Excerpts from the Legal Arguments of Dr. Hassan Diab's Lawyers

Full factum is available at:
http://www.justiceforhassandiab.org/wp-content/uploads/DOC/Diab-Appeal-Factum-Jan-2013.pdf

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Dr. Diab raises five grounds of appeal:

1) Did the Learned Committal Judge err by ordering committal on the basis of the methodologically unsound Bisotti report [handwriting analysis report], contrary to *United States of America v. Ferras*?

The ROC [record of the case] in this case discloses a case that is not merely weak, but which would be unsafe or dangerous to convict upon. The methodologically unsound handwriting report bears the full burden of connecting Dr. Diab to Alexander Panadriyu [the suspect]. (paragraph 150, page 39)

Dr. Diab adduced a significant body of expert evidence demonstrating that the Bisotti report [handwriting analysis report] was methodologically unsound, in that it failed to adhere to the procedures universally recognised as valid by the community of forensic document examiners. (paragraph 121, page 30)

Justice Maranger accepted that the defence experts who reviewed the Bisotti report were "highly regarded experts in the area of document examination, including handwriting comparison." They testified that the Bisotti report was based on a method of analysis that was inconsistent with the universally accepted methodology for handwriting comparison. They testified that the methodology of Mme Bisotti and the mandate she was given exhibited scientific bias. They testified that as a result, the Bisotti report was "patently unreliable", "wholly unreliable" and "fatally flawed". (paragraph 142, page 37)

Justice Maranger, having thoroughly reviewed the ROC, concluded that the Bisotti report was necessary evidence for committal. Counsel for the Attorney General all but conceded that the entire case turned on the report. If this Court accepts the Appellant's arguments that the Bisotti report is manifestly unreliable, then the committal must be quashed. (paragraph 145 , page 38).

2) Did the Minister of Justice have jurisdiction to order Dr. Diab's surrender for a purpose other than to stand trial?

France describes Dr. Diab as a "person under investigation" and confirms that if surrendered he may or may not be made *mise en examen*. If placed *mise en examen* he may or may not be referred to trial. No one disputes those facts. What is disputed is, given those facts, does the Minister have jurisdiction to surrender? As the act only

permits surrender of a person to stand a trial, the answer to that question must be 'no'. (paragraph 153, page 41)

Given that the *Act* only permits surrender for the purposes of standing trial, and given the very clear statements from France that no decision to put Dr. Diab on trial has yet been made, the Minister acted *ultra vires* in ordering surrender. His order must be quashed. (paragraph 175, page 46)

3) Did the Minister of Justice err in concluding that it would not be unjust, oppressive or contrary to the *Charter* to order the surrender of Dr. Diab to be tried on the basis of unsourced and uncircumstanced intelligence?

Repeated public inquiries have described the shocking injustice that the use of unsourced and uncircumstanced intelligence can wreak upon the innocent, whether inside a courtroom or without. NGOs and governments alike have criticized the use of intelligence in courts, both as a troubling global phenomenon, and as a matter of serious concern specific to the French Republic. The use of unsourced and uncircumstanced intelligence to deprive a person of their liberty is "simply unacceptable." (paragraph 177, page 47)

Canada rejects the use of secret intelligence by the prosecution in criminal trials; it would violate the fundamental requirement that a person be "informed of the case against him or her, and be permitted to respond to that case." This principle is not a mere quirk of the *Charter*. It expresses a universal norm inherent in the idea of a fair trial. (paragraph 179, page 47)

[T]he Minister recognized that "the admission of such evidence [intelligence] would, in Canada's adversarial system of justice, render a trial unfair" and as such, the use of such material was a relevant factor for him to consider. The question for him was whether the foreign state's justice system offered sufficient protections so as to render the use of such materials acceptable. (paragraph 181, page 48)

Absent any procedural protection that could conceivably serve to address the problems of using intelligence as evidence, the Minister could not reasonably conclude that any possible trial of Dr. Diab would be fair. To surrender in those circumstances surely must be unjust, oppressive, and indeed, shocking to the conscience. (paragraph 208, page 55-56)

Because the Minister's reasons for surrender both ignore the evidence placed before him, and rely on features of the French justice system that have no logical relationship to the dangers inherent in using intelligence, his decision to surrender is unreasonable and must be quashed. (paragraph 178, page 47).

4) Did the Minister of Justice err in concluding that it would not be unjust, oppressive or contrary to the *Charter* to order the surrender of Dr. Diab to be tried on the basis of the manifestly unreliable Marganne and Barbe-Prot reports [two

handwriting reports that were withdrawn in Canada as they relied on comparison handwriting samples that were not even written by Dr. Diab]?

In his submissions to the Minister of Justice, Dr. Diab stressed that the Committal Judge had effectively found that the Marganne and Barbe-Prot reports [two handwriting reports that were withdrawn in Canada as they relied on comparison handwriting samples that were not even written by Dr. Diab] were manifestly unreliable. He submitted that surrender to stand trial on the basis of manifestly unreliable evidence anywhere in the world would violate s. 7 of the *Charter*. He then relied on the evidence that indicated, if put on trial, he would not have a realistic opportunity to challenge the handwriting reports [France confirmed that these reports remain evidence for use against Dr. Diab]. (paragraph 212, 56-57)

In his reasons, the Minister ignored the first issue, and proceeded directly to the question of whether Dr. Diab would have an opportunity to effectively challenge the flawed reports. In doing so, he failed to address a more fundamental submission: extradition to face trial where manifestly unreliable evidence would be relied upon, other than in a trivial way, will always violate the principles of fundamental justice. (paragraph 213, page 57)

In ordering surrender, the Minister acted unreasonably … the Minister failed to discharge his duty to ensure that surrender would not violate Dr. Diab's s. 7 *Charter* rights by surrendering him to face trial on the basis of manifestly unreliable evidence. (paragraph 211, page 56)

5) Did the Minister of Justice err in ordering surrender to stand trial on the basis of evidence that is plausibly connected with torture, and where he declined to conduct an inquiry into this connection?

A disturbing feature of modern counter-terrorism policy is the tendency of states to trade intelligence with foreign powers with horrific human rights records. From a legal standpoint, such activities present a serious dilemma. Evidence obtained by torture may never be used as evidence in a legal proceeding. Logically, there must be some mechanism to ensure that torture-derived information is not used. However, where secret intelligence is traded between states, it will usually be impossible to know with certainty whether the information is tainted by torture. (paragraph 229, page 61-62)

International human rights law prohibits extradition where there is a real risk that evidence derived from torture would be used in a foreign trial. Where the impugned evidence is intelligence obtained in secret circumstances unknown to the requested person, he or she must only establish a plausible connection between that intelligence and the use of torture. Once this is done, surrender may only occur if the Minister satisfies himself through appropriate inquiries that the evidence was not obtained through torture. Should the Minister decline to make such inquiries, he must refuse surrender. (paragraph 226, page 60-61)

The Minister's reasons show that he misunderstood Dr. Diab's submissions respecting the appropriate evidentiary threshold, ignored relevant evidence respecting the use of torture to obtain information like that contained in the 1999 DST report, and denied the existence of a well-established duty to investigate. (paragraph 228, page 61)

Having established a plausible connection with torture, two options were open to the Minister: He could conduct an inquiry into the allegations, or he could decline to investigate, and refuse surrender due to the plausible connection. By failing to select either of the two options lawfully open to him, the Minister acted unreasonably. (paragraph 253, 68-69)