

Taking Liberties: Revelations in Hassan Diab case highlight major faultlines in extradition process



[1] Matthew Behrens
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The multi-year extradition saga of Ottawa university professor Hassan Diab -- sought by the French for his alleged role in a 1980 Paris bombing that claimed four lives -- has taken yet another bizarre turn with the news that Diab has not even been formally charged. He is merely sought for questioning, with no guarantee that a trial would ensue.

Despite this astounding discovery -- no doubt discomfiting to the Ontario judge who presided over Diab's two-year extradition hearing -- Justice Minister Rob Nicholson has signed a surrender order committing Diab to years of French detention without charge while the 32-year investigation into the crime continues.

It's a decision that Diab's lawyer, Don Bayne, says is unprecedented in Canadian history. But then again, nothing about the Diab case passes the judicial smell test. It would be an understatement at best to declare that Diab, who adamantly denies any involvement and condemns violence and anti-Semitism, is a victim of mistaken identity. Indeed, Diab's finger and

palm prints, handwriting, and physical description do not match those of the suspect, yet the case has ground on largely due to an arcane process that sacrifices the Charter rights of an individual to the politics of foreign relations.

Under Canada's extradition law, the duty of a Canadian court and the Minister of Justice is, first and foremost, to the government seeking an individual. That individual no longer enjoys the rights that are supposed to be accorded everyone else facing the deprivation of their liberty. Canadian standards of evidence are thrown out the window, and the case against the individual is presumed to be reliable, regardless of how many inaccuracies, errors, omissions and contradictions are contained within it. One cannot present evidence to show one's innocence, and the requesting state need not present any evidence of that innocence.

The deck is clearly stacked yet, as the Supreme Court of Canada has found, extradition is, in the end, not a legal issue, but a political decision: is the government of Canada willing to risk its relations with one of its extradition partners, or will it sacrifice one of its citizens (or a refugee or permanent resident) in the name of maintaining happy diplomacy?

In all extradition cases, the argument goes, an individual sought by another country can "sort out the mess" upon their arrival in a foreign jail. It is a process fraught with danger: a foreign government can carry out a persecution by proxy using the extradition law, claiming it has a case against a political pain in the neck living in Canada, and presenting what amounts to a "prima facie" case without needing to vouch for the case's accuracy.

Extradition cases normally involve individuals who have been charged and would face trial upon being surrendered to a foreign country. And so Diab's new conundrum -- being sought on mere suspicion -- is, as Bayne suggests, a "new low" for the Harper government.

Diab is dumbstruck at the thought that his whole life should be upended -- even more so than it already has -- because the French have some questions for him.

"I have been clear -- since these unfounded allegations against me surfaced in 2007 -- that I am willing to answer any questions that the French officials may have," Diab told a packed Parliament Hill press conference April 13. "I have previously accepted the RCMP offer to take a polygraph test. I am anxious to clear my name, and I am willing to do whatever it takes to prove my innocence."

While the RCMP withdrew their polygraph offer and the French have been silent on the idea of questioning Diab here in Canada, the professor and his partner, Rania Tfaily, are saddled with \$2,000 a month in GPS monitoring costs that keep him out of the physical prison where he spent many long months following his 2008 arrest.

While the Diab case has been perplexing from the start, it also shines a light on differing judicial interpretations of the standards required for an extradition case. Bayne notes that if Diab had been before the B.C. courts (which employ a slightly higher standard), he likely would be a free man today, rather than facing surrender to France on a case that the Ontario extradition judge found to be "weak," "suspect," and "confusing," concluding "the case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial, seem unlikely." The Ontario judge nonetheless concluded his hands were tied and he had no choice but to commit Diab for extradition.

Apart from the fact that the French system Diab would face is hardly fair -- indeed, it is an inquisitorial, Napoleonic-era creation that even French President Sarkozy has said should be abolished given that it eliminates the presumption of innocence -- the likelihood of even getting to trial is far from certain.

Diab's legal odyssey also reflects the conflict of interest that taints the "surrender stage" of the extradition process. Nicholson, the individual who originally agreed to set the process in motion four years ago, is now asked to consider arguments about why he should change his mind. Doing so would be a blunt admission that something was wrong with his prior judgment, with the French case, and with the system itself, an exercise in humility not likely to be found on a Tory's resumé.

And so, in considering whether to surrender Diab, Nicholson was presented with a mountain of expert reports, court decisions and human rights documents pointing out that sending Diab to France would be inconsistent with the Extradition Act's grounds for refusal: that "the surrender would be unjust or oppressive" or a finding that the case is motivated by political or racial persecution. Nicholson was made aware, for example, of two significant cases where the French sought an individual for questioning, but the courts of Gibraltar and Ireland both turned France down after concluding the extraditions were sought for impermissible purposes.

Nicholson also had before him legal opinions stating that in cases like Dr. Diab's, where unsourced, often secret intelligence is introduced as evidence, the rights to a fair trial and fundamental justice are hijacked. One report from the respected British human rights group Justice [3] notes such intelligence is "unreliable, unfair, undemocratic, unnecessary and damaging," yet Nicholson simply chose to ignore such findings in favour of his own opinions.

Nicholson also says Diab can rest easy because, were he to be facing a French trial, he "may also seek to call the sources" of the anonymous, secret intelligence, yet it is unclear how this would be possible, given that the French judge himself does not know the source, and there is also a possibility that it may come from torture in Syria (French intelligence has a history of collaboration with Syrian torturers). While acknowledging "our courts have found that the admission of such evidence would, in Canada's adversarial system of justice, render a trial unfair," Nicholson nonetheless concludes he is obliged to accept that the French system "comports with our notions of fairness and due process."

Canada's Justice Minister claims that he has to interpret the Extradition Act in a flexible manner, and "I must not subject the judicial process in France to overly technical evaluations against the rules that govern the legal process in Canada." Indeed, he must not do anything to question "the good faith, integrity and honour of Canada's trusted extradition partner," but calling this dysfunctional relationship a partnership is a misnomer, given France does not allow extradition of its own citizens.

An appeal of both the original Ontario court extradition committal as well as a judicial review of the Justice Minister's surrender decision is expected later this year or early in 2013.

In the meantime, Diab and his partner live with the combined stresses of a house arrest they must incur massive debts to pay for and the psychological torture of this indefinite, Kafkaesque process. Diab has gathered considerable cross-Canada support, however, and it's part of what keeps him going through the years of uncertainty that lie ahead.

"I remain hopeful that the Canadian legal system will give me a fair chance, will look at the facts, and realize that it would be a grave injustice to extradite me for a crime that -- even the evidence shows -- I did not commit."

Matthew Behrens is a freelance writer and social justice advocate who co-ordinates the Homes not Bombs non-violent direct action network. He has worked closely with the targets of Canadian and U.S. 'national security' profiling for many years.

Canada's Extradition Act and the case of Hassan Diab ^[4]

Hassan Diab, a Canadian citizen and former University of Ottawa professor, is fighting deportation to France under Canada's Extradition Act for allegations that would not stand up in Canadian courts.

Extradition injustice: The case of Hassan Diab ^[5]

This week on Constructing Change: Extradition injustice: Hassan Diab was an Ottawa University professor who had his life turned upside down when he was accused of a Paris bombing in 1980, charged and detained.

Canadian extradition and secret trials ^[6]

Hassan Diab is a Canadian citizen who has been fighting extradition to France since 2007. The French prosecutors compiled a case against him based on secret intelligence said to be from German and Israeli sources.

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