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Why the Diab case should worry all Canadians

Randal Marlin, *Ottawa Citizen*
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Human Rights Watch is deeply concerned that insufficient safeguards in police custody leave terrorism suspects vulnerable to ill-treatment. Terrorism suspects may be held for up to six days before being brought before a judge (in practice, a four-day detention period is standard), have severely curtailed access to a lawyer, and are interrogated at will without a lawyer present or video-or audio-recording.
In the course of our research, we learned of disturbing accounts of ill treatment in police custody.

-Human Rights Watch Concerns and Recommendations on France, March 11, 2010

Canadians should be deeply concerned that Canadian extradition law, as interpreted in Ontario, is such that Justice Robert Maranger felt bound to rule that there was sufficient evidence to commit Hassan Diab to being extradited to France. If extradited, Diab will stand trial in France accused of involvement in the atrocious bombing of a Paris synagogue in 1980, killing four people and injuring many others.

Justice Maranger made it clear in his judgment June 6 that in his view the case presented by France against Diab is "weak" and that "the prospects of conviction in the context of a fair trial, seem unlikely." But he added that he was bound by the Ontario Court of Appeal's interpretation of Canadian extradition treaty law, where the test for committal is such that guilt or innocence is to be determined by the foreign court and "it matters not whether the case against the person sought is 'weak' or whether the prospect for conviction is 'unlikely.' "

By contrast, the British Columbia Court of Appeal has held that there are degrees of weakness in a case and extradition judges have the discretion to disregard unreliable and unavailable evidence and assess whether remaining evidence is "sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada."

Justice Maranger, applying the Ontario interpretation, found that four components of the case submitted by France, namely passport evidence (that on its face showed Diab to be in Spain at the time), membership in the Popular Front for the Liberation of Palestine, eyewitness descriptions, and composite sketches and photographs "whether taken individually or viewed as a whole, would not be sufficient to justify committing Mr. Diab to trial in the Republic of France." But he ruled that there was enough evidence that five words on a hotel ledger and signature of the fictitious name, Alexander Panadriyu, signed by the presumed bomber, matched Diab's handwriting sufficiently that in conjunction with the four items there was enough evidence to make out a prima facie case against Diab.

I was in court when three handwriting experts, all with excellent credentials, gave their opinion about the

French handwriting report. They made it plain that the report was flawed from the beginning, when the French analyst making the report was directed by investigating magistrate Marc Trevidic to state only whether comparisons with Diab's handwriting showed he was "certainly" or "may be" the writer of five words on the hotel ledger and an illegible fictitious signature, both of which have been connected to the bomber. That direction makes no provision for a finding that Diab was "probably not" the writer in question.

The methodology used by the French expert did not follow established standards, the three experts testified. It is ludicrous, for example, to count similarities and differences in samples without giving proper weight to the kind of differences and similarities for establishing identity of authorship. If, in forensics generally, the court was told, you look only at numbers of similarities and differences, you could end up convicting a suspect who matches the criminal in many details, such as scar under the left eye, so many teeth, such-and-such hair characteristics, etc. But only one difference can nullify the weight of similarities if, for example, the criminal was known to be Chinese and the suspect is Jamaican.

Justice Maranger says in his judgment: "I found the French expert report convoluted, very confusing, with conclusions that are suspect," but he did not view it as something to be completely rejected on the basis that it was "manifestly unreliable." The phrase echoes Chief Justice Beverley McLachlin's judgment in the leading 2006 Supreme Court of Canada case *USA v. Ferras*, where she wrote that a judge should not order extradition "if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict on it."

One oddity in Maranger's judgment, to my mind, is that he casts some doubt on the defence experts' testimony on the basis of "the possibility that the Republic of France does have a different approach/ methodology in relationship to handwriting comparison analysis." Not only do scientific principles transcend national boundaries, but when the defence offered to have a French expert testify, as a way of refuting that possibility, the request was denied.

Justice Maranger's decision, specifically with regard to the handwriting "evidence," leads me to conclude that the extradition law fails to respect Canadian Charter guarantees of presumption of innocence, due process and security, by substituting French standards for Canadian ones. Either that, or Justice Maranger has been unduly latitudinous in interpreting the scope of what constitutes evidence that would support a "prima facie case" in Canada.

If France has more compelling evidence, let her produce such. Failing this, Canadians should have sufficient respect for human rights to ask Justice Minister Rob Nicholson to use his legal discretionary power to halt the proceedings. The rights of every Canadian citizen are at stake.

If nothing is done, and Diab is sent to France, we might as well rewrite the Charter to read: "The guarantee of Canadian Charter rights ceases whenever a country which has lower standards has an extradition treaty whereby Canada presumes they fully respect such rights even when they don't."

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