Court File No. C53812

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA
(ON BEHALF OF THE REPUBLIC OF FRANCE)

Respondent

- and -

HASSAN NAIM DIAB

Appellant

Court File No. C55441

B E T W E E N :

THE MINISTER OF JUSTICE OF CANADA

Respondent

- and -

HASSAN NAIM DIAB

Applicant

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COURT OF APPEAL FOR ONTARIO

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PART I - OVERVIEW

1. The British Columbia Civil Liberties Association (the "BCCLA") has been granted leave to intervene in this judicial review application. The BCCLA's submissions focus on the proper legal framework to be applied at the ministerial stage of extradition proceedings when the person sought has alleged that the requesting state is relying upon torture-derived evidence.

2. The BCCLA acknowledges that the need to cooperate with Canada's international partners, and to maintain comity within the international community, are legitimate and important considerations in interpreting and applying the *Extradition Act*, S.C. 1999, c. 18 (the "Act"). But they are not the only considerations, nor are they uniquely important. At the end of the day, the BCCLA submits that the Act reflects a dual purpose: it seeks to balance international co-operation, on the one hand, with respect for the procedural and substantive rights of those protected by Canadian law. The structure and very existence of the Act reflects this purpose, and the reality that the balance cannot always fall on the side of "international co-operation".

3. Recognizing the dual purpose of the Act, and striking the proper balance between comity and civil rights, has taken on increasing importance in recent years. The global "war on terror" has impacted the security and intelligence practices of many states, including western democracies. Fears of further attacks, and heightened pressure to respond to past incidents of terrorism, have led states to take shortcuts to "get results", even at the expense of basic rights. In particular, many states are more aggressively seeking information related to suspected terrorist activities – including through intelligence-sharing arrangements with other states, regardless of their reputations for human rights abuses – often without the ability or the desire to fully examine the circumstances behind the gathering of that information.[1] The result has been a dangerous dynamic whereby all too often individuals get lost in the state machinery of suspicion and guilt by association, rather than being properly charged because reliable evidence demonstrates a *prima facie* case.

4. It is simply no longer enough to look to the fact that an extradition partner is a western ally with broadly similar legal traditions. On issues such as the use of torture-derived evidence and secret intelligence, respect for human rights and civil liberties requires that the Minister of Justice –

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[1] See, for example, ICJ Report, **Appeal Book – Judicial Review**, Vol. 3, Tab 6-X, p. 926; *A & Others v. Secretary of State for the Home Department,* [2005] UKHL 71, **Appellant's Book of Authorities** ("Appellant's BOA"), Tab 38 at para. 98

and the reviewing Courts – ensure *substantive* protections, and ensure concrete scrutiny even of Canada's longest-standing extradition partners.

5. Where, as here, the Minister is determining the legal test or framework for analysis to be applied on an issue with constitutional dimensions, the proper standard of review is correctness. The BCCLA submits that the correct legal framework for the Minister's decision-making process involves a two-stage analysis. At the first stage, the person sought must establish a "plausible connection" between the evidence put forward by the requesting state and the use of torture. This standard recognizes the practical difficulties of establishing torture on any higher standard, particularly in the extradition context, and also respects the fact that the use of torture-derived evidence in legal proceedings is a serious affront to the principles of fundamental justice. Even if this is a *potential* consequence of extradition, it simply cannot be tolerated.

6. If the person sought can establish a plausible connection, then the Minister is obliged to either (i) investigate and rebut that connection based on specific information from the requesting state or the Minister's own inquiries; or, (ii) satisfy himself that the evidence will not be used against the person sought by the requesting state, either by way of clear and reliable assurances from that state, or conclusive evidence that the requesting state will not admit the impugned evidence. If the Minister cannot or does not satisfy one of the two alternatives at the second stage, then both the *Charter* and the Act require the Minister not to surrender the person sought.

7. Such an approach respects, and flows out of, the fundamental balance struck by the Act. It ensures that Canada honours its obligation to participate in combating international criminal acts, while insisting on concrete, practical measures to protect Canadians from circumstances where our extradition partners – regardless of their legal traditions – do not guarantee protection from the use of torture-derived evidence, the reception of which is at odds with fundamental rights.

PART II - ISSUES AND THE LAW

8. The BCCLA's submissions address the following issues:

(a) The standard of review of the Minister's decision with respect to the legal test for addressing the use of torture-derived evidence by the requesting state;

(b) The circumstances where the Minister's obligations are engaged in extradition cases involving an allegation of evidence derived from torture; and

(c) The nature of the Minister's obligations in cases where they are engaged.

A. Minister's decision on the legal test for addressing torture-d*erived ev*idence is subject to correctness review

9. The Minister's role in the extradition process has been routinely described as "political and/or diplomatic" in nature, and thus accorded significant deference. While it is true that a surrender decision has these dimensions, characterizing it only as a political/diplomatic decision does not accurately reflect the expanded role of the Minister under the Act. The Act gives the Minister, not the judiciary, significant discretion to decide matters that are *judicial*, and not political, in nature. For example, ss. 44 to 47 of the Act concern whether surrender should be refused because it would be, *inter alia,* "unjust or oppressive having regard to all the relevant circumstances", or for an improper purpose.

10. At the very least, deference cannot apply where the Minister is faced with deciding or applying a legal test that engages constitutional considerations. Notwithstanding a generally deferential posture towards surrender decisions, the Supreme Court (and other appellate courts) have held that the Minister must apply the "correct legal test", correctly "carry out the proper legal

analysis", and correctly interpret the relevant statutory criteria.[2] This applies *a fortiori* where the matter has constitutional dimensions and is purely a question of law.

11. The legal analysis to be applied where it is alleged that the requesting state is relying upon torture-derived evidence is precisely the type of question that must be correctly decided. It is the proper province of the courts as "guardian[s] of the Constitution" to ensure that the correct legal principles are applied, and that basic constitutional values are respected, on questions that raise "issues of fundamental importance to Canadian society."[3] Just as the possibility of extraditing an individual to face the death penalty "opens up a different dimension" with considerations that fall "squarely within the inherent domain of the judiciary as the guardian of the justice system", so too does the risk of extraditing an individual to face trial on torture-derived evidence.[4] Anything less risks falling into the category of "blind submission to the Minister's assessment"[5] – something the Supreme Court has cautioned against, and an outcome that would upset the important, but sometimes delicate balance between assisting Canada's extradition partners and protecting constitutional rights.

B. Engaging the Minister's obligations

i. The limits of Ministerial discretion: no extradition to face trial on torture-based evidence

12. The Minister must exercise his/her discretion under the Act in a manner that is consistent with the *Charter*.[6] In particular, because the power to surrender implicates the liberty and, in some cases, the security interests of the person sought, the Minister's decision must accord with the

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[2] *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, **Appellant's BOA**, Tab 14 at para. 41; *United States of America v. Cail* (2009), 254 C.C.C. (3d) 205 (Alta. C.A.), **Appellant's BOA**, Tab 15 at para. 10

[3] *United States of America v. Burns*, [2001] 1 S.C.R. 283, **Appellant's BOA**, Tab 28 at para. 35

[4] *Ibid.*, at para. 38

[5] *Lake, supra*, **Appellant's BOA**, Tab 14 at para. 41

[6] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, 1982, c. 11 (U.K.), Schedule B. See *Canada (Justice) v. Fischbacher* [2009] 3 S.C.R. 170, **Appellant's BOA**, Tab 16 at para. 36

principles of fundamental justice that apply to extradition proceedings under s. 7 of the *Charter*.[7] The Supreme Court has used different expressions to describe an extradition that fails to respect these principles – one that "shocks the conscience" or is "simply unacceptable" – but has consistently held that a surrender in these circumstances is unreasonable and cannot stand.[8]

13. Similarly, s. 44(1)(a) of the Act directs that the Minister "shall refuse" to order surrender where satisfied that "the surrender would be unjust or oppressive having regard to all the relevant circumstances." The Supreme Court has recognized that "[t]he orientation of s. 44 is the protection of human rights" and, although this provision covers a range of conduct that extends beyond breaches of the *Charter*, it also includes cases where surrender would be contrary to the principles of fundamental justice.[9] While the Minister's decision under s. 44(1)(a) is entitled to deference, its mandatory nature requires the Minister to consider "all relevant circumstances, singly, and in combination, to determine whether surrender would be unjust and oppressive."[10]

14. The protections in s. 7 of the *Charter* and s. 44(1)(a) are not limited to the act of extradition. As the Supreme Court made clear in *United States v. Burns,* they extend to the "potential consequences of extradition for the person sought."[11] The question is whether "extraditing the person sought to face those consequences offends the principles of fundamental justice."[12]

15. The extradition of an individual to face trial on the basis of torture-derived evidence is contrary to the principles of fundamental justice. As the Supreme Court put it in *Suresh v. Canada (Minister of Citizenship and Immigration),* "It can be confidently stated that Canadians do not

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[7] *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, **British Columbia Civil Liberties Association Book of Authorities** ("BCCLA BOA"), Tab 1 at para. 70; *United States of America v. Ferras,* [2006] 2 S.C.R. 77, **Appellant's BOA**, Tab 1 at paras. 11-12
[8] See *Burns*, **Appellant's BOA**, Tab 28 at paras. 66-70; *Lake, supra,* **Appellant's BOA**, Tab 14 at para. 18
[9] *Németh, supra,* **BCCLA BOA**, Tab 1 at para. 71; *Fischbacher, supra,* **Appellant's BOA**, Tab 16 at para. 38; *Lake, supra,* **Appellant's BOA**, Tab 14 at para. 24
[10] *Fischbacher, supra,* **Appellant's BOA**, Tab 16 at para. 37
[11] *Burns, supra,* **Appellant's BOA**, Tab 28 at para. 60 (emphasis in original). See also: *Németh, supra,* **BCCLA BOA**, Tab 1 at para. 73; *Canada v. Schmidt,* [1987] 1 S.C.R. 500, **Appellant's BOA**, Tab 27 at p. 522.
[12] *Németh, supra,* **BCCLA BOA**, Tab 1 at para. 73

accept torture as fair or compatible with justice."[13] Such a result would be "simply unacceptable", would "shock the conscience" of Canadians and would constitute "unjust and oppressive" circumstances. The same views are shared abroad, both in the judgments of foreign courts[14] and in international treaties.[15] The problems with torture-derived evidence were put forcefully by the European Court of Human Rights ("ECHR") in *Othman v. the United Kingdom*:

> International law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. There are powerful legal and moral reasons why it has done so… States must stand firm against torture by excluding the evidence it produces… As Lord Bingham observed in *A & Others,* torture evidence is excluded because it is unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice… **More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.**[16]

16. The ECHR concluded that "the admission of torture evidence is manifestly contrary… to the most basic international standards of a fair trial" and "would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome." In short, the ECHR held that it would be "a flagrant denial of justice if such evidence were admitted in a criminal trial."[17] On that basis, the ECHR refused to deport the applicant to face trial for terrorism-related offences in Jordan.

17. The logic of *Othman* extends with equal force to torture-derived evidence that will be relied upon by the requesting state in the extradition context, even if the requesting state has not

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[13] *Suresh* at para. 50

[14] See, for example, *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139 (17 January 2012) (European Court of Human Rights), **Appellant's BOA**, Tab 33 at paras. 264-267; *A & Others, supra,* **Appellant's BOA**, Tab 38

[15] See, for example, the United Nations Convention Against Torture (s. 15), the European Convention on Human Rights (Article 3), the International Covenant on Civil and Political Rights (Article 7), the United Nations Declaration on Human Rights (Article 5). These and other instruments are discussed in *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, **BCCLA BOA,** Tab 2 at paras. 59-75

[16] *Othman, supra,* **Appellant's BOA**, Tab 33 at para. 264 (emphasis added; citations omitted).

[17] *Othman, supra,* **Appellant's BOA**, Tab 33 at para. 267

committed any act of torture itself. It is the fact that torture-derived evidence may be used, and not where it is gathered, that is at the core of its destructive effects on the trial process.

18. Accordingly, the Minister's discretion is limited in that both the *Charter* and the Act prohibit him from extraditing an individual to face trial on the basis of torture-derived evidence.

ii. A plausible connection to torture is sufficient to engage the Minister's obligations in the extradition context

19. It will be a rare extradition case where the individual alleging a connection between evidence and torture can demonstrate, on a balance of probabilities, that the evidence put forward was, in fact, derived from torture. There are at least two reasons for this – the first being generally applicable to all instances of torture-derived evidence, and the second being specific to the extradition context.

20. Acts of torture committed by agents of a foreign state will be difficult to prove on a balance of probabilities *in any context*. As the ECHR correctly recognized, torture "is practiced in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim."[18] The foreign state where torture occurred is unlikely to cooperate in clarifying the facts, and other states are unlikely to assist for fear of jeopardizing relations with the foreign state.[19] Even assuming that direct evidence of torture in a given case exists, as a practical matter, securing that evidence (from the victims of torture or otherwise) may be extremely difficult or even impossible – and will require resources that a complainant will rarely have at his/her disposal,

21. These difficulties are exacerbated in the extradition context. This is, in large part, a function of the very nature of extradition proceedings under the Act and, in particular, the ability of the

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[18] *Othman, supra,* **Appellant's BOA**, Tab 33 at para. 267. See also *A & Others, supra,* **Appellant's BOA**, Tab 38 at para. 59

[19] See *A & Others, supra,* **Appellant's BOA**, Tab 38 at para. 59

requesting state to present the basis for its request through a "Record of the Case" ("ROC"). The ROC is a peculiar innovation of the Act. It allows for evidence to be presented in summary form, without the need for a first-person affidavit, or any details as to the source of underlying information set out therein. Indeed, apart from the proper certifications by the relevant judicial or prosecuting authorities in the requesting state, all the Act requires is "a document summarizing the evidence available to the extradition partner for use in the prosecution."[20] The person sought generally cannot cross-examine or independently investigate the contents of the ROC.[21]

22. Since the Act contemplates a "generous approach to the admissibility of the record of the case"[22], the Supreme Court has deemed the ROC to be presumptively reliable and presumptively admissible in summary form.[23] Courts have held that a lack of detail in form, content and attribution will insufficient to rebut the presumption of reliability or undermine admissibility.[24] Under this approach, the extradition process practically *invites* the use of unsourced intelligence information by requesting states. As long as proper certifications are given by the extradition partner, including evidence by way of "summary" in an ROC is basically a risk-free proposition.

23. These aspects of torture-derived evidence in general, and the extradition regime in particular, highlight why it would be both impractical and inappropriate to require the person sought to prove, on a balance of probabilities, that the ROC contains evidence derived from torture. As Lord Bingham put it in *A & Others,* "It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet."[25] For

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[20] Section 32(1) of the Act
[21] An exception has been made in respect of Canadian-gathered evidence: see *United States of America v. Anekwu,* [2009] 3 S.C.R. 3, **BCCLA BOA**, Tab 3 at para. 31
[22] Elaine F. Krivel et al., *A Practical Guide to Canadian Extradition*, (Toronto: Carswell, 2002), **BCCLA BOA**, Tab 7 at p. 272
[23] *Ferras, supra,* **Appellant's BOA**, Tab 1 at para. 66; *Anekwu, supra,* **BCCLA BOA**, Tab 3 at para. 21
[24] *United States of America v. Hulley,* 2007 BCSC 976, **BCCLA BOA**, Tab 4 at paras. 24-25
[25] *A & Others, supra,* **Appellant's BOA**, Tab 38 at para. 59. See also paras. 80 (per Lord Nicholls) and 98 (per Lord Hoffmann)

that reason, the BCCLA submits that, in the extradition context, the person sought need only demonstrate a "plausible connection" between the evidence in the ROC and the use of torture.[26]

24. However, under the approach set out by the BCCLA, establishing a plausible connection will not automatically result in an extradition being contrary to s. 7 of the *Charter* or s. 44(1)(a) of the Act. Rather, the BCCLA submits that where a person sought demonstrates a plausible connection, the Minister has an obligation to investigate the link to torture and/or ensure that the impugned evidence will not be used against the person sought (as discussed further in Part II.C, below). If the Minister does not discharge this obligation, and still orders surrender, *then* the extradition would be contrary to the *Charter* and the Act.

25. This is entirely appropriate given the interests at stake and the practical limitations faced by the person sought. The BCCLA submits that if the Minister has been given an opportunity to discharge his obligations, and there remains a plausible connection between torture and the evidence to be used against the person sought in the requesting state, then that connection is sufficient to engage the very concerns raised by the EHCR in *Othman*. A plausible connection to torture makes the trial proceedings appear unfair, offends the rule of law and cannot be tolerated. As in *Burns*, it raises a "potential consequence" – here, a trial based on torture-derived evidence – that would shock the conscience and violate the principles of fundamental justice. Canadian courts should not act as the "necessary link in the chain of causation to that potential result."[27]

iii. Establishing a plausible connection between evidence and the use of torture

26. Courts must take a realistic and pragmatic approach when determining whether the person sought has established a plausible connection between the summary of evidence in the ROC and the

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[27] *Burns, supra,* **Appellant's BOA**, Tab 28 at para. 54 (emphasis in original)

use of torture – one that recognizes the practical reality that the person sought will almost never be in a position to adduce evidence of a direct nexus between the specific contents of the ROC and the use of torture. At the same time, something more than generalized assertions of human rights violations by agents of the requesting state (or the state which provided the evidence to the requesting state) is necessary.[28] If this were not so, the mere involvement of a state with a questionable human rights record could suffice to trigger the Minister's duty to investigate and/or seek assurances, making the process unmanageable.

27. The circumstances of a particular case will dictate what is required to establish a plausible connection. If there is a direct connection between torture and the evidence in the case involving the person sought, the general records of the states involved (for using torture and/or relying on torture-derived evidence from other states) may be less relevant. However, where it is shown that the requesting state has a routine and widespread practice of relying on information derived from torture, a connection to the particular characteristics of the case may not be as meaningful.

28. Where a state denies using torture, but is shown to rely upon information from other states with a record of using torture, the plausible connection threshold may be satisfied by demonstrating that the case involving the person sought is sufficiently similar to other documented cases where the requesting state has relied upon torture-derived information by the state alleged to have committed torture. This similarity in the "type" of case may be informed by factors such as the nature, timing and location of the offence, as well as the nationality, ethnicity and other relevant characteristics of the person sought and/or other individuals who have played a role in the case.

29. In establishing this plausible connection, the person sought may rely upon the reports of U.N. institutions, reputable non-governmental organizations (such as Amnesty International and

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[28] See *Mahjoub*, **Appellant's BOA**, Tab 39 at para. 27

Human Rights Watch), U.S. State Department reports, judgments of foreign courts, books, news reports and other publicly available sources of information.[29] The Minister must consider this information fully and carefully. A failure to do so is an error warranting appellate intervention.[30]

C. Discharging the Minister's obligations

30. If the person sought establishes a plausible connection between the use of torture and the evidence that will be used against him in the requesting state, the BCCLA submits that the Minister has an obligation to satisfy himself that either (i) the plausible connection has been rebutted; or (ii) the requesting state will not use the impugned evidence against the person sought. Extradition without meeting one of these two obligations would be contrary to the *Charter* and the Act.

i. Investigating and rebutting the plausible connection

31. Courts have recognized that, depending on the circumstances raised by a particular extradition, the Minister should take steps to investigate certain issues before making a surrender decision.[31] Applying this principle to cases where the person sought has established a plausible connection between the use of torture and the evidence relied upon by the requesting state, the Minister must satisfy himself that the plausible connection to torture has been rebutted.

32. Requiring the Minister to meet this standard recognizes both his unique position to seek out information from the requesting state (especially as compared to the person sought), and the fundamental importance of ensuring that Canada does not extradite an individual to face a trial based on evidence procured as a result of torture.

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[29] See, for example, *Othman, supra,* **Appellant's BOA**, Tab 33 at paras. 106-124

[30] See, for example, *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 247, **Appellant's BOA**, Tab 39

[31] See *Németh, supra,* **BCCLA BOA**, Tab 1 at para. 66 (Minister must consult with Minister of Citizenship and Immigration where surrender decision concerns a person with refugee status); *Singh v. Republic of India*, 2007 BCCA 157, **BCCLA BOA**, Tab 5 at paras. 58-59 (Minister investigating the legal procedure for hearing fresh evidence of innocence in the Requesting State, in response to the person sought raising the prospect of a wrongful conviction); *Czech Republic v. Zajicek*, 2012 ONCA 99, **Appellant's BOA**, Tab 45 at para. 21 (Minister "quite properly" asking the requesting state for a response to the allegations of torture raised by the requesting state); ***Fowler v. Minister of Justice of Canada***, 2011 QCCA 1076, **BCCLA BOA**, Tab 6 at paras. 37, 47 (Minister's decision unreasonable for failing to check parole eligibility period in Florida)

33. Any information from the requesting state that the Minister relies upon in assessing whether the plausible connection has been rebutted must be specific and reliable. Just as generalized assertions of human rights abuses by the person sought will not suffice to establish a plausible connection, generalized denials of impropriety by the requesting state (or the state alleged to have committed torture) will be insufficient to rebut it. Equally unreliable is the mere fact that a state is a signatory to instruments denouncing and precluding the use of torture-derived evidence. As Lord Bingham recognized in *A & Others*, countries may be widely known to practice torture or rely upon information derived from torture, but may also be signatories to UNCAT and "will, no doubt, disavow the practice publicly."[32] This is particularly true when the broad denials in question have not even been given directly to the Minister, but are rather considered a matter of "public record" from previous statements by the requesting state.

34. Rather, to be afforded any weight in the assessment of whether a plausible connection has been rebutted, denials from a requesting state must be specific to the evidence in question, and accompanied by sufficient details concerning the source and circumstances of that evidence to support the conclusion that it was not obtained by way of torture.

35. In addition, the Minister may undertake his own independent investigation, through whatever means and resources are available to him, to try and determine whether the plausible connection has been rebutted.

36. Whatever information the Minister ultimately relies upon in making his determination should be disclosed to the person sought, so that they may make further submissions to the Minister concerning its sufficiency, accuracy and reliability.

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[32] *A & Others, supra,* **Appellant's BOA**, Tab 38 at para. 56 (per Lord Bingham)

ii. Ensuring torture-derived evidence will not be used by the requesting state

37. The second option available to the Minister where a plausible connection has been established is to satisfy himself that the legal regime in the requesting state will not permit the introduction of torture-derived evidence against the person sought. This may be done either by acquiring sufficiently specific and reliable assurances from the requesting state that the evidence will not be used against the person sought[33], or by relying on compelling and conclusive evidence that the foreign legal system will not permit the introduction of that evidence.

38. In the extradition context, assurances are not necessarily sought out of regard for the person sought, but out of "regard for the principles that have historically guided this country's justice system".[34] In *Burns,* the Supreme Court held that these principles required the Minister to seek assurances that no death penalty would be imposed by the requesting state (in all but exceptional circumstances).[35] The same result must follow in cases where the person sought would be tried on the basis of torture-derived evidence.[36] Indeed, under international law, the use of torture-derived evidence is arguably even more offensive than the imposition of the death penalty. In any event, both are fundamentally incompatible with Canadian values, and both shock the conscience.

39. Assurances that the person sought will not be tried on the basis of torture-derived evidence must be sufficiently specific and reliable. Some of the factors identified by the Supreme Court in *Suresh* are instructive in making this evaluation, including the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances.[37]

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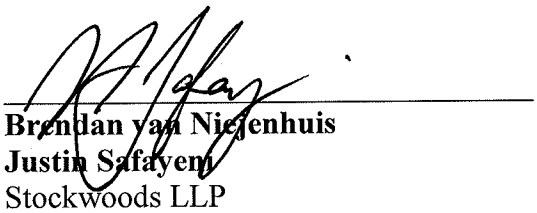
[33] The Minister "may seek assurances that the Minister considers appropriate from the extradition partner...": s. 40(3) of the Act
[34] *Burns, supra,* **Appellant's BOA**, Tab 28 at para. 126
[35] *Ibid.,* at para. 65
[36] Assurances are required in order to comply with s. 7 of the *Charter* when extradition would otherwise "shock the conscience" of Canadians: see *Cail, supra,* **Appellant's BOA**, Tab 15 at para. 22
[37] *Suresh, supra,* **BCCLA BOA**, Tab 2 at para. 125; *Othman, supra,* **Appellant's BOA**, Tab 33 at para. 152

40. Finally, rather than obtain specific, meaningful assurances, the Minister may rely on conclusive evidence put forward by the requesting state that the rules or principles of its legal system will not allow for the introduction of any evidence that has a plausible connection to torture; that the judiciary has the capacity to investigate and evaluate whether the evidence has a plausible connection to torture; and that, as a practical matter, the person sought may exercise this challenge at the outset of any legal proceedings in the requesting state. However, if there is any doubt as to the ability of the person sought to fully and effectively challenge and exclude the impugned evidence, then relying on this alternative will not be sufficient.[38] Accordingly, in circumstances where there are open questions about the content or application of the rules of evidence or procedure in the requesting state vis-à-vis torture-derived evidence, or the ability of courts in the requesting state to investigate and determine the plausible connection issue, the Minister cannot simply rely on those rules and procedures to discharge his obligations. To return to the language of *Burns* once again, the "potential consequences" of being tried based on torture-derived evidence offends the principles of fundamental justice and "tilts the s. 7 balance against extradition", unless the requesting state provides assurances or evidence of some similarly clear and reliable means of ensuring that the impugned evidence will not be used at trial.[39]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2013.



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[38] See *Othman*, **Appellant's BOA**, Tab 33 at paras. 278-279
[39] *Burns, supra*, **Appellant's BOA**, Tab 28 at para. 131

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE
1.	*Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281
2.	*Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3
3.	*United States of America v. Anekwu,* [2009] 3 S.C.R. 3
4.	*United States of America v. Hulley,* 2007 BCSC 976
5.	*Singh v. Republic of India*, 2007 BCCA 157
6.	*Fowler v. Minister of Justice of Canada*, 2011 QCCA 1076
	TEXT
7.	E. Krivel et al., *A Practical Guide to Canadian Extradition* (Carswell, 2002) (excerpt)

TAB B

SCHEDULE "B"
RELEVANT STATUTES

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, CONSTITUTION ACT, 1982, c. 11 (U.K.), Schedule B

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

EXTRADITION ACT, S.C. 1999, c. 18

31. For the purposes of sections 32 to 38, "document" means data recorded in any form, and includes photographs and copies of documents.

32. (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(*a*) the contents of the documents contained in the record of the case certified under subsection 33(3);

(*b*) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

(*c*) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.

33. (1) The record of the case must include

(*a*) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and

(*b*) in the case of a person sought for the imposition or enforcement of a sentence,

(i) a copy of the document that records the conviction of the person, and

(ii) a document describing the conduct for which the person was convicted.

(2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.

(3) A record of the case may not be admitted unless

(*a*) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(*b*) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

(5) For the purposes of this section, a record of the case includes any supplement added to it.

34. A document is admissible whether or not it is solemnly affirmed or under oath.

...

40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.

(2) Before making an order under subsection (1) with respect to a person who has made a claim for refugee protection under the *Immigration and Refugee Protection Act*, the Minister shall consult with the minister responsible for that Act.

(3) The Minister may seek any assurances that the Minister considers appropriate from the extradition partner, or may subject the surrender to any conditions that the Minister considers appropriate, including a condition that the person not be prosecuted, nor that a sentence be imposed on or enforced against the person, in respect of any offence or conduct other than that referred to in the order of surrender.

(4) If the Minister subjects surrender of a person to assurances or conditions, the order of surrender shall not be executed until the Minister is satisfied that the assurances are given or the conditions agreed to by the extradition partner.

...

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

(*a*) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or

(*b*) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

(2) The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner.

45. (1) The reasons for the refusal of surrender contained in a relevant extradition agreement, other than a multilateral extradition agreement, or the absence of reasons for refusal in such an agreement, prevail over sections 46 and 47.

(2) The reasons for the refusal of surrender contained in a relevant multilateral extradition agreement prevail over sections 46 and 47 only to the extent of any inconsistency between either of those sections and those provisions.

46. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that

(*a*) the prosecution of a person is barred by prescription or limitation under the law that applies to the extradition partner;

(*b*) the conduct in respect of which extradition is sought is a military offence that is not also an offence under criminal law; or

(*c*) the conduct in respect of which extradition is sought is a political offence or an offence of a political character.

(2) For the purpose of subparagraph (1)(*c*), conduct that constitutes an offence mentioned in a multilateral extradition agreement for which Canada, as a party, is obliged to extradite the person or submit the matter to its appropriate authority for prosecution does not constitute a political offence or an offence of a political character. The following conduct also does not constitute a political offence or an offence of a political character:

(*a*) murder or manslaughter;

(*b*) inflicting serious bodily harm;

(*c*) sexual assault;

(*d*) kidnapping, abduction, hostage-taking or extortion;

(*e*) using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and

(*f*) an attempt or conspiracy to engage in, counselling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct referred to in any of paragraphs (*a*) to (*e*).

47. The Minister may refuse to make a surrender order if the Minister is satisfied that

(*a*) the person would be entitled, if that person were tried in Canada, to be discharged under the laws of Canada because of a previous acquittal or conviction;

(*b*) the person was convicted in their absence and could not, on surrender, have the case reviewed;

(*c*) the person was less than eighteen years old at the time of the offence and the law that applies to them in the territory over which the extradition partner has jurisdiction is not consistent with the fundamental principles governing the *Youth Criminal Justice Act*;

(*d*) the conduct in respect of which the request for extradition is made is the subject of criminal proceedings in Canada against the person; or

(*e*) none of the conduct on which the extradition partner bases its request occurred in the territory over which the extradition partner has jurisdiction.

Hassan Naim Diab Appellant/Applicant	and	The Attorney General of Canada (on Behalf of the Republic of France) Respondent	Court File No: C53812 / C55441

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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