Currie: Repatriate Hassan Diab and reform our unbalanced extradition law

ROBERT J. CURRIE

More from Robert J. Currie (HTTP://OTTAWACITIZEN.COM/AUTHOR/ROBERT-J-CURRIE)

Published on: July 27, 2017 | Last Updated: July 27, 2017 1:53 PM EDT

The law that allowed for the extradition of Hassan Diab (shown here) to France needs a rethink. *TONY CALDWELL / POSTMEDIA*

Canadians have recently become increasingly aware of the plight of Hassan Diab. Diab, a former Ottawa university professor, was extradited from Canada to France in 2014. He has since been held in custody without trial, on the basis of what can increasingly only be called trumped-up charges involving the bombing of a Paris synagogue in 1980. Recently, two prominent Canadian professionals, Bernie Farber and Mira Sucharov, published a piece (https://www.thestar.com/opinion/commentary/2017/07/10/ottawa-must-seek-justice-for-hassan-diab.html) in the Toronto Star in which they urged the government of Canada to put pressure on France to either try Diab or send him home. Both expressed their regret that they did not speak up earlier.

I am one of a small number of Canadian legal academics with expertise in extradition law, and I have been following the Diab case since the beginning. I have mentioned it in my legal writing, spoken about it in public lectures and discussed it with lawyers on both sides. What I have not done up until now is express publicly a clear position. Reading Farber and Sucharov has moved me to do so, because I too feel that I should have spoken up sooner.

The deplorable situation that Diab is experiencing in France — held without trial for years, in spite of numerous judicial decisions indicating he should be bailed or even released has been well documented elsewhere, including by Amnesty International (http://www.justiceforhassandiab.org/wp-content/uploads/2017/06/AI-Letter-To-Ministers-Re-Diab-2017-06-15.pdf) . However, what Canadians need to understand is that this situation is a direct, even logical, result of the current state of Canadian extradition law. Specifically, our law prevents individuals sought for extradition from making any meaningful challenge to a foreign state's extradition request on the basis that the

requesting state does not have sufficiently reliable evidence. This is because the federal *Extradition Act* requires judges to presume that the foreign state's case is solid enough to sustain a prosecution, unless the contrary can be shown by the individual sought.

Of course, the practical difficulties of any accused person challenging the foreign state's evidence are profound, and in its 2006 decision in *United States of America v. Ferras* (http://canlii.ca/t/1nzc3), the Supreme Court of Canada realized that the approach under the *Act* was in danger of turning Canadian extradition judges into rubber stamps. It responded with an attempt at balance: the requesting state's evidence should be presumed to be sufficient, unless the accused could show that the evidence was unavailable or "manifestly unreliable." Case after case since then, however, has shown that the "manifestly unreliable" standard is a pipe dream — desirable, but practically unattainable.

Diab's own situation is the best example. France's case was found by the extradition judge to rest on an analysis by a French handwriting expert that was thoroughly debunked by numerous other experts of international renown. Ontario Justice Robert Maranger famously opined that if Diab received a fair trial in France, the prospects of a conviction were "unlikely." Yet the law required him to order committal for extradition.

And so Hassan Diab sits in a French prison, no trial in sight. Every challenge to his continued detention has been denied by a foreign legal system the Canadian government now seems — by its silence — too keen to accommodate.

There are good policy reasons for taking a restrictive approach to how individuals sought for extradition can challenge the requesting state's case. After all, potential problems with the prosecution's evidence are a feature of virtually every criminal trial. An extradition hearing is not a trial, and most questions relating to quality of evidence are best resolved in the country where the trial will be held. Too broad an approach to these challenges can eat up valuable Canadian court time, unnecessarily.

That said, there must always be room for accommodating exceptional and egregious cases. Sadly, it is clear that Canada's "manifestly unreliable" mountain is not actually possible to scale. If an extradition request cannot be turned aside on the basis of a case as weak as that against Hassan Diab, it is difficult to imagine one that will be. The Supreme Court itself has diluted the promise of *Ferras* in the recent case of *M.M., v. United States of America* (http://canlii.ca/t/gmhcd) , which, on my reading, closes the door even more firmly to defence challenges. And the Justin Trudeau government sits silently while the questionable French legal process grinds away Diab's freedom and well-being.

It is time for this to change. Hassan Diab should be repatriated and our extradition law should be reformed.

Robert J. Currie is a Professor of Law at the Schulich School of Law, Dalhousie University, where he teaches International Criminal Law.