mr. Agbakoba’s compliance with treatment and resolve to abstain from substances has not been tested in the community without intense supervision by his mother. Still further, we have considered that the ongoing stress that Mr. Agbakoba remains under due to his uncertain immigration status may increase the chance that he will relapse into substance use to cope, leading to a deterioration in his mental state, all of which would increase his risk to the public. Finally, we considered that no party suggested that Mr. Agbakoba is ready to be absolutely discharged. Having said that, the Board is of the view that Mr. Agbakoba has made significant progress and we anticipate that once the identified areas have been addressed, he will be ready for an absolute discharge – perhaps as early as next year.

[64] For all the above reasons, we are satisfied that the least onerous and least restrictive disposition that is both protective of the public and meets Mr. Agbakoba’s needs, is a conditional discharge for 12 months.

The express non-removal condition

[65] After concluding that a conditional discharge is the necessary and appropriate disposition, we then considered defence counsel’s request that the Board add a condition to our order that would preclude Mr. Agbakoba from being detained or removed from British Columbia without notice to and a hearing of the Board. We decline to make such an order for the reasons that follow.

[66] In reaching our decision, we considered all of the cases that the parties cited to us, though we will refer only to those on which we rely in support of our decision. We find the Federal Court’s decision in *Perez* to be applicable in the circumstances. In that case, the Federal Court noted that the *IRPA* provides a “comprehensive scheme” which allows for the immigration of foreign nationals to Canada and for the protection of those in need of Canada’s surrogate protection. At paragraph 15, the court described the central aspects of the immigration scheme as:

1. Non-citizens do not have an unqualified right to enter or remain in Canada (citation omitted).
2. Where an enforceable removal order exists in respect of a foreign national, the foreign national is obliged to leave Canada immediately, and

the Minister is required to enforce the order as soon as is reasonably practicable (see: subsection 48(2) of the Act).

3. The Federal Court has exclusive jurisdiction to issue prerogative relief, including interim relief, under the Act.

[67] In that context, the Federal Court considered the conditions that the Review Board had placed on Mr. Perez's discharge and noted that none of the listed conditions directly prohibited the enforcement of a valid deportation order on a person who is admissible to Canada (para. 18). The Court continued at paragraph 20 of the judgement by stating, that even if express language were to have been used in the proceeding (i.e., in the Review Board order), the other factors that the Court must consider may function to override the express language. The other factors listed by the Court were: 1) the requirement to give a narrow interpretation to the words "directly contravened"; 2) recognizing the case law under s. 50(1)(a) of the former *Immigration Act*, and construing the statutory provisions harmoniously, and 3) considering that non-citizens do not have an unqualified right to enter or remain in Canada and that a valid removal order must be enforced as soon as is reasonably practicable.

[68] After weighing the factors, the court made these observations at paragraphs 25 and 26:

[25] To prevent deportation of the applicant, based on the decision of the Review Board would contradict the purposes of the *IRPA*, and compromise the efficacy of the *IRPA* as a whole. The Minister has a duty to remove inadmissible people as soon as reasonably practicable, and must not be prevented from completing that duty without a clear and express non-removal condition, which does not exist in the instant application. The applicant, as a non-citizen, has no unqualified right to remain in Canada, and, therefore, the Minister has a duty to enforce the valid deportation order.

[26] In addition, the absurdity of the circular argument was pointed out by the respondent:

"And we come to this circle, like over and over again. We cannot deport him because the B.C. Review Board will not absolutely discharge him because of the prospect of deportation."

To allow this application would create a statutory loophole which directly contrasts with the purpose of the *IRPA*.

(underlining added)

[69] The court ultimately concluded that, even absent express language in the Review Board, the remaining factors weighed against Mr. Perez. The court dismissed Mr. Perez's application and upheld the deportation order.

[70] We accept the central aspects of the immigration scheme are as described in *Perez*. We further accept that, even in the presence of an express provision, the Federal Court has the exclusive jurisdiction to issue interim relief and, in doing so, will consider all the relevant factors, including any express non-removal condition in a Review Board order.

[71] Notwithstanding the Federal Court's exclusive jurisdiction to rule on immigration matters, we considered whether there would still be merit to our making an express non-removal condition such as Mr. Agbakoba seeks. We are mindful that there is a prior decision of the Board (ZS) making such an order.

[72] In ZS, the accused was subject to a removal order. Indeed, he had been subject to that order for 17 years. Ms. Park provided letters to the Board indicating that CBSA and Citizenship and Immigration would commence removal arrangements if he were to receive a conditional discharge. The Board considered evidence that he had a history of failing to take his medication leading to an onset of decompensation, evidenced by agitation, anger, grandiosity and paranoia, which necessitated his return from CTC to FPH for several months before returning to the community on visit leave prior to his hearing. The evidence established that he was "exquisitely" sensitive to stressors.

[73] In the Board's reasons for disposition, then Chair Walter also considered the serious nature of the index offence (second degree murder of a co-worker), ZS' anxiety and stress about the prospect of returning to his home country in disgrace and the possibility that he would not be able to access his prescribed medications or psychiatric care. The Board concluded that the accused remained a foreseeable and significant threat to the public and determined that a conditional discharge was the appropriate disposition. The Board then considered ZS request that any conditional discharge include an "express clause to prevent [CIC] from removing him to Ethiopia/Eritrea."

[74] Chair Walter noted at paragraph 24 of the Board's reasons for disposition, that the accused had the right to launch an application for protection under s. 112 of the *IRPA*, but concluded that given its findings regarding the accused's mental fragility, the right was of little consequence since he would "most certainly decompensate" under the stress of the process.

[75] Ultimately, Chair Walter concluded, that not including the express provision sought by defence counsel would be to "tacitly order the accused to be de facto discharged absolutely" as, if the accused were to be deported, the Board would not be able to "meaningfully exercise its jurisdiction over the accused while he is abroad and beyond its reach" (para. 50). The Board determined that it "must take steps to continue or assert [(its pre-existing)] jurisdiction in the form of express language as identified in *Perez*" (para. 56).

[76] With the greatest respect to the Board's former chair, we decline to follow the panel's decision in *ZS*. We do not accept that the Board would be tacitly ordering the accused to be *de facto* discharged absolutely if it were to decline to include the express provision suggested by Mr. Abbey. Mr. Agbakoba is already subject to a removal order lawfully made by another statutory decision-maker. As the court made clear in *Perez*, CBSA is entitled to act on that order once Mr. Agbakoba is discharged unless that order is set aside by a court of competent jurisdiction. If Mr. Agbakoba is removed from Canada by a lawful removal order, he will be beyond our jurisdiction by result of law. Should he return to Canada within the term of our order, he will again be subject to the Board's purview.

[77] In our view, if the Board were to accept defence counsel's submissions and add the removal prohibition requested, such as the Board did in *ZS*, the Board would be purporting to override the lawful authority of other agencies. By way of example, an order in the terms sought would purportedly ban law enforcement agencies from acting on their authority to arrest and detain Mr. Agbakoba for a criminal offence absent notice to the Board and a prior hearing. We do not accept that it is our purview to create such an outcome. Other examples are readily apparent to us, e.g., officials are required to enforce federal legislation intended to protect the public (e.g., during a pandemic or an outbreak of a communicable disease). Again, it is not the purview of the Board to put provisions in our orders that would purport to prevent officials from enforcing valid orders made under such legislation.

[78] As the Court noted in *Miller*, it is trite that the Board cannot act except within its statutory mandate. We have exercised our mandate, based on the evidence, and have conditionally discharged Mr. Agbakoba. We made that order based on the evidence before us, which was that his risk is adequately managed in his current community with the support and supervision of his mother, as supplemented by that which forensic services is able to offer based on Mr. Agbakoba's legal status. If circumstances change such that his risk can no longer be managed in the community, for instance if his mother's visa is not renewed, then he may be subject to a restriction of his liberties. So long as he remains within the province, he will be subject to that order. In my view, it is not appropriate for the Review Board to add a provision to an otherwise necessary and appropriate disposition (a conditional discharge) for the purpose of preventing another administrative tribunal or statutory decision-maker from lawfully exercising its authority. Any conflict that arises from an administrative tribunal or statutory decision-maker exercising its lawful authority is for the courts to resolve.

[79] We wish to make clear that, in reaching this decision, we were not unsympathetic to Mr. Agbakoba's plight. We recognize that he has been in Canada for all of his adult life (albeit

in custody or detained in hospital for much of that time). It is understandable that he is apprehensive about being returned to a country where he has not lived for eight years, and in circumstances where he is unfamiliar with the mental health system and where no plans have been made for his care. That said, there is a comprehensive statutory scheme in place within which Mr. Agbakoba may (and we understand continues to) seek exemption from the current order which provides for his removal from the country. It is not the Board's purview to interfere in the immigration system. Rather, it is our obligation to ensure that, so long as he remains within our jurisdiction, Mr. Agbakoba does not pose a significant risk to public safety.

[80] We are satisfied that, by making the order that we have, Mr. Agbakoba's risk to public safety while in the community and within our jurisdiction is manageable.

Reasons written by B. L. Edwards with Dr. J. Smith and P. Cayley concurring.

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