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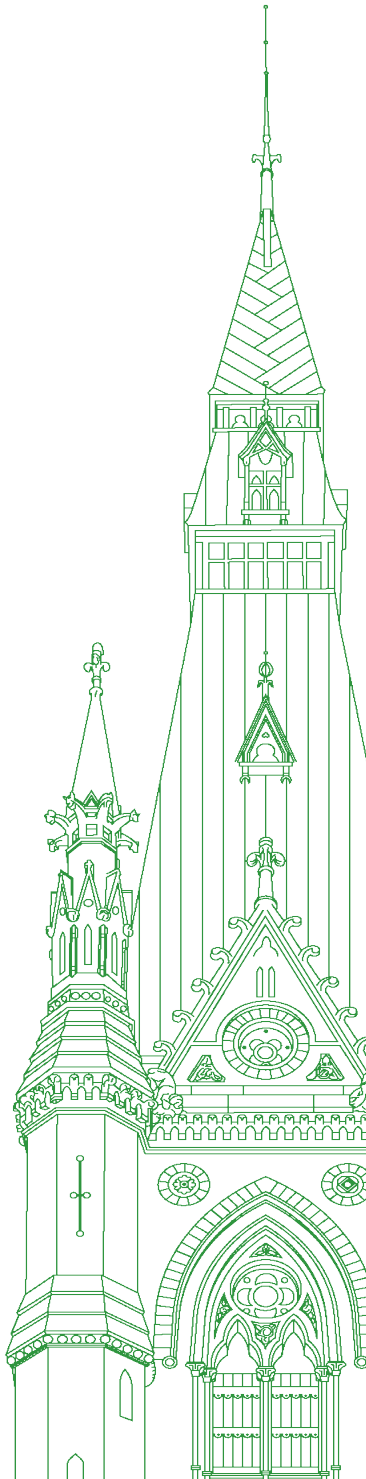

Chair: Mr. Randeep Sarai

Standing Committee on Justice and Human Rights

Monday, February 13, 2023

● (1550)

[*English*]

The Chair (Mr. Randeep Sarai (Surrey Centre, Lib.)): I call this meeting to order.

Welcome to meeting number 49 of the House of Commons Standing Committee on Justice and Human Rights.

Pursuant to Standing Order 108(2) and the motion adopted on January 30, the committee is beginning its study on extradition law reform.

Today's meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and remotely using the Zoom application.

I'd like to make a few comments for the benefit of the witnesses and members.

Please wait until I recognize you by name before speaking. If you are participating by video conference, click on the microphone icon to activate your mike, and please mute yourself when you are not speaking.

For interpretation, those on Zoom have the choice, at the bottom of their screen, of "floor", "English" or "French". Those in the room can use the earpiece and select the desired channel.

I remind everyone that all comments should be addressed through the chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the "raise hand" function. The clerk and I will manage the speaking order as best we can, and we appreciate your patience and understanding in this regard.

I will use some cue cards. For those who are not familiar with this, when you're closing in on 30 seconds, I will raise the yellow card. When you're out of time, it's the red card. I ask that you try to complete your submissions, questions or answers within the time period, so I don't have to interrupt you. Otherwise, I advise that you keep tabs on the clock on your own.

For the first hour, we are concluding the witness hearings for our study on extradition. We wish to welcome, as an individual, Mr. Anand Doobay, by video conference. I think we're working on one other panellist. Ms. St-Laurent is having some technical difficulty, so we may have to suspend if it's not corrected by the time Mr. Doobay finishes.

We'll begin with you, Mr. Doobay. You have five minutes for your opening statement, then we'll begin a round of questioning.

Thank you.

Mr. Anand Doobay (As an Individual): Good afternoon, and thank you to the committee for inviting me to give evidence.

I think the questions the committee is examining are drawing out some of the inherent tensions that exist within the extradition system. The need to ensure effective co-operation for prosecution and punishment of criminal offences has to be balanced against the need to protect civil liberties and human rights. The United Kingdom has grappled with these issues on a number of occasions.

In 2010, I was appointed to be part of a panel to review the United Kingdom's extradition arrangements. When undertaking this task, we were very aware that we had to take into account the potentially serious consequences for a person who may be sent to face trial in an unfair legal system where they may in fact be dealing with a language they do not speak and with little or no support from family, friends or their community.

We also looked at the fact that we wanted to try to recognize the potential shortcomings of the extradition system itself and the requesting country, while not allowing this to become a complete bar to extradition, except in extreme situations. This can be made more difficult when decisions are made during the extradition process by politicians because these are often interpreted by the requesting state as being diplomatic rather than judicial decisions. They can lead to potential diplomatic repercussions.

In today's world, with globalization and technological advances, it is increasingly common that more than one country may have jurisdiction to prosecute. This is leading to increasing public debate as to how the question of which country should prosecute is decided and extradition cases can often cause this issue to come to the fore.

I thought it might assist the committee if I explain very briefly a few of the changes the U.K. has made to its extradition law to deal with specific problems it has faced.

In particular, there was an issue in relation to requests from other EU member states because they have what's called the “principle of legality”. That means they will make a request for any extradition offence, no matter how minor it might be, because there is no discretion involved in deciding whether to make a request. That led the U.K. to be concerned that extradition was being granted for what may be seen to be relatively trivial offences, so it introduced a proportionality bar. The U.K. can now look at the seriousness of the conduct, the likely penalty that might be imposed and whether there are less coercive measures that might be employed rather than extradition.

A further issue that has arisen is in relation to the ability of the U.K. to [*Technical difficulty—Editor*] evidence as part of the extradition process. For most countries, evidence is not required either because they're EU member states, because they're parties to the European Convention on Extradition or because they are trusted partners of the United Kingdom. Those include Australia, New Zealand, Canada and the U.S.

The U.K., therefore, relies to a large extent on the court's ability to invoke its abuse of process jurisdiction to protect where there may be improprieties in relation to the extradition process itself.

There is also a question about whether somebody who is a resident or a national of the U.K. should be extradited to face prosecution in another country. As I said in my first remarks, I think this actually goes to a question of where somebody should be prosecuted. Very few people are suggesting there should be impunity and that simply because you are, for example, a U.K. national, you shouldn't be subject to prosecution if there is sufficient evidence to justify it.

In the U.K., they have introduced a forum bar. Where there is a substantial [*Technical difficulty—Editor*] conduct that takes place in the U.K.—which means the U.K. could prosecute—the court can consider whether it's in the interest of justice for extradition to take place. There are a specified number of factors that the court can take into account, but it can take only those factors into account.

The court also considers human rights and it must do so. If there is a real risk of a violation of a human right, then this will lead the court to bar extradition. One of the rights is article 8 of the European Convention on Human Rights, which relates to the private and family life. This can allow a court to consider, firstly, the effect on other people of extradition, most particularly the effect on children of the extradition of their parents, for example. It can also allow the court to consider the effect on the requested person. It has to carry out its own proportionality exercise.

● (1555)

Ordinarily, the court obviously finds that extradition is justified, given the need to prosecute serious crimes, and the need to co-operate internationally, but it does allow flexibility for the court to take into account whether there are other reasons why it would be [*Technical difficulty—Editor*] in a particular case.

The other thing I'd like to finish with is this. I've seen that one of the issues in Canada [*Technical difficulty—Editor*] seemingly to the role of the prosecutor. It's probably worth emphasizing that within the U.K., whilst extradition cases are dealt with by the prosecution service, which is the U.K.'s national prosecutor, it acts as a minister of justice in extradition cases. Therefore, it owes an [*Technical difficulty—Editor*] acts fairly, and it also has a specific obligation to disclose evidence it's aware of that might undermine, or weaken, the request it's prosecuting if it's within [*Inaudible—Editor*]. It also has an overriding obligation of fairness.

I hope it gives the committee some examples, and ideas of how the U.K. has tried to deal with some of these issues. I'd be very happy to answer any further questions.

● (1600)

The Chair: Thank you, Mr. Doobay.

I will next go to Ms. St-Laurent.

First, I'll let the clerk take over, and do some sound tests.

[*Translation*]

The Clerk of the Committee (Mr. Jean-François Lafleur): Ms. St-Laurent, could you please put on your headset, unmute yourself, and talk for 15 to 20 seconds about anything, like the weather where you are, so we can do a sound test?

Ms. Michelyne C. St-Laurent (Lawyer, As an Individual): Sure. I've been through quite an adventure with this test. We've been working on it for half an hour, but I've finally managed to join you. Can you hear me okay?

The Clerk: Everything is working fine. Thank you.

[*English*]

The Chair: Thank you, Ms. St-Laurent. You will have five minutes for your opening statement.

Please go ahead.

[*Translation*]

Ms. Michelyne C. St-Laurent: Hello to you, Mr. Chair, and to all the members of the Standing Committee on Justice and Human Rights.

I invite you to read my brief, and I'm ready to answer all your questions.

Here are the key points I want to cover.

First of all, under the existing Extradition Act, Canadian citizens can be extradited on the basis of hearsay evidence, the veracity and reliability of which are questionable. The only evidence you get is an account of the events according to a second or third party. There's no sworn statement or solemn affirmation. Certification doesn't involve a personal affirmation or statement either. Worse still, case law holds that the judge reviewing the record of the case doesn't have to consider whether the content of the record is true.

Since 1989, we have had universal jurisdiction to try Canadians who are accused of crimes committed in other countries, like Rwanda or Mexico. These Canadians have all been tried here. At the very least, we should be giving Canadian citizens an opportunity to plead guilty in Canada, which wouldn't violate our contractual obligations. It's all the more important when the accused citizen has a mental illness.

I just want to say a few words about disproportionate sentences. For example, in Canada, the penalty for trafficking Xanax is a maximum of three years. In the United States, the penalty for the exact same crime is five to 40 years.

I don't know if my five minutes are up. All the rest of the information I wanted you to have is included in my brief. I know you'll also have questions for me.

● (1605)

[*English*]

The Chair: You are only at two minutes, Ms. St-Laurent. You have another three minutes, if you'd like to go.

[*Translation*]

Ms. Michelyne C. St-Laurent: No, since you have my brief anyway, I know members will have questions for me, so I'll answer their questions and add some comments.

[*English*]

The Chair: That sounds good. Thank you.

Just to let everyone know, we were not able to get a House of Commons-approved headset to Mr. Herman, who is travelling to Europe, so he will not be giving evidence at this point. It will just be these two witnesses.

For our first round of questions, we'll begin with Mr. Van Popta for six minutes.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for being here with us.

Mr. Doobay, I'll start with you.

Thank you for taking the time to meet with Canadian parliamentarians. We appreciate the opportunity to mine your brain and learn something about your experience in the EU.

You talked about some of the tensions in the EU, in the realm of extradition law. We're feeling some of those same tensions here. I read somewhere that you've argued cases that reveal the tension between a motive to seek justice and political motivation. I wonder whether you could comment on that. How do we distinguish between the two?

I'm thinking particularly of the Hassan Diab case. I don't know whether you're familiar with it, but it was a case wherein a Canadian national was extradited to France based on pretty skimpy evidence. We feel it was probably more politically motivated than motivated by justice.

What is your comment on that?

[*Translation*]

Ms. Michelyne C. St-Laurent: That's a very long question.

[*English*]

I speak French. There is no translation.

Mr. Tako Van Popta: I meant the question for Mr. Doobay, because he commented on the tension between political motivation and the motivation to seek justice.

[*Translation*]

Ms. Michelyne C. St-Laurent: I'm not getting the French interpretation.

The Clerk: Ms. St-Laurent, if you look at the bottom of your screen, you'll see a button for interpretation. Click on it and select French. Then you'll get the interpretation.

[*English*]

The Chair: Mr. Doobay, please go ahead.

I stopped the clock, so I'm not taking any time from Mr. Van Popta.

Mr. Anand Doobay: Thank you.

I think that we need to be clearer about political motivation in terms of the way I've used it in particular cases. There are a number of ways in which [*Technical difficulty—Editor*] argue that a prosecution was brought for an improper reason because, obviously, prosecutions are supposed to be brought in order to simply prosecute crimes that are legitimately suspected.

In some cases, one can point to a purely political motivation. For example, it's an opposition politician, and the government is simply bringing a prosecution in order to silence that politician. In other cases, there can be a commercial motivation. For example, the government has its own commercial interests and is trying to advance them by bringing a prosecution to support that. In some cases, there may be a political interest in terms of prosecuting a particular case. A government may feel public pressure to bring a prosecution because there is a crime that is particularly sensationalized within that [*Technical difficulty—Editor*].

In the U.K., we have a number of legal ways of dealing with particular cases. We can make arguments to the human rights bars to say that, if you're being prosecuted for a reason that's not proper, then it's a breach of convention articles. You can also make arguments under the abuse of process jurisdiction that I mentioned earlier, and, finally, we can make arguments in particular to what we call extraneous grounds. If you can prove that you're being prosecuted for your political opinion, your gender, your race or your nationality, then that also will operate as a bar.

I obviously have read something about the case that was referred to in the question, but I'm not claiming to be familiar with it. I think the difficulty with those types of cases can be that the government may have an interest in prosecuting a particular case because it's of great national importance, and it may do so with very little evidence to support its request. I think that would fall into a slightly different category in terms of what I have referred to as politically motivated requests, because when I use that term, I really mean that the government has its own political interest separate from simply prosecuting a crime, as opposed to the government being willing to overlook evidential difficulties in terms of trying to bring somebody to be [*Technical difficulty—Editor*].

We've had those cases in the U.K. After the terrorist attacks in the U.S., there was a particular case called Lotfi Raissi, where the U.S. tried to bring an extradition request. This was the case that gave rise to the principle I referred to, where the prosecutor was said to have to disclose material that undermined the U.S.'s case. That lead to the U.S., in fact, not pursuing the extradition request.

● (1610)

Mr. Tako Van Popta: My next question is about the burden of proof on the requesting state. We had witnesses here earlier in this study who said that the burden has shifted too far in favour of the requesting state and away from a sense of justice for human rights; but we had another lawyer who said that we have the balance correct, that an extradition hearing is not a trial and that the trial will happen in the other country. We parliamentarians are reviewing our law to see whether it should be amended, and we're looking for some advice from you on that.

How do we find the right balance between being efficient and cooperating with our extradition partners and, on the other hand, ensuring that human rights and justice goals are met?

Mr. Anand Doobay: I think the difficulty is really working out to what level you want to examine a case. I appreciate that your system, with the records of cases, is obviously slightly different from what we have in the U.K. As I was saying earlier on, in a large number of countries, no evidence at all needs to be provided. All that's required is for them to make allegations. As long as those allegations include criminal offences then that's sufficient. Those countries include, for example, Azerbaijan and Turkey. They used to include the Russian Federation before it withdrew from the Council of Europe.

You can see that the U.K. doesn't have any evidential test for a number of countries in which there's certainly controversy as to whether that should be the case.

I think the argument you're referring to as to whether the extradition process should be a trial is a difficult one, because obviously it is not possible to have a full trial applying the laws of the requesting state when you're dealing with an extradition case. There are cases in which, it seems to me, it would be appropriate to examine further the evidence that's put forward. Again, within the U.K. we tend to be able to do this by having the safeguards of human rights standards. In exceptional cases, those can be used to say there is a reason to examine the evidence in more detail than would ordinarily be done. This residual [*Technical difficulty—Editor*] abuse of process.

I completely understand that there is a tension and that it is not possible in every case to insist upon a trial when you're having an extradition hearing. But I do think that the system should cater to people in those exceptional cases where there is really something to be discussed in relation to the evidential test and there's a potential for unfairness.

This particularly arises in relation to a specific aspect of the case you mentioned. We have had this as well. There have been cases of people being extradited and then placed in pretrial detention for long periods of time because their case has in fact not been ready to be prosecuted. So the U.K. introduced a bar that says if the case has not been charged and is not ready to be tried, then that is a reason to stop extradition. That is to deal with situations within the EU for which there are long periods of pretrial detention. There were lots of requests being made [*Technical difficulty—Editor*] where people end up for many years in pretrial detention.

● (1615)

The Chair: Thank you.

Next we go to Ms. Dhillon for six minutes.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): Thank you, Mr. Chair.

Thank you to our witnesses for being here.

I'm going to start with Mr. Doobay. Last week, during our last meeting, we spoke about the experience of racialized Canadians when it comes to the Extradition Act.

Could you please comment a little bit about this?

Mr. Anand Doobay: I'm sorry, but I didn't hear that session.

Could you just explain what you mean by the experience of racialized Canadians?

Ms. Anju Dhillon: By racialized Canadians I mean people of colour or members of the LGBTQ community, etc.—minority communities.

Can you talk about their experience regarding the Extradition Act?

Mr. Anand Doobay: There is a specific set of bars that can apply if you can show that people are being discriminated against for those reasons. The bars apply if you can show someone is being prosecuted for that particular reason or that they may face some form of prejudice after they are extradited. They give pretty good protection. You just have to be able to prove a causal link. You have to be able to show that it's one of the reasons they are being prosecuted, not the only reason. You have to be able to show that it's one of the reasons they may suffer prejudice after their return. That prejudice can take a number of different forms.

For example, you might be able to show that they would face harsher treatment in custody or that they would be at greater risk of [*Technical difficulty—Editor*] violence. There are all sorts of ways in which you can seek to show that they may face discriminatory treatment because of one of these characteristics.

Ms. Anju Dhillon: Thank you for that clarification.

Can you comment on the legal procedures of extradition, especially when it comes to the prohibition against surrendering a person to a country in which it's likely they would be at risk of being tortured?

Mr. Anand Doobay: That's something that we struggle with in the U.K., because we have an absolute prohibition in relation to surrendering to torturers. However, when we're looking at extradition, we're looking at something prospectively, so the test is whether there is a real risk of violation of article 3, which is the prohibition against torture.

The difficulty we now have is, I think, one that you were also grappling with. That is when that risk is now raised, if it is shown to be real and a diplomatic assurance can be given in response to it to say, “Whilst we recognize there's a real risk of torture, we guarantee that in this particular case, this person will not be tortured”.

I have quite a lot of difficulties with this, because the only reason you need a diplomatic assurance is if there is a real risk. You're then trusting [*Technical difficulty—Editor*] where you've already established that there is a real risk they're going to torture somebody to give you an assurance where they say, “But you can trust us [*Technical difficulty—Editor*] but we won't torture them”.

There are particular difficulties, as well, with monitoring. Very often, there is no monitoring mechanism built in, or the monitoring that a court suggests is going to happen is pretty fanciful. For example, they say, “Your client can complain if they are tortured”, and you say, “Well, I'm pretty sure they're not going to want to do that when they're in prison in this country, because they're obviously going to face further ill-treatment if they complain”. The methods suggested by the courts in the U.K. as sufficient to ensure that there will be no ill-treatment are, in my mind, not sufficient.

I think one of the things one has to grapple with when using [*Technical difficulty—Editor*] assurances is how you can make sure that they are going to be effective in practice and that they're going to be monitored, given that they're only given when there is already an agreed risk of this bad treatment happening.

Ms. Anju Dhillon: Thank you for that.

When it comes to monitoring, as you just mentioned in your response, what can governments do to better monitor or make sure that promises are being kept?

Mr. Anand Doobay: In some instances, consular officials have been delegated to do this. The difficulty is that, if it's not a British national, the British consular officials don't have any right to see the person, but of course, the country can agree to it. However, that gives [*Technical difficulty—Editor*] resource implications when countries can be concerned about using consular staff in order to do this. That, to my mind, is quite a safe way of doing it, because it gives the person a confidential ability to report ill-treatment.

The other mechanisms that have been suggested are human rights bodies, but again, there are practical difficulties with them.

I think the most serious issue about monitoring is what you do if there is a breach. The only repercussion is diplomatic, because the [*Technical difficulty—Editor*] that is given is diplomatic assurance. It's given from one country to another. If there is a breach, and you can establish that in a way that's objectively verifiable, what then happens?

● (1620)

Ms. Anju Dhillon: Thank you.

What kind of crimes are most often seen as part of extradition cases? What are the most common ones?

Mr. Anand Doobay: I'm not sure the U.K. is a very good example. We now have this system with the EU that allows for extradition requests that many EU members face, and because they have this principle of legality, they don't exercise any discretion. For most countries where this principle doesn't exist, there is a decision taken as to whether an offence is serious enough to justify the resources needed in order to make an extradition request, but within the EU, that doesn't really apply. We face requests that range from what you would see as very serious to those that some people would consider to be much more trivial.

I would add one caveat, which is that it is quite hard to categorize seriousness unless you understand the context within which these crimes are being prosecuted. What may seem trivial to you in a particular country can be an endemic problem. If there's a low standard of living, the theft of a chicken can actually be a relatively serious offence, even though in a different country, that might seem pretty trivial.

The Chair: Thank you.

Monsieur Fortin, you have six minutes.

[*Translation*]

Mr. Rhéal Fortin (Rivière-du-Nord, BQ): Thank you, Mr. Chair.

I would like to thank our two witnesses, Mr. Doobay and Ms. St-Laurent, for joining us today.

Ms. St-Laurent, I understand that you're a lawyer and that you're appearing today because you've probably had some experience with the application of the Extradition Act.

In your brief introductory remarks, you said that a Canadian citizen convicted of a crime that was committed abroad should be able to plead guilty in Canada if they so wish. You also mentioned a problem with unsworn statements.

Could you elaborate, and could you tell me whether this applies to one or more of the cases you've handled as a lawyer?

Ms. Michelyne C. St-Laurent: Being able to plead guilty in Canada to crimes committed abroad would be very important in certain cases, especially those involving people with mental illness or autism spectrum disorder. Those people already have huge problems to deal with. Being here in Canada, with their family, where they can communicate in their own language, is so important. In my opinion, going to the United States, having to adapt and facing the possibility of a decades-long prison sentence could make them suicidal. I would call that cruel and unusual punishment. As it happens, I commissioned an expert report on this for a case, and I'm expecting it shortly.

There's also the matter of universal jurisdiction. In the Cotroni case, Mr. Cotroni asked to be tried in Canada. The Supreme Court refused, saying it would cost too much to bring witnesses over, among other things.

Given the disparity between the sentences meted out in Canada and the United States, however, why shouldn't a Canadian citizen be allowed to plead guilty here in Canada? I don't think that would run counter to our international collaboration. As I wrote in my brief, the costs would be low for both the United States and Canada. There would be collaboration, especially since we have universal jurisdiction. I think that would be a plus, and it's extremely important.

I just can't get over the fact that this isn't allowed. I think it ought to be legal. I seem to recall another Supreme Court case where the person said they wanted to plead guilty in Canada, as in the case of Mr. Cotroni. However, the Supreme Court decided that that wasn't a right. It was up to the minister, in cooperation with the United States, to make the decision. But I don't remember which ruling it was, and I don't have it with me because I had hardly any time to prepare, as you know. I'm very busy.

I don't remember what year the ruling was from, so I don't know if universal jurisdiction already existed at the time. But that would be a plus, especially for people with mental disorders, such as autism. I think that, in all cases, this ought to be allowed in light of the disparity between the sentences handed down in the United States and Canada.

● (1625)

Mr. Rhéal Fortin: You were talking about how it's a problem when the record of the case contains unsworn statements and about the fact that the judge only has to consider whether it's complete, not whether the evidence is valid. Do you have any specific cases you can tell us about?

Ms. Michelyne C. St-Laurent: I do have one specific case in mind, but generally speaking, that's how it always is.

Judges say that it doesn't take much evidence. I mentioned that in my brief. It's not at all like a preliminary inquiry, because first of all—

Mr. Rhéal Fortin: If you want to tell us about your case, Ms. St-Laurent, we have about a minute left, so you might want to do it now.

Ms. Michelyne C. St-Laurent: I'll talk fast.

It's extremely important. We asked for disclosure, and we have some facts, but there are no sworn witness statements, just a set of facts. And as the Extradition Act says, it doesn't have to be verified.

I had a lot of suggestions to make, because I thought I had an hour, minus the five minutes, but I see I won't have time to present them. I'm very disappointed, because there were some important points I wanted to make.

Mr. Rhéal Fortin: You can still do it by sending us your written notes, Ms. St-Laurent. Sadly, my time is up.

Ms. Michelyne C. St-Laurent: I would be happy to. Thank you.

[*English*]

The Chair: Thank you, Ms. St-Laurent. As Mr. Fortin said, you are more than welcome to send in your submissions in writing. If you want to add more material we will be more than happy to receive that.

Next is Mr. Garrison for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thank you very much, Mr. Chair, and thank you to both of the witnesses for being with us today. I want to go back to Mr. Doobay, who raised a question of what's called the “forum bar”. I would like to know a bit more about how the forum bar works, which in my understanding says if things can be prosecuted in the U.K. there's a presumption they will prosecuted in the U.K. rather than extradition taking place.

Did that come about through case law, Mr. Doobay, or was that legislated?

● (1630)

Mr. Anand Doobay: It came about through legislation rather than case law. I think I just need to explain a bit further because that's not quite what it does. It says that if there's a substantial measure of conduct that took place in the U.K. then the forum bar applies. That's the gateway. That generally means that it could be prosecuted in the U.K. because a substantial measure of the conduct has taken place there. Then there are a number of specified factors that the law looks at, but there's no hierarchy to them. The court can give different weight to different factors. The factors include what prosecutions have taken place, whether there's an interest in prosecutions taking place in one country and the defendant's connections to the U.K. There are a variety of factors.

One of them looks at the possibility of prosecuting in the U.K. Now a U.K. prosecutor can say that there is no possibility of a prosecution in the U.K. and can issue a certificate. If they issue a certificate, you can't invoke the forum bar. That does give a prosecutor an ability to stop you from invoking. That hasn't happened yet in any case in the U.K. The prosecutor can also issue what is called a belief letter that says they don't believe the most appropriate jurisdiction for prosecution is the U.K. and they will then explain why they don't believe that. That happens in most cases and the court will then take that into account.

The reason why the forum bar is difficult to operate is the defendant always has long-standing connections with the United Kingdom and the court is trying to reconcile that with whether they can be prosecuted in the U.K. If they were already being prosecuted in the United Kingdom, they couldn't be extradited. You would ordinarily have a defendant saying that they want to be prosecuted in the U.K. and the requesting country saying that they already prosecuting the person and could do so swiftly. For example, they have other defendants who they are already prosecuting.

It's quite a difficult picture for a court to consider when weighing up these various factors. Often, the court is put in a position where it feels like it has to order extradition because if it doesn't do so it may be concerned that the person is going to have impunity and isn't going to be prosecuted anywhere.

Mr. Randall Garrison: Thank you, Mr. Doobay.

You also made reference in your original presentation to a proportionality bar. Could you talk a little bit more about how that operates and whether that came about legislatively or through case law?

Mr. Anand Doobay: That also came about legislatively. It arose just because, as I said, there was a lot of public concern about the number of offences that were being sought from the EU member states that were thought of as being trivial. There are three limbs to the proportionality bar and it only applies to requests made by EU member states.

The first is the court looks at the seriousness of the offence and there's a test laid out in terms of considering what's serious and what's not. It then looks at the likely sentence that's going to be imposed, and it then looks at whether there is a less coercive measure that could achieve a just outcome in the case.

Once it has looked at the combination of all three it reaches an overall assessment as to whether it would be disproportionate to extradite in a particular case. Often what may happen is the person may be kept in custody while the extradition proceedings are ongoing. For example, the court may say the amount of time that the person spent in custody in the U.K. is probably about the same amount of time that they would have spent in custody if they had been convicted of the offence. The court may say there's an offence that it doesn't think is significant enough to justify the extradition. It will also try to test with the requesting country whether there are less coercive measures, whether the person could be sentenced to a non-custodial sentence, or a fine, or some diversionary measure that would be short of a custodial sentence

Mr. Randall Garrison: In the case of fearing persecution on the basis of factors like race, sexual orientation or gender identity, who makes that decision in the U.K. system? Is that a decision of the judge? In Canada, that decision on surrendering someone for extradition is left to the minister.

Mr. Anand Doobay: That is a decision of the judge. In fact, the minister in the U.K. has a very limited role now. The minister used to have a very broad discretion, in the same way as I think you currently have in Canada, but over time, that has been narrowed down for the reasons I gave in my opening remarks.

The review that I carried out recommended that the minister's discretion be narrowed even further. At that point, the minister was still considering human rights [*Technical difficulty—Editor*], because we took the view that these were really judicial decisions. They should be taken uninfluenced by political considerations, and be dealt with in a transparent way. In fact, the U.K. government agreed with that.

In the U.K., the minister now only looks if there is a risk of the death penalty, and if so, whether an assurance been given that it won't be carried out. Are there specialty undertakings in place, i.e., is the country agreed the person is only going to be prosecuted for the offence the person is being extradited for? If there's an earlier extradition request from another country, how do you do a competing request? The minister has a very limited set of questions to deal with, and they're very technical, essentially, in application. All the other issues are now dealt with by the courts.

● (1635)

Mr. Randall Garrison: Thank you.

The Chair: We'll go to our next round, which will be five minutes, beginning with Mr. Brock.

Mr. Larry Brock (Brantford—Brant, CPC): I would like to thank the witnesses for their attendance and participation.

The first question is to you, Mr. Doobay.

I listened very carefully to your opening remarks. You spoke about tensions in our current extradition system, and punishment versus protection of civil liberties. You talked about the role of the prosecutor in Canada. I'm not quite sure if I took down all of your notes. You made reference to the prosecutor in the U.K. being akin to a minister of justice, with duties to act with fairness, and to disclose evidence that is not favourable. In other words, it's probably evidence that normally could be disclosed, but sometimes some countries may not disclose it.

Were you trying to suggest that in Canada we do not have that minister of justice type of prosecutorial system, when it comes to extradition hearings? Are you suggesting that our prosecutors deliberately withhold exculpatory evidence without that duty to disclose?

Mr. Anand Doobay: I'm certainly not an expert on Canadian law, so I'm not in a position to really comment on that. I've read some academic discussion that said that there is, in Canadian case law, a distinction between prosecutors acting in a domestic criminal case, and the role they fulfill within an extradition process. You'd have to address that question to somebody who is a Canadian expert on extradition law.

The only point I was making was that U.K. case law is very clear that within the U.K. system, even though domestic prosecutors bring the case on behalf of a foreign government, they have a duty to act, and, more specifically, they have a duty to disclose evidence that they know about, and which might destroy or undermine the evidence on which the requesting state relies. That duty overcomes their duty that they might owe as a lawyer to their client, because obviously, in that situation, they are essentially acting as a lawyer for the client, the requesting state.

Mr. Larry Brock: You were specifically chosen by a member of this committee to provide evidence to aid this committee in reviewing our current extradition laws, and provide a study to the government as to what recommendations, if any, should flow.

In terms of your preparation for today's appearance, did you do any thorough examination of Canada's current extradition laws with a view to perhaps suggesting ways that Canada has been contrasted to the system in the U.K.? Do you have some suggestions on ways that we can improve our system to achieve that proper balance that most countries, which do engage in extradition processes, try to achieve?

Mr. Anand Doobay: I did do that, and that is why I've highlighted some of the issues. I've reviewed some of the testimony about the existing system in Canada. Whilst I'm not an expert on Canadian extradition law, those issues have led me to highlight for you some of the reforms we have put forward in the United Kingdom in case they are of assistance to you. You may be dealing with the same issues.

Mr. Larry Brock: One of the pieces of evidence that I've reviewed in advance of your testimony is an excerpt of a committee hearing on extradition that you participated in in the U.K. House of Lords back in 2014. I appreciate it is some time ago, but I think one of the questions put to you still has application today. It was a question put to you by Lord Jones. I'm going to read out his question to you. and then I may modify the question I ask of you afterwards.

Lord Jones says:

> In the Baker review, you wrote that extradition is a form of international co-operation in criminal matters based on comity intended to promote justice. Do you still subscribe to this view and, since you wrote that sentence, do you feel the Government have focused too much on achieving efficient international co-operation on extradition and focused too little on ensuring that the UK's extradition arrangements are just?

Applying it in a Canadian context, sir, how would you respond?

● (1640)

Mr. Anand Doobay: As I say, I'm not a Canadian extradition lawyer, so from my assessment of the issues that I've seen raised in the context of Canadian extradition arrangements, the one that I think is common to Canada and the U.K. is this issue of diplomatic assurances. I think this is an issue that is going to cause difficulty for all countries trying to resolve the tension between a need to co-operate and to protect individuals.

The Chair: Thank you.

We'll go over to you, Ms. Brière, for five minutes.

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Mr. Chair.

I thank our two witnesses, Mr. Doobay and Madam St-Laurent for being with us this afternoon.

Mr. Doobay, I will ask you my questions in French.

[*Translation*]

In your opening statement, you asked a question: Where should a person be prosecuted? Could you please elaborate?

[*English*]

Mr. Anand Doobay: To my mind, that is the most important question, because I do not believe anybody thinks that people should be allowed to get away with committing a crime and not be prosecuted for it. For those cases where there is sufficient evidence to suggest that somebody should face trial, I think that the most important question is where they should face trial.

In the U.K., those decisions are generally taken between prosecutors of different countries. It is certainly unclear to me to what extent they take account of the suspect or the defendant when making that decision. My concern is that ordinarily they only prioritize their desire to successfully prosecute somebody or their desire to obtain the maximum penalty they can. What they don't take into account in the balancing process is the effect on the person of being taken out of the country where they reside and where they are familiar with the system, and being put into another country in order to be prosecuted there.

I think it is [*Technical difficulty—Editor*]that as well as looking at the extradition process, you also look at the system for deciding whether somebody should be prosecuted. In an extradition context, it is very unattractive for an extradition court to say, “I'm going to stop tradition. This person is not going to be prosecuted anywhere...even though there appears to be sufficient evidence to suggest they should be prosecuted.”

I'm referring back to one of the earlier comments. There are countries that do say that for their nationals or their citizens. They will refuse extradition, but they will prosecute them instead. They are not rendered immune from prosecution, but they are then prosecuted in the country where they live or where they ordinarily reside and in a system they're familiar with.

[*Translation*]

Mrs. Élisabeth Brière: Thank you very much. That's very interesting. I have two sub-questions.

You said just now that effect of extradition isn't necessarily taken into account. Earlier, you were talking about the effect on children specifically. At a previous meeting, we heard testimony from Mrs. Diab, who said that her husband had been extradited and that the children were in Canada. The family spent years apart.

Do you have any other examples of similar effects you could tell us about?

[*English*]

Mr. Anand Doobay: In the United Kingdom, a Supreme Court case has established that the court, in extradition cases, must take into account the impacts of extradition on children. Obviously, there's always an impact, but it can't simply be that the child is deprived of the care of their parents. It has to rise to a more severe level before the court will say it's sufficient to bar extradition. For example, it might be there are no care arrangements in place for the children, because both parents are being extradited. That would leave them with no one to care for them. Even then, the Crown will look at whether there are alternative care arrangements that could be made, through foster parents or other types of things.

The other types of issues related to children that can lead courts to find it's not proportionate to extradite are medical conditions and mental health issues—something that rises above the ordinary. I'm using that advisedly, because, obviously, it's terrible for children to be separated from their parents. However, the court has to be satisfied there is something more than what would normally be the case, were a child to be separated from their parent because they've been extradited.

● (1645)

[*Translation*]

Mrs. Élisabeth Brière: I have 30 seconds left.

You were talking about torture earlier, saying it's necessary to assess whether there's a real risk of torture. It's not easy to assess that risk, is it?

[*English*]

Mr. Anand Doobay: I'm sorry. I didn't hear the question.

[*Translation*]

Mrs. Élisabeth Brière: You said earlier that it's necessary to assess whether there's a real risk of torture.

What's the process for assessing whether there's a real risk?

[*English*]

Mr. Anand Doobay: Ordinarily, the court will look at NGO reports, country reports and U.S. State Department reports to see whether there's a prevalence of torture that has been independently verified. You would have to establish a general pattern, then you would normally have to identify how that could apply to your particular client. You would have to share how they fall into a category of people who [*Technical difficulty—Editor*] subject to torture.

It's firstly a question of establishing general objective evidence, then applying it [*Technical difficulty—Editor*] your client, in terms of showing why they are also going to fall into one of those at-risk categories.

The Chair: Thank you, Ms. Brière.

We'll now go to our last rounds of two and a half minutes each, beginning with Monsieur Fortin.

[*Translation*]

Mr. Rhéal Fortin: Thank you, Mr. Chair.

Mr. Doobay, you just explained the steps in the process to Mrs. Brière. Does the process work? Do you think it is in fact possible to accurately assess the risk of torture in a foreign country?

[*English*]

Mr. Anand Doobay: It is difficult, but I think it should be difficult to prove there is a risk of torture.

The other thing we often use, in the U.K., is an expert witness. Once you have the objective material showing torture can be prevalent in particular countries, in particular situations [*Technical difficulty—Editor*] show it may apply to an individual. Ordinarily, the court is assisted by somebody who is an expert in that country, one who can say, "Look, I'm applying the generalities to this specific individual and, in my opinion, this individual is at risk of torture."

It's difficult to do, but I think the greater problem is the one I highlighted earlier: that this is now routinely met with a diplomatic assurance. Even if the risk exists, there's no need to be concerned about it, because they give you an assurance it won't happen in this particular case.

[*Translation*]

Mr. Rhéal Fortin: Thank you. I don't have much time left, so this will probably be my last question.

I wonder if you could explain to me the distinction that's made in the United Kingdom between extraditing a U.K. citizen and extraditing a foreign national.

[*English*]

Mr. Anand Doobay: There are two ways this can make a difference.

The first is in relation to foreign [*Technical difficulty—Editor*], because, if you can pass through the gateway of a substantial measure of conduct happening in the U.K, one of the criteria the court has to take into account is the person's connection to the United Kingdom. Obviously, a U.K. national or resident is going to have stronger connections than somebody who is not.

The second way this can be relevant is through article 8: the rights of private and family life. That is part of a balancing exercise. As I said, ordinarily, the court is going to find that the rights of private and family life are outweighed by the need to have effective extradition arrangements. However, in a rare situation, the court might find that the person's nationality, residence and rights of private and family life outweigh the—

● (1650)

[*Translation*]

Mr. Rhéal Fortin: I'm sorry to interrupt, but my time is almost up.

Do you think a resident of the U.K. and a foreigner should be treated differently, or should the same rules apply to both?

[*English*]

Mr. Anand Doobay: In my view, I think that there should be some factors where nationality and residence do have more weight. Private and family life [*Technical difficulty—Editor*]. The right to be prosecuted in a particular country is another, so I do think there are some instances where it should be a factor to be taken into account.

The Chair: Thank you.

Lastly, we go to Mr. Garrison for two and a half minutes.

Mr. Randall Garrison: Thank you very much, Mr. Chair.

I'm going to stay with Mr. Doobay.

In your opening presentation, you made reference to an obligation to disclose possibly exculpatory evidence. I'm not sure how that actually operates since you've also told us that in the U.K. generally no evidence is required for extradition requests.

Could you simply come back to that point and explain the intersection there?

Mr. Anand Doobay: Of course.

The obligation only exists if the prosecutor in the U.K. is aware of that information. As you rightly say, in many cases they won't be because the requesting state has to provide [*Technical difficulty—Editor*] evidence or a very limited amount of evidence. The obligation can only arise if they are [*Technical difficulty—Editor*] something in the course of acting for the requesting state that does undermine the evidence that they've already been given and have put forward to the court.

Mr. Randall Garrison: With regard to your last point in answer to my question, I think you were onto something very important for this committee to be considering, and that's the balance between the role of judges and the role of minister.

If I understood you correctly, really the role of minister has been reduced in the U.K. to dealing with three things that are judged to be more political, and most of the other legal decisions then moved back to the judge and the extradition proceedings. Is that correct?

Mr. Anand Doobay: That's entirely correct. They're political in the sense that specialty relations are countries [*Technical difficulty—Editor*], so it's one country saying to the other, “We will only prosecute for these things.” The death penalty requires an assurance, a diplomatic assurance, if there's a risk of one country saying to the U.K., “We won't impose a death penalty.” If there's been an earlier extradition request from another country, then it's the [*Technical difficulty—Editor*] competing international obligations.

If that's right, everything else has now been moved to the courts. That's happened probably over a period of time, but it's now completely clear that all of the rest of it is held by the court to deal with.

Mr. Randall Garrison: Is there any recourse to the courts after a decision of the minister on those cases?

Mr. Anand Doobay: Yes, in fact, [*Technical difficulty—Editor*] where any appeal is heard after the minister has made a decision. You have to wait for any appeal until the court has decided and the minister has decided. Once the minister has decided, then you can appeal again either or both of those decisions, but the appeal happens at the same time.

Mr. Randall Garrison: Thanks, Mr. Chair.

The Chair: Thank you, Mr. Garrison.

That concludes our first hour of this meeting. I want to thank both witnesses for their very important testimonies.

We will now suspend for a minute or two while we go in camera for committee business.

[*Proceedings continue in camera*]