One Year After Diab's Repatriation: Canada's Extradition Legal Framework Still Threatening Citizens

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Language French
Le:
15 January 2019

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Monday 15 January 2018 marked the end of a long journey for Hassan Diab, a Canadian citizen who finally came home following a near decade-long legal ordeal involving three years of detention in France. The troubling story of this innocent man shed light on important flaws of Canada's extradition legal framework, leading human rights advocates to call for a reform.

Rob Currie (Schulich School of Law, Dalhousie University), Joanna Harrington (University of Alberta) and Don Bayne (counsel for Mr. Diab and partner with Bayne Sellar Ertel Carter) are some of these advocates. On 2 November 2018, they gathered together on the occasion of the 47th Annual Conference of the Canadian Council on International Law (CCIL) for a fascinating panel discussion moderated by Craig Forcese (University of Ottawa). Their wide expertise in criminal and transnational criminal law enabled them to point out key aspects for a reform in Canada's extradition law in the light of the Diab case.

The Diab case or the failure of Canada's extradition legal framework

The case of Hassan Diab exemplifies the failure of Canada's extradition law to deal with an extradition request in a manner that is consistent with principles of fundamental justice. On 3 October 1980, a bomb exploded in a synagogue in Paris as a result of what was qualified as an antisemitic attack (see Don Bayne's intervention here). The suspect was identified as a man aged 40 to 45 years old, but evidence was scarce. After several years of unfruitful investigations, a French investigator "sought to make a case" against Hassan Diab, as Mr. Bayne explained. At first, evidence against this then 26-year-old Lebanese student was mostly based on the expertise of two graphologists, who provided opinions based on a piece of paper on which the author of the attack had written five words in 1980, and based on a sample of what they thought was Mr. Diab's handwriting in 1997. This evidence cruelly lacked credibility. First, as Don Bayne reminded the audience, reports by graphologists are not reliable and is not admissible before in Western tribunals. Second, the huge time difference between the written notes analyzed made the comparison completely irrelevant, since a person's handwriting generally changes during her or his lifetime. Further, it was eventually discovered that the author of Diab's writing sample used by the graphologists was not even authored by Mr. Diab himself, but by his wife. The case seemed so overwhelmingly ill-founded and so indignant that Mr. Bayne even compared it to the *Dreyfus* case, which led Émile Zola to write his famous manifest "*J'accuse!*" in 1898. As time went by, "it became increasingly clear that there was no evidence to support the French assumption", assessed Don Bayne. Diab was nevertheless extradited in 2014, his extradition having first been ordered by Canadian courts in 2011. After spending three years and two months imprisoned in France while the investigation was still ongoing, he was finally released in early 2018 due to a "lack of evidence". In the meantime, incontestable evidence of his presence in Lebanon at the moment of the bombing had been revealed. Mr. Diab has been back in Canada since 15 January 2018 and seeks justice through a reform of the Canadian extradition legal framework. But a question arises: how could he possibly have been extradited in the first place?

Towards a reform of extradition law?

Extradition can be defined as "the surrender of an alleged criminal, usually under the provisions of a treaty or Statute, by one authority, namely a state, to another having the jurisdiction to try that charge" (see Craig Forcese's intervention here). Extradition, as Joanna Harrington highlighted, is two-faceted: first, it is a means of complying with Canada's international obligations to secure efficient crime-control cooperation in the fight

against cross-border crimes; second, it should also protect the fundamental rights and liberties of the person sought.

According to Rob Currie, the last reform of Canada's extradition law, in 1999, transferred the decisional power from the hands of the judge into those of the Minister of Justice. Even though the Ontario Court of Appeal stated that the extradition judge must not act as a "rubber stamp", following the statement made by the Supreme Court in Canada in 2006 in the *Ferras* case, it is pretty much what she or he actually does, since the threshold is very high for evidence to be deemed unreliable. As a matter of fact, in the *Diab* case, the Ontario Superior Court of Justice judge found that the only evidence against Mr. Diab, that is the graphologist report, "made no sense, was illogical, suspect, and couldn't support a conviction", but as he interpreted the law in Canada, he nonetheless felt compelled to extradite him to France. "The judge does not ask whether he or she would conclude that the accused is guilty nor does the judge draw factual inferences or assess credibility", he explained. "The judge asks only whether the evidence if believed, could reasonably support an inference of guilt." (See para. 141)

The Court of Appeal for Ontario completed this interpretation from the Superior Court judge by stating that "while the evidence presented by a requesting state at an extradition hearing is presumptively reliable, s. 7 of the Charter of Rights and Freedoms requires that the person sought be given a meaningful opportunity to rebut that presumption […]" (see para. 4).

A necessary human rights analysis

The panelists emphasized that the much-needed reform of Canada's extradition law should transfer some of the decisional power back into the hands of the extradition judge. According to Joanna Harrington, this judge should make "a human rights protection analysis in each and every case".

Two elements are of particular importance when making this human rights analysis. The first one concerns the stage of the proceedings in the country that seeks to extradite. As stated in s. 3 of the *Extradition Act*, a person must be extradited for trial, and not for further investigations. Canada must ensure to obtain guarantees in this regard, to avoid another situation where the person extradited would languish for years in jail in the requesting state. An insurance that the trial will be held expeditiously must be obtained. Even better, Canada should include such an obligation in its future extradition treaties; if violated, the extradited person would be sent back to Canada. For instance, Canada's extradition treaty with India states that the trial is to be held within six months of the extradition. Its extradition treaty with Philippines, for its part, provides that the trial is to be held expeditiously after extradition.

The second element to include in the human rights analysis pertains to the reliability of the evidence. First, the onus should be on the requesting state to prove that its evidence is reliable, rather than on the person sought to prove that it is not. Second, it should be easier to reject an extradition request due to unreliable evidence in order to avoid dramatic situations in which the judge finds that the evidence makes no sense, but nonetheless has to authorize the extradition.

This human rights analysis is at the core of the reform currently being advocated for in Canada. One year after his return home, Mr. Diab, who says he "[does not] want a penny", is still fighting for this reform to take place to prevent further citizens to experience the same ordeal. However, in recent days, the cumbersome Canadian extradition legal framework appeared once more problematic in the context of the *Meng* case, in which a Chinese business executive is expected to face undue delays before her case is resolved even if she will inevitably stand trial in the United States. Advocates including Rob Currie and Don Bayne were quick to link this case with that of Hassan Diab. How many times will the story repeat itself until a real change is achieved?

This blogpost and the authors' attendance to the 47th Conference of the Canadian Council on International Law were supported by the Canadian Partnership for International Justice and the Social Sciences and Humanities Research Council of Canada.

Social Sciences and Humanities Research Council of Canada
Conseil de recherches en sciences humaines du Canada
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Sujet:
Lois d'extradition