

Extradition and how it works

BY CHRIS COBB, THE OTTAWA CITIZEN NOVEMBER 8, 2010

OTTAWA -- Nobody in an official legal capacity has asked Hassan Diab where he was on Oct. 3, 1980 — the day he is accused of planting a bomb outside a Paris synagogue.

Under Canada's extradition process if Diab claimed to have an iron clad alibi that proved he was somewhere other than Paris, it wouldn't matter. He would have to save that for his trial in France.

Nor have French police asked to come to Ottawa to interview him. Canada's extradition treaties do not require that.

If a Canadian citizen or resident was suspected of committing a crime, both those steps would be fundamental to a police investigation. But under Canadian extradition legislation, the only requirement of the French is that they provide documents that make a prima facie case for extradition.

That means they provide just enough information that could persuade a "reasonable, properly instructed Canadian jury return a guilty verdict" against Diab.

If Diab was a French citizen and Canada convinced the French that he should stand trial for a crime committed in Canada, that trial would have to be held in France. France, in common with other countries with Napoleonic or civil law — Germany is another — does not extradite its citizens outside of Europe.

"There is a double standard down the line," said Gary Botting, one of Canada's leading legal authorities on extradition. "Canada almost always extradites people when it's requested and almost never prosecutes them here.

"The Supreme Court has said that judges shouldn't just rubber stamp these requests." added Botting, a long-time critic of the extradition process. "But that's exactly what they do, unless there has been some fundamental breaking of rules. In order to facilitate international co-operation, they have sacrificed individual rights."

The extradition case against Diab is held under a Mutual Assistance Treaty and an Extradition Treaty. Canada has these treaties with France and many other countries.

The Mutual Assistance Treaty provides for a mutual exchange of information in criminal cases.

The Extradition Treaty is the legal basis for suspected criminals to be removed from one country and delivered to the country where they are accused of committing a crime.

France cited both treaties when it asked for Canadian surveillance, arrest and incarceration of Diab.

The University of Ottawa professor was in jail for four-and-a-half months before being released on bail, to what, in his case, is effectively house arrest.

The extradition hearing that began Monday is almost two years to the day that Diab was arrested. While

a long period, two years isn't unusual for this first — or “judicial” — phase of a Canadian extradition hearing.

An extradition hearing is not a trial and is conducted for the most part on documentary evidence and without witnesses.

Justice Robert Maranger, who is hearing the case, will decide whether the documentary evidence is sufficient and reliable enough to pass the theoretical test.

If Maranger decides that the evidence is strong enough, he will commit Diab for extradition, which means it goes to the desk of Justice Minister Rob Nicholson who makes the final decision.

If the justice minister orders Diab extradited, Diab can appeal.

That process would likely take about a year.

If Justice Maranger decides the French evidence presented by Crown lawyers is insufficient, Diab will go free and the case will likely be closed.

Under the Extradition Treaty, evidence provided by the foreign state has to meet Canadian requirements for extradition and Crown lawyers say that in the Diab case it does.

Although the request comes from a foreign country, the Canadian Justice department rejects the accusation that it simply takes a foreign warrant and applies it in Canada.

“In order to arrest someone in Canada you need an order to do so,” said a member of the prosecution team.” You need a Canadian warrant.”

As is usual in extradition cases, Canada takes France at its word that all the information it provided is reliable and properly certified.

On the Diab side, his lawyer Donald Bayne says none of the evidence offered by France meets Canadian judicial standards and he says the extradition process violates Diab's Charter rights.

Bayne will spend most of this week attempting to persuade the judge that proceedings against Diab should be halted and the case thrown out.

Botting says Bayne is right to raise his client's Charter rights because it is the only basis on which Diab is likely to win the judicial phase of his case.

“You have to at least defend it if there is something defensible,” he said. “But if there is a prima facie case against you, you need to start thinking about Charter rights because those rights will be non-existent once you're extradited and out of the country.

“So you decide what Charter rights you have that might affect the hearing. That's about the only thing that's going to get you off.”

Canada typically extradites about 100 people a year, mostly to the United States, but, said Botting, if the initial Charter challenge is lost the defence should expect to lose the initial judicial phase and focus on

the appeal.

“Lawyers new to these cases often make the mistake of thinking ‘this is going to be easy because the evidence hasn’t met the standards we use in Canada.’ But it doesn’t and never will.

“So they spend a lot of money defending the indefensible and then they have no money left for the critical step which is the appeal,” he said. “The first step is rubber-stamping all down the line but the Court of Appeal will take a more measured look and perhaps say ‘this is wrong — you should have been allowed to look under the edges of the rug to see what the government of France may have swept under there’.”

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