The complex case of Hassan Diab

BY CHRIS COBB, THE OTTAWA CITIZEN JUNE 10, 2011

Hassan Diab (left) arrives at the Elgin Street courthouse.
Photograph by: Pat McGrath, Ottawa Citizen

Given that many Canadian extradition hearings last only a day or two and usually go unnoticed, the complex and often acrimonious Hassan Diab case has shone an unusual light on a judicial process that critics say is at odds with Canada's principles of justice and fairness.

France wants the former University of Ottawa professor to stand trial for a terrorist bombing outside a Paris synagogue on Oct. 3, 1980. The blast, allegedly carried out by the Popular Front for the Liberation of Palestine, killed four passersby and injured more than 40 inside and outside the synagogue.

It was the first attack against French Jews since the Second World War.

The Diab case, which has lasted two years and is likely to last another two, has highlighted differing judicial interpretations and apparent legal confusion surrounding Canada's revamped Extradition Act passed by Parliament with little debate in 1999.

The 1999 Act replaced antiquated 1877 legislation and harmonized legislation that had distinct extradition agreements with British Commonwealth countries.

Critics say that the 1999 legislation also reduced protections previously offered Canadians and opened

the door to handing Canadians over to countries with less than stellar human rights records.

“Parliament rubber-stamped it into place and judges have been rubber-stamping ever since,” says lawyer and author Gary Botting, one of Canada’s leading specialists on extradition law.

There are about 100 extradition cases heard every year in Canada, mostly to send Canadians to face trial in the United States. Since 1999, there have been roughly 1,200 extradition requests, and Canadian judges have denied only a half a dozen of them.

Canada has extradition treaties with more than 50 countries although some European nations, including France and Germany, do not extradite their own citizens outside Europe.

If, for instance, Canada wanted a French citizen to stand trial in Canada, France would likely refuse, opting instead to try the suspect on French soil based on the Canadian evidence.

“It isn’t,” says Botting, “a level playing field.”

Under the treaties, extradition is usually document-based, with the requesting country sending written evidence that a Canadian extradition court must presume reliable.

The purpose of a Canadian extradition hearing is not to determine guilt or innocence but to decide whether the written evidence is enough to form a prime facie case against the suspect. In legal jargon, the only issue a judge must decide is whether there is enough evidence to enable a reasonable jury, properly instructed, to convict.

In his judgment Monday, Ontario Superior Court of Justice Robert Maranger ruled that based on French handwriting analysis and Ontario legal precedent, 57-year-old Diab has a case to answer in France.

But Maranger, who gave both sides significant leeway to make their cases, criticized the French analysis which Diab’s lawyer Donald Bayne had aggressively attempted to discredit.

Bayne was only partially successful.

“I found the French expert report convoluted, very confusing with conclusions that are suspect,” he said. “That said, I cannot say that it is evidence that should be completely rejected as manifestly unreliable.”

And, more significantly, he added: “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.

“However, it matters not that I hold this view,” he added, summing up his legal dilemma. “There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.”

British Columbia lawyer Botting disagrees and says Maranger could have denied the French request had he stuck to a Supreme Court of Canada ruling in a 2006 B.C. extradition case knows as “Ferras.”

The Ferras ruling, which was argued over scores of times during the Diab hearing, was a refinement that told judges they should not rubber-stamp extradition requests but rather weigh evidence from

requesting countries and, if they deem it unreliable, refuse the request.

“The trouble is,” says Botting, “is that Ontario appeal courts have departed from the Ferras principles and each province is now going in more or less their own directions. Ontario and B.C. are particularly at odds.

“Judges have to follow precedent — that’s true — but there’s a degree of discretion,” he added. “Maranger could have gone back to Ferras.”

The Diab case is certainly destined for Canada’s top court, says Botting, because the Ontario Court of Appeal, which will hear the case next, is bound by its own precedents and unlikely to reverse Maranger.

“The Supreme Court has to keep it on course,” he says. “It is the least fair act on earth and shocks the conscience of Canadians — and that is the ultimate test — when a Canadian citizen is sent to another country on flimsy or suspect evidence.

“The decks are completely stacked against an individual being sought for extradition.”

Botting predicts the Supreme Court decision will favour Diab and that Maranger’s comments about the weakness of the French case could work to the Lebanese-born academic’s advantage.

“If he (Maranger) is saying that the French have undermined the record of the case that’s all that will be required,” he said.

Federal Justice Department lawyers Claude LeFrancois and Jeffrey Johnston, acting for the French government, ultimately won the day, but the road to Maranger’s decision was hardly smooth for the Crown team.

The French were forced to withdraw the analysis of two forensic handwriting experts because they contained samples of handwriting that purported to be Diab’s but were not.

It was, barely, third time lucky for the Crown.

Maranger allowed a report by French court analyst Anne Bisotti, but only after it had been ripped apart and dismissed as the work of an incompetent by three internationally-renowned experts hired by defence lawyer Donald Bayne.

After nearly three weeks of argument over the Bisotti report, Maranger allowed it to stand although the judge’s expressed reservations — “convoluted, suspect, confusing” — showed the experts had had an impact.

With that pivotal victory under their belts, Crown lawyers immediately set aside shaky French intelligence reports that Bayne had attacked as unsourced and potentially gleaned from torture.

At a news conference after Monday’s decision, Bayne lamented Maranger’s decision emphasizing a point he had made numerous times: Under the French judicial system, none of the defence evidence that led Maranger to describe the French case as “weak” would be allowed if Diab is tried in Paris.

Further, the first two handwriting reports and the intelligence reports would be back in play.

“A Canadian is being shipped to France and the cruel irony is he will not have his evidence judged by the same standard in France because the French in their system do not regard defence evidence reliable.”

At the end of his 79-page decision, Maranger said despite the many reservations, the French have made a prima facie case against Diab and, based on Canada’s treaty with France, he had to accept that the French would give the Canadian a fair trial and that ultimately, justice will be done.

Diab, who describes the attack on the synagogue as “hateful,” clearly disagrees.

“Many ask, why bother to fight extradition?” he said. “Why not go to France, face trial and clear my name? Unfortunately under France’s anti-terrorism laws I will face charges based on secret intelligence that I cannot challenge.

“I will take very legal opportunity to clear my name.”

Diab is now jailed awaiting an appeal court decision on whether he should be granted bail. At his bail hearing in Toronto on Thursday, his appeal court lawyer Marlys Edwardh asked that the government pay for Diab’s expensive electronic monitoring equipment and that he be allowed to stay out with a surety an extra two hours – until 11 p.m. Government lawyers oppose bail saying Diab is a flight risk.

Justice Eleanor Cronk gave no indication when she will make her decision.