Court File No. C53812

COURT OF APPEAL FOR ONTARIO

B E T W E E N

THE ATTORNEY GENERAL OF CANADA
(ON BEHALF OF THE REPUBLIC OF FRANCE)

Respondent

and

HASSAN NAIM DIAB

Appellant

Court File No. C55441

B E T W E E N

THE MINISTER OF JUSTICE OF CANADA

Respondent

and

HASSAN NAIM DIAB

Appellant

and

CANADIAN CIVIL LIBERTIES ASSOCIATION,
AMNESTY INTERNATIONAL,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION

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FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – STATEMENT OF THE CASE

1. The Appellant/Applicant, Dr. Hassan Diab, has been ordered committed and surrendered to France for his alleged role in the 1980 bombing of a Synagogue in Paris that killed four and injured forty others.

2. The Appellant/Applicant appeals against the extradition judge's committal order and the Minister's surrender order.

3. This matter raises issues of fundamental importance to civil liberties in the extradition context, including:

i) The standard to be applied by an extradition judge acting under section 29(1)(*a*) of the *Extradition Act*,[1] when assessing the adequacy of the evidence put forward by a requesting state. In particular, whether or not an extradition judge has the power to deny extradition if it would be dangerous or unsafe to convict?

ii) Whether it would violate section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*) to surrender an individual under the *Extradition Act* in circumstances where information from unknown sources, provided in unknown circumstances, will be relied upon as evidence at the individual's trial in the requesting state?

iii) The circumstances in which (a) the Minister of Justice will be obligated to investigate whether or not the requesting state will rely on information obtained through torture as evidence at the requested individual's trial; and (b) whether or not, and under what circumstances, the Minister has a duty to seek assurances from the requesting state in that regard?

4. Given the importance of the issues raised, the Canadian Civil Liberties Association ("CCLA") applied to intervene in these proceedings.

5. On May 9, 2013, Rouleau J. granted the CCLA's application to intervene with respect to both the judicial review proceedings and the committal appeal.

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[1] S.C. 1999, c. 18.
[2] 2006 SCC 33, [2006] 2 SCR 77 [*Ferras*].
[3] *Ibid*. at para 26.
[4] *Supra* note 1.
[5] *Supra* note 2 at para 50.

PART II – SUMMARY OF FACTS

6. The CCLA accepts as correct the Statement of Facts set out in the Appellant/Applicant's Factum.

PART III – ISSUES AND LAW

A. Overview of the CCLA's Position

7. It is the position of the CCLA that the Supreme Court of Canada's decision in *United States of America v. Ferras; United States of America v. Latty*[2] (*Ferras*) requires an extradition judge to engage in a limited weighing of the evidence put forward by the requesting state in order to assess the sufficiency of evidence for committal. This limited weighing should take place after the judge has disregarded any evidence shown either to be unreliable or unavailable. If, after looking at the whole of the remaining evidence, an extradition judge concludes that it would be dangerous or unsafe to convict, then committal should not be ordered. It is the position of the CCLA that permitting extradition based on anything less would contravene the principles of fundamental justice and violate section 7 of the *Charter*.

8. Further, the CCLA submits that it would violate the principles of fundamental justice under section 7 of the *Charter* to surrender an individual to a requesting state where there is a reasonable likelihood that information from unknown sources, provided in unknown circumstances, would be treated as "evidence" at the individual's trial in the requesting state. This is especially so, given the very real danger that such "intelligence" could include information derived from torture.

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[2] 2006 SCC 33, [2006] 2 SCR 77 [*Ferras*].

9. Finally, given that the British Columbia Civil Liberties Association and Amnesty International have both been granted intervener status in order to deal with the third issue noted above – relating to the Minister's obligations with respect to concerns about evidence derived from torture – the CCLA will refrain from making submissions with respect to that issue, so as to avoid unnecessary duplication and overlap.

B. Assessing the Adequacy of the Evidence in Extradition Proceedings

10. In *Ferras* the Supreme Court of Canada unanimously held that in the context of extradition hearings, the principles of fundamental justice guaranteed by section 7 of the *Charter* require a meaningful judicial assessment of the evidence proffered by the requesting state. This mandates that the extradition judge decide whether or not there is evidence "sufficient to permit a properly instructed jury to convict."[3]

11. In order to ensure compliance with this basic constitutional requirement, the Supreme Court in *Ferras* construed the authority conferred by section 29(1)(*a*) of the *Extradition Act*[4] as granting "the extradition judge discretion to refuse to extradite on insufficient evidence such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial."[5]

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[3] *Ibid*. at para 26.
[4] *Supra* note 1.
[5] *Supra* note 2 at para 50.

12. In providing guidance on how this new approach to extradition would operate, the Supreme Court explained in *Ferras* that the affected individual is entitled to call evidence at the hearing that is deemed reliable by the extradition judge, in order to impeach the evidence put forward by the requesting state. The extradition judge is then expected to consider all of the evidence put forward by the requesting state and the individual whose extradition is being sought. In doing so, the Supreme Court explained that:

> [54] .... an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.[6]

13. As the Supreme Court further explained in *Ferras,* "[s]imply put, the extradition judge has the discretion to give no weight to unavailable or unreliable evidence when determining whether committal is justified under s. 29(1)."[7] In applying this approach to the evidence presented in *Ferras*, the Supreme Court concluded that committal was warranted because "[t]here is nothing in evidence to impugn the reliability of these witnesses nor the documentary evidence described in the records."[8]

14. In contrast, in this case, there was a substantial body of evidence calling into question the reliability of what is alleged to be the key link between the

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[6] *Ibid* at para 54 [underlining added].
[7] *Ibid* at para 59.
[8] *Ibid* at para 69.

Applicant/Appellant and the crimes that were the subject of the extradition request – the Bisotti Report.[9] Despite this, the extradition judge felt obliged to order committal after construing prior decisions of this Honourable Court[10] as foreclosing his authority to critically analyze or meaningfully weigh anything other than circumstantial evidence.[11]

15. It is submitted that this Honourable Court's prior decisions should be interpreted to preserve the extradition judge's authority to assess the evidence, as amplified at the hearing, when deciding whether or not to order committal. This accords with *Ferras*, which expressly acknowledged the need for an extradition judge to "engage in a limited weighing of evidence to determine whether there is a plausible case"[12] and to refuse to order committal where "the evidence is so defective or appears so unreliable that …it would be dangerous or unsafe to convict."[13]

16. To construe the role of the extradition judge any more narrowly would be inconsistent with section 7 of the *Charter* and the principles of fundamental justice, which require "a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty."[14] As the Supreme Court explained in *Ferras*, "[f]or a person sought to receive a fair extradition hearing, the extradition judge must be able to

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[9] See Applicant/Appellant's Factum, at paras 49 - 69.
[10] Specifically, *United States of America v Anderson,* 2007 ONCA 84 at para 28, 218 CCC (3d) 225; *United States of America v Thomlison*, 2007 ONCA 42 at paras 45-46, 216 CCC (3d) 97; *United States of America v Michaelov*, 2010 ONCA 819 at paras 44-47, 264 CCC (3d) 480.
[11] See *Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337 at paras 139-142, 190-191.
[12] *Supra* note 2 at para 54.
[13] *Ibid*. See also para 65.
[14] *Ibid* at para 47 [italics in original].

evaluate the evidence, including its reliability, to determine whether the evidence establishes a sufficient case to commit."[15] With respect, *evaluation* necessarily requires the ability to critically analyze and weigh, at least to a limited extent, the evidence put forward by the requesting state. This is true of all extradition cases, not just those comparatively rare situations that depend exclusively on circumstantial evidence. Anything less and the extradition judge becomes little more than a "rubber stamp," which is exactly what *Ferras* aimed to avoid.[16]

17. The question as to the extradition judge's appropriate role in deciding whether or not to order committal has far-reaching implications. The Appellant/Applicant's case rests on problematic handwriting analysis, and bitter experience has demonstrated that unreliable evidence can take many forms and occasion much injustice. Over the past twenty-five years, "Canada's growing platoon of the wrongfully convicted"[17] has exposed the risk of unreliable evidence occasioning miscarriages of justice. Although the causes have been multifaceted, evidence that initially seemed compelling but that ultimately proved unreliable has been a recurring theme.[18] This experience is not unique to Canada. For example, a comprehensive American study recently found that wrongful

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[15] *Ibid* at para 41.
[16] *Ibid* at paras 25, 34, and 41.
[17] *R v Sinclair*, 2010 SCC 35 at para 90, [2010] 2 SCR 310, Binnie J, dissenting.
[18] See Ontario, The Commission on Proceedings Involving Guy Paul Morin, *Report* vol. 1, 2 (Toronto: Queen's Printer, 1998) (Chair: Fred Kaufman) (dealing with the dangers associated with hair and fibre evidence, as well as jailhouse informants); Manitoba, The Inquiry Regarding Thomas Sophonow, *Report* (Winnipeg: Manitoba Justice, 2001) (Chair: Peter Cory) (online: http://www.gov.mb.ca/justice/publications/sophonow/) (dealing with jailhouse informants and eyewitness identification); Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, Report vol. 1, 2, 3 & 4 (Commissioner: The Honourable Stephen T. Goudge) (dealing with forensic pediatric pathology evidence).

convictions in the United States have been occasioned because of uncritical reliance on erroneous eyewitness identification evidence, flawed forensic evidence, unreliable informant testimony and false confessions.[19]

18. In light of this experience, it is submitted that the importance of ensuring a meaningful judicial role at the committal stage of the extradition process cannot be overstated. The circumstances involved in the Appellant/Applicant's case, as well as the example provided by [redacted],[20] aptly demonstrate the importance of judges retaining the discretion to review the reliability and sufficiency of the evidence put forward by a requesting state at an extradition hearing.

19. In summary, the CCLA submits that this Honourable Court should affirm the authority of extradition judges to engage in a limited form of weighing of the evidence put forward by a requesting state on a committal hearing. This limited weighing should take place only after the judge has disregarded any evidence shown to be either unreliable or unavailable. If, after looking at the whole of the remaining evidence, an extradition judge concludes that it would be dangerous or unsafe to convict, then committal should not be ordered. Anything less could result in committal being ordered

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[19] See Brandon L. Garrett, "Judging Innocence" (2008) 108 Columbia L Rev 55, which found that 79% of 200 documented wrongful convictions in the United States resulted from mistaken eyewitness identification, 55% of the cases involved faulty forensic science evidence (including blood serology, hair and fibre comparison, and bite mark evidence), 18% of cases involved false informant testimony, and 16% of the cases involved false confessions.

[20] [redacted], subject to a sealing order.

in circumstances where it is not justified, which would be contrary to section 7 of the *Charter*.[21]

C. Using "Evidence" from Unknown Sources and Unknown Circumstances

20. The CCLA recognizes the importance of a fair and effective extradition system. Those who have committed crimes abroad, especially serious crimes, should be extradited, prosecuted and held accountable for their misdeeds. That said, this important goal must always be accomplished in accordance with established due process requirements. It is the role of our courts to strike the essential balance between these sometimes competing goals.[22]

21. International comity is an important consideration in the law of extradition. It is not generally the function of the courts to second-guess executive decisions regarding the countries that Canada will accept as extradition partners. This includes a general need for Canadian courts to show deference toward the processes and the rules that operate within the criminal justice systems of our extradition partners.[23] However, the need for deference necessarily has its limits.

22. For example, the Supreme Court has repeatedly held that it would violate the principles of fundamental justice under section 7 of the *Charter* to surrender an individual to a requesting state where he or she would be subject to oppressive,

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[21] *Ferras, supra* note 2 at para 25.
[22] See generally *United States of America v Khadr*, 2011 ONCA 358 at paras. 73-76, 106 OR (3d) 449, leave to appeal ref'd 294 OAC 397 (note).
[23] See *Ferras, supra* note 1 at para 31; *Argentina v Mellino*, [1987] 1 SCR 536 at 554-55 [*Mellino*].

egregious or simply unacceptable treatment.[24] In other words, comity can never trump the judiciary's *Charter* obligation to protect an individual from being sent abroad to face a situation that fails to accord with our most basic expectations of fairness and decency.

23. The CCLA submits that it would be unacceptable to surrender an individual where there is a reasonable likelihood that information from unknown sources, provided in unknown circumstances, would be treated as "evidence" at the individual's trial in the requesting state. This is especially so, given the very real danger that such "intelligence" could include information derived from torture. This would appear to be the very situation faced by the Appellant/Applicant if he is surrendered. Commenting on the situation in France, Human Rights Watch has observed:

> Intelligence material, including information coming from third countries, is often at the heart of association de malfaiteurs investigations. Indeed, most if not all investigations are launched on the basis of intelligence information. The appropriate use of intelligence material in judicial proceedings can play an important role in the effective prosecution of terrorism offenses. But the close links between specialist investigative judges and the intelligence services in terrorism cases undermine the skepticism and consideration for the rights of the accused with which the judges should approach any potential evidence or source of information. The right of defendants to a fair trial is seriously undermined when they cannot effectively probe or question the source of the evidence against them.
>
> The use of evidence obtained from third countries where torture and ill-treatment are routine raises particular concerns, including about the nature of cooperation between intelligence services in France and those countries. Some defendants in France who credibly allege they were tortured in third countries into confessing have successfully had the confessions excluded as evidence.
>
> But the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons. Trips by investigative judges to third countries with poor records on torture to verify material for use in French

[24] See *United States of America v Allard*, [1987] 1 SCR 564 at 572, 40 DLR (4th) 102; *R v Schmidt*, [1987] 1 SCR 500 at 522-23; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 831-832, 84 DLR (4th) 438; *United States of America v Dynar*, [1997] 2 SCR 462 at 515, 33 OR (3d) 478; *Mellino*, *, supra* note 23 at 557-559; *United States of America v Cobb*, 2001 SCC 19 at paras. 43-45, 1 SCR 587; *United States v Burns*, 2001 SCC 7 at para. 66-69, 1 SCR 283.

> prosecutions raise questions about the willingness of French judges to turn a blind eye to allegations of abuse.
>
> The overly broad formulation of the association de malfaiteurs offense has led, in our view, to convictions based on weak or circumstantial evidence. As long as there is evidence that a number of individuals know each other, are in regular contact, and share religious and political convictions, there is considerable room for classifying a wide range of acts, by even the most peripheral character, as the "material actions" demonstrating participation in a terrorist undertaking.[25]

24. In Canada, it would be unacceptable to permit a criminal trial based on information from unknown sources provided in unknown circumstances. Such a trial would violate section 7 of the *Charter*, as it would be inconsistent with the principle of fundamental justice requiring, "that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case."[26] It is submitted that this is a most basic and universal norm of any fair process[27] and that extradition to face trial in circumstances where this venerated principle will be disregarded would be inconsistent with the pursuit of justice and would therefore offend section 7 of the *Charter*.

25. It is submitted that this Honourable Court should be troubled by the prospect of establishing a precedent that would allow for extradition from Canada to face trial abroad based on information obtained from unknown sources provided in unknown circumstances. Such a development would be especially worrisome in the post-911 era,

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[25] Human Rights Watch, *Preempting Justice Counterterrorism Laws and Procedures in France* (New York: Human Rights Watch, 2008) at 3-4 [underlining added].
[26] *Charkaoui v Canada*, 2007 SCC 9 at para 61, 1 SCR 350.
[27] See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 14(3)(e), Can TS 1976 No 47. 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), Art. 14(3)(e), which recognizes the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

which has been marked by the well-documented erosion in due process safeguards found in the legal systems of some of our historic extradition partners.[28] The changes occasioned in some states have included a lessening of historic standards in order to facilitate the use of intelligence as evidence.[29] In other words, any precedent set in the Appellant/Applicant's case could have far-reaching implications in future cases involving other current and future extradition partners, beyond just France.

26. In summary, the CCLA submits that this Honourable Court should hold that it would violate the principles of fundamental justice under section 7 of the *Charter* to surrender an individual to a requesting state where there is a reasonable likelihood that information from unknown sources, provided in unknown circumstances, would be treated as "evidence" at the individual's trial in the requesting state.

PART IV – ORDER REQUESTED

27. The CCLA takes no position in terms of the order that should be granted by way of relief.

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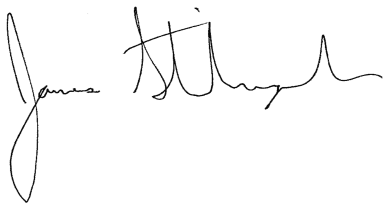
[28] See generally International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva: International Commission of Jurists, 2009). See also Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (New York: Cambridge University Press, 2006) at 214; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (New York: Cambridge University Press, 2006) at 3.

[29] See generally Daphne Barak-Erez & Matthew C. Waxman, "Secret Evidence and the Due Process of Terrorism Detentions" (2009), 48 Colum. J. Trasnat'l L. 3.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 31st day of May, 2013.



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SCHEDULE A
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SCHEDULE B
LEGISLATION

***Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11:**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

***Extradition Act*, SC 1999, c 18:**

29(1) A judge shall order the committal of the person into custody to await surrender if

(a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner;

* * *

31. For the purposes of sections 32 to 38, "document" means data recorded in any form, and includes photographs and copies of documents.

32. (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(*a*) the contents of the documents contained in the record of the case certified under subsection 33(3);

(*b*) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(*c*) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

33. (1) The record of the case must include

(a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and

(b) in the case of a person sought for the imposition or enforcement of a sentence,

(i) a copy of the document that records the conviction of the person, and

(ii) a document describing the conduct for which the person was convicted.

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(3) A record of the case may not be admitted unless

(a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) For the purposes of this section, a record of the case includes any supplement added to it.

34. A document is admissible whether or not it is solemnly affirmed or under oath.

* * *

40. (1) The Minister may, within a period of 90 days after the date of a person's

committal to await surrender, personally order that the person be surrendered to the extradition partner.

(2) Before making an order under subsection (1) with respect to a person who has made a claim for refugee protection under the *Immigration and Refugee Protection Act*, the Minister shall consult with the minister responsible for that Act.

(3) The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

(4) If the Minister subjects surrender of a person to assurances or conditions, the order of surrender shall not be executed until the Minister is satisfied that the assurances are given or the conditions agreed to by the extradition partner.

***International Covenant on Civil and Political Rights*, 19 December 1966, UNTS 171, art 14(3), Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976):**

Art. 14(3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

B E T W E E N :

HASSAN NAIM DIAB Appellant	and	THE ATTORNEY GENERAL OF CANADA (ON BEHALF OF THE REPUBLIC OF FRANCE) THE MINISTER OF JUSTICE OF CANADA Respondents	and	THE CANADIAN CIVIL LIBERTIES ASSOCIATION Intervener	Court File Nos C53812 & C554

COURT OF APPEAL FOR ONTARIC

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