

Surrendered

Posted on April 10, 2012

Last week, Minister of Justice Rob Nicholson ordered the surrender of Hassan Diab (<http://www.ottawacitizen.com/life/Ottawa+professor+extradited+France+terrorism+charges/6416753/story.html>) to the Republic of France. As readers of these pages will know, Mr. Diab is a Canadian citizen whose extradition is being sought in connection with a bombing in Paris in October, 1980. We've been following his extradition proceedings because of concerns that if delivered to France, Mr. Diab may face trial based on evidence potentially derived from torture, given France's documented history of using torture evidence in anti-terrorism investigations and trials.

Extradition in Canada is a two-step process. First, an extradition judge must issue an order for committal based on a "Record of the Case" provided by the requesting state, which sets out the case and evidence against the accused. After an order for committal has been entered, the Minister of Justice then decides whether it is appropriate to surrender the accused to the requesting state.

Last June, a court in Ontario issued a committal order for Mr. Diab's extradition. In September, the BCCLA wrote to the Minister of Justice (<http://bcclanationalsecurity.wordpress.com/2011/09/12/no-complicity-in-torture/>), urging him to ensure that Canadian citizens are protected against foreign prosecutions relying on evidence derived from torture. In our view, there were only two ways Canada could properly protect its citizens in such circumstances: first, to refuse the surrender altogether, or second, to only surrender subject to strict conditions that the accused would not be tried based on evidence potentially derived from torture.

Minister Nicholson, however, has decided to surrender Mr. Diab without conditions. With respect to the concerns raised about France's reliance on unsourced intelligence, the Minister acknowledges that:

I am mindful that under Canadian law, our courts have identified serious concerns with the admission of intelligence evidence to detain and prosecute individuals, including with respect to the person's ability to challenge the reliability and veracity of this type of unsourced information. Our courts have found that the admission of such evidence would, in Canada's adversarial system of justice, render a trial unfair.

Nonetheless, he argues that:

... Mr. Diab will have recourse to the European Court of Human Rights (ECHR), to which France is subject, to bring any claim that his fair trial rights have been infringed by France. As well, France is a party to the UNCAT [UN Convention Against Torture] and is under the same obligations as Canada to ensure that torture-derived evidence is "not invoked as evidence in any proceedings." In addition, France has made a declaration under Article 22 that they agree to allow individual complaints to the Committee Against Torture, which monitors the implementation of the UNCAT by States Parties.

And with respect to concerns over France's use of evidence derived from torture, the Minister states:

Mr. Diab is not being surrendered to a country that condones the use of torture-derived evidence or that is known to use evidence that is the product of torture in its criminal proceedings. ... [W]hile France's legal system is different from that which operates in Canada, it is nevertheless one that comports with our overall concepts of justice and the duty to uphold constitutional standards, including with respect to banning the use of torture-derived evidence to detain and try accused persons.

But this assertion runs contrary to what Human Rights Watch has repeatedly (<http://www.hrw.org/node/91220/section/6>) documented (<http://www.hrw.org/en/reports/2008/07/01/preempting-justice-0>): the use of “foreign torture material” by the French judiciary, “both in the investigative phase and at trial.” And while the Minister attempts to draw a distinction between extraditing Mr. Diab to France as opposed to Egypt or Jordan, for example, by citing France's status as a state party to the Convention Against Torture, it is important to remember that Egypt and Jordan are also parties to the Convention. When it comes to whether a country is truly respecting the anti-torture principle, it simply isn't enough to point to the fact that it is a signatory to the Convention Against Torture.

Moreover, it appears that as far as the Minister is concerned, if Mr. Diab has a problem with the French relying on evidence derived from torture, then Mr. Diab can take it up with the United Nations and the ECHR, and seek remedies against France directly. But this approach flatly ignores the threshold question: why surrender Mr. Diab to trial by an unfair system to begin with?

The Minister's reasons for surrender run to roughly 32 pages, but the clear theme running through them is this: Mr. Diab's concerns about the fairness of the proceedings in France and the prosecution against him can be explained by the fact that France and Canada have different judicial systems, but “principles of comity and good faith” dictate that Canada must “assume” that France will treat Mr. Diab fairly, “even if the evidentiary and procedural requirements under which he would be tried are at variance with our own.”

But such a position is untenable where, as here, there are documented reports of France's willingness to use evidence derived from torture, in direct contravention of the exclusionary rule. And principles of comity and good faith — while important in international relations and in matters of diplomacy — must give way where, as here, rights violations would result. In this case, Canada's priority must be the protection of its citizens.

Reports are that Mr. Diab plans to appeal the Minister's decision (<http://www.ottawacitizen.com/life/expected+this+decision+this/6419749/story.html>), possibly all the way to the Supreme Court of Canada. He already has an appeal underway of the extradition judge's committal order. We'll keep you posted as this case continues to develop.

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