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Meeting: 1377th meeting (June 2020) (DH)

Communication from an NGO (21/02/2020) in the cases of AL NASHIRI and HUSAYN (ABU ZUBAYDAH) v. Poland (Applications No. 28761/11, 7511/13) and reply from the authorities (06/03/2020)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1377^e réunion (juin 2020) (DH)

Communication d'une ONG (21/02/2020) relative aux affaires AL NASHIRI et HUSAYN (ABU ZUBAYDAH) c. Pologne (requêtes n° 28761/11, 7511/13) et réponse des autorités (06/03/2020) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Warsaw, 10 February 2020

302/2020/PSP/KW/JG

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SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

To:
The Secretary of the Committee of Ministers
Council of Europe
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**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN
RIGHTS**

CONCERNING

**THE EXECUTION OF THE ECtHR JUDGMENT IN THE CASES *HUSAYN (ABU
ZUBAYDAH) V. POLAND* (APPLICATION NO. 7511/13) AND *AL NASHIRI V.
POLAND* (APPLICATION NO. 28761/11)**

To the attention of:

1. Mr Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and proceedings before the
European Court of Human Rights
Agent of the Polish Government

2. Mr Adam Bodnar

Polish Ombudsman

I. Introduction

The Helsinki Foundation for Human Rights (“HFHR”, “the Foundation”) respectfully submits another set of observations on the execution of the judgment made by the European Court of Human Rights (“ECtHR”, “the Court”) on 24 July 2014 in the cases of *Husayn (Abu Zubaydah) v. Poland* (application no. 7511/13) and *Al Nashiri v. Poland* (application no. 28761/11).

The HFHR is a non-governmental organisation set up to protect human rights, also by reviewing the observance of human rights by public authorities in Poland. The Foundation carries out its statutory responsibilities by representing clients in proceedings before national courts and international human rights bodies, submitting amicus curiae briefs in judicial proceedings, issuing opinions on legislative proposals and submitting position statements to state bodies. The Foundation also monitors the execution of ECtHR judgments entered in cases brought against Poland. In this respect, we have already presented the Committee of Ministers with our assessments of the execution of a number of ECtHR judgments, including *P. and S. v. Poland* (judgment of 30 October 2012, application no. 57375/08), *Kędzior v. Poland* (16 October 2012, no. 45026/07), *Beller v. Poland* (1 February 2005, no. 51837/99), *Rutkowski and others v. Poland* (7 July 2015, no. 72287/10), *Burza v. Poland* (18 October 2018, no. 15333/16), *Adamkowski v. Poland* (28 March 2019, no. 57814/12), *Parol v. Poland* (11 October 2018, no. 65379/13).

The prohibition of torture or inhuman and degrading treatment or punishment set out in Article 3 of the European Convention on Human Rights (“ECHR”) is a focal area of the Foundation’s work. Over the years, the HFHR has been acting to protect individuals against the behaviour of public authorities that may violate Article 3 ECHR. The Foundation’s activities taken to advance that goal focus on, among other things, cases involving certain controversial operations of the US Central Intelligence Agency (CIA).

Observatory of CIA Activities in Poland, a programme launched by the HFHR in 2007, has obtained access to the Polish Border Guard’s records according to which in the period between December 2002 and September 2003, 20 unnamed individuals were brought to the Szymany airport on-board seven Gulfstream planes arriving from Afghanistan, Dubai and Marocco. One of the key measures taken by the HFHR in this respect was the amicus curiae briefs submitted in the *Abu Zubaydah* and *Al Nashiri* cases. Later on, the HFHR legal team monitored the domestic criminal investigation into the operations of CIA secret prisons in Poland, as well as the execution of *Abu Zubaydah* and *Al Nashiri* judgments by the Polish authorities¹.

In January 2020, the HFHR organized the debate entitled *Secret prisons, secret proceedings, apparent (un)responsibility – what do we still don’t know about CIA prisons in Poland*², whose participants, including experts, discussed the international policy impact of the disclosure of information about secret CIA prisons in Europe and analysed the international community’s response to the findings made so far. The debate participants also attempted to answer the question whether the disclosure of this information has led to a change of the attitude of the authorities and public in Poland towards torture and measures taken in connection with

¹ *Secret prisons, secret proceedings, apparent (un)responsibility – what do we still don’t know about CIA prisons in Poland* (a brochure), <http://www.hfhr.pl/wp-content/uploads/2020/01/CIA-FIN-web.pdf> [accessed on: 13.02.2020].

² The Helsinki Debate *Secret prisons, secret proceedings, apparent (un)responsibility – what do we still don’t know about CIA prisons in Poland*, <http://www.hfhr.pl/debata-helsinki-tajne-wiezienia-tajne-postepowanie-jawna-nieodpowiedzialnosc-czego-nadal-nie-wiemy-o-wiezieniach-cia-w-polsce/>, <https://www.rpo.gov.pl/pl/content/debata-hfpc-o-tajnych-wiezieniach-cia-z-udzialem-rpo> [accessed on: 13.02.2020].

contemporary international conflicts. Last but not least, the debaters talked about whether or not such a situation could be avoided in the future.

II. The judgment of the European Court of Human Rights

In *Al Nashiri*, the ECtHR found that Poland had violated the following Convention provisions:

- Articles 2 and 3 ECHR taken together with Article 1 of ECHR Protocol No. 6, on account of the applicant's transfer from Poland, which exposed him to a real risk of the death penalty;
- The procedural limb of Article 3 ECHR, on account of Poland's failure to carry out an effective investigation into the applicant's allegations of serious violations of the Convention, including torture, ill-treatment and undisclosed detention;
- The substantive limb of Article 3 ECHR, on account of Poland's complicity in the CIA High-Value Detainees Program, which consisted of enabling the US authorities to subject the applicant to torture and ill-treatment on Poland's territory and transferring the applicant from Poland despite the existence of a real risk that he would be subjected to treatment contrary to Article 3 ECHR;
- Article 5 ECHR, on account of the applicant's undisclosed detention on Poland's territory and the fact that Poland enabled the US authorities to transfer the applicant from its territory, despite the existence of a real risk that he would be subjected to further undisclosed detention;
- Article 6 § 1 ECHR, on account of the applicant's transfer from Poland's territory despite the existence of a real risk that he could face a flagrant denial of justice;
- Article 8 ECHR;
- Article 13 ECHR, on account of the lack of effective remedies in respect of the applicant's grievances under Article 3 ECHR.

In *Abu Zubaydah*, the ECtHR found that Poland had violated the following Convention provisions:

- The procedural limb of Article 3 ECHR, on account of Poland's failure to carry out an effective investigation into the applicant's allegations of serious violations of the Convention, including torture, ill-treatment and undisclosed detention;
- The substantive limb of Article 3 ECHR, on account of Poland's complicity in the CIA High-Value Detainees (HVD) Programme, which consisted of enabling the US authorities to subject the applicant to torture and ill-treatment on Poland's territory and transferring the applicant from Poland despite the existence of a real risk that he would be subjected to treatment contrary to Article 3 ECHR;
- Article 5 ECHR, on account of the applicant's undisclosed detention on Poland's territory and the fact that Poland enabled the US authorities to transfer the applicant from its territory, despite the existence of a real risk that he would be subjected to further undisclosed detention;

- Article 6 § 1 ECHR, on account of the applicant's transfer from Poland's territory despite the existence of a real risk that he could face a flagrant denial of justice;
- Article 8 ECHR;
- Article 13 ECHR, on account of the lack of effective remedies in respect of the applicant's grievances under Articles 3, 5 and 8 ECHR.

In both cases, the Court raised a number of important issues. First, the ECtHR established beyond a reasonable doubt that Poland was responsible for undisclosed arbitrary detention and torture or inhuman treatment on its territory. Second, the ECtHR found that the rendition programme would not be possible with the participation of European countries such as Poland. Third, and the most important, the ECtHR held that the Polish authorities had failed to carry out an effective investigation. The latter conclusion is all the more concerning given the fact that the investigation has not yet been finished.

III. Execution of the judgment

Individual measures:

Violation of the procedural limb of Article 3 ECHR

- According to the Action Plan of 22 June 2018³ ("2018 Action Plan") and the Action Plan of 3 February 2020⁴ ("2020 Action Plan"), the criminal investigation is still ongoing. The Polish Prosecution Service has repeatedly extended its duration, most recently until 31 March 2020⁵. Notably, the basic information on the investigation is classified, so only the prosecution and the parties to the proceedings are privy to details of the case which has been opened for 12 years. Information presented in the 2020 Action Plan is the most detailed account of the investigation presented by the Polish authorities in recent years⁶.
- In the 2020 Action Plan, the Polish authorities point out that "(...) *the access of the public to the information on the investigation is realised through the Spokesperson of the Regional Prosecution Office in Kraków who in response to the activity of the representatives of the media provides, to a possible extent, the replies to their questions*"⁷. However, there are hardly any⁸ journalistic pieces or documentaries that would convey specific information on this topic.

³ Action plan (21/06/2018) – Communication from Poland concerning the case of AL NASHIRI v. Poland (Application No. 28761/11), 1324th meeting (September 2018) (DH), p. 24.

⁴ Updated action plan (03/02/2020) - Communication from Poland concerning the AL NASHIRI group of cases v. Poland (Application No. 28761/11), 1369th meeting (March 2020).

⁵ *Ibid.*, p. 7.

⁶ *Ibid.*, pp. 7-10.

⁷ *Ibid.*, p. 10.

⁸ The only exception being the piece *Od 11 lat szukają dowodów tortur w więzieniach CIA w Polsce* [The eleven-year search for the evidence of torture in CIA prisons in Poland], <https://dziennikpolski24.pl/od-11-lat-szukaja-dowodow-tortur-w-wiezieniach-cia-w-polsce/ar/c1-14317219>. The article reads: "The Regional Prosecutor's Office in Kraków requested the National Prosecutor's Office to extend the duration of the investigation into CIA prisons in Poland for another six months. However, six months later, there is nothing that would suggest that the case, which has already been opened for 11 years, is going to be solved anytime soon. 'In a situation where a prosecutor's office cooperates with foreign institutions, in this case the U. S. Department of Justice, all procedures take more time. Unfortunately, our interaction with foreign partners is unreasonably timeconsuming', explains Zbigniew Gabryś a prosecutor with the Regional Prosecution Office."

- Another issue raised in the 2018 Action Plan by the Polish authorities is that “[d]ue to the subject matter of the investigation and its personal scope the access of the media and the public to information on the proceedings is contingent upon strict rigours. However, in cases of questions sent by media or NGOs Polish prosecution authorities give replies on the state of the investigation in a scope determined, on the one hand, by the necessity of ensuring the effectiveness of the proceedings and on the other hand by the need for transparency”⁹. Unfortunately, above statements are inconsistent with what we have been observing for a prolonged period of time. In recent years, the HFHR have filed multiple access to public information requests with the Prosecutor’s Office, asking for such details as the status of the ongoing proceedings, the name of the prosecutor in charge, number of case file, etc. For a certain period, the Prosecutor’s Office answered all our questions in sufficient detail. However, the situation changed last year. On 8 November 2019, we submitted an access to public information request¹⁰ in response to which, by the letter of 19 November 2019, the Regional Prosecutor in Kraków informed us that the criminal investigation had not yet been legally concluded and denied the request, invoking the fifth sentence of Article 156 § 5 of the Code of Criminal Procedure.¹¹ The Foundation submitted another access to public information request on 24 January 2020¹², this time referring to information which was directly related to the content of the case file. On 10 February 2020, the HFHR received a reply identical to the one received in November, which denied the request based on the secrecy of the pre-trial proceedings¹³. Accordingly, the Foundation was unable to obtain any information on the recent developments of the investigation.

General measure:

Violation of Articles 2 and 3 ECHR taken together with Article 1 of Protocol No. 6 (*Al Nashiri*) and the violation of Article 6 § 1 ECHR (both cases).

- In the 2018 Action Plan, the Polish authorities further point out that “[d]emocratic control over Poland’s special services is exercised by the Committee for Special Services of the Sejm, i.e. lower chamber of Polish Parliament, as well as by domestic courts and prosecutor’s offices”¹⁴. Polish special services are clearly under some kind of legal control. However, as indicated in a thematic expert report¹⁵, “Poland has never followed the example of other democratic countries and actually completed the development of

⁹ Action plan (21/06/2018)..., p. 31.

¹⁰ Helsinki Foundation for Human Rights, Access to public information request of 8 November 2019, ref. 1681/2019/PSP/JG/KJ.

¹¹ Regional Prosecutor in Kraków, Response to the HFHR’s Access to public information request of 8 November 2019, ref. RP III Ip 41.2019.

¹² Helsinki Foundation for Human Rights, Access to public information request of 24 January 2020, ref. 152/2020/PSP/JG/KJ.

¹³ Regional Prosecutor in Kraków, Response to the HFHR’s Access to public information request of 24 January 2020, ref. RP III Ip 6.2020.

¹⁴ Action plan (21/06/2018)..., p. 33.

¹⁵ A. Bodnar, T. Borkowski, J. Cichoński, W. Klicki, P. Kładocznny, A. Rapacki, Z. Rudzińska-Bluszcz, *Osiadłać Pęgasza. Przestrzeganie praw obywatelskich w działaniach służb specjalnych – założenia reformy* [Taming the Pegasus. Respect for human rights in the activities of secret services – the tenets of a reform], Warszawa 2019, https://panoptikon.org/sites/default/files/osiodlac_pegaza_-_jak_powinien_wygladac_nadzor_nad_sluzbami_raport_ekspertow.pdf [accessed on: 13.02.2020].

*modern special services. The missing element is an independent body that would supervise all secret service agencies. Currently, this supervision is fragmented and does not allow for an effective, impartial and unpolitical review of the activities of special services”*¹⁶. Concerns about the apoliticality and effectiveness of control over special services in Poland are also corroborated by the fact that this control is currently performed by a person who is an active politician of the ruling party and who was pardoned by the President, before court gave a sentence which could be legally binding, in case concerning abuse of power.

- Another important issue raised in the 2018 Action Plan is the ongoing legislative works. As the Polish authorities mentioned, “[t]he intensive works are still being conducted on drafting comprehensive legal acts aimed at introducing changes of a systemic nature to the functioning of the special services. The aim of these changes requires also setting up of appropriate mechanisms for prevention of human rights violations, on both substantive and procedural level”¹⁷. It was also pointed in the 2020 Action Plan that “the works on solutions aiming at strengthening the supervision over the special services have not been finished yet”¹⁸. Undoubtedly, the Polish authorities have actively been engaged in legislating an array of laws on special services. However, the new legislation as a whole fails to introduce measures that would protect individuals against human rights violations. Moreover, according to an expert, recent amendments pose a considerable threat to the right to privacy¹⁹.

IV. Conclusions and recommendations

According to the Helsinki Foundation for Human Rights, the *Abu Zubaydah* and *Al Nashiri* judgments have yet not been implemented and the Committee of Ministers should continue its supervision over their execution.

With this in mind, the HFHR respectfully presents the following recommendations:

- A. The Committee should request that the Polish Government:
- a. publicly provide regular and up-to-date information on the course of criminal proceeding concerning CIA secret prisons (for example, by way of online news releases);
 - b. conduct an effective and transparent investigation, which will lead to the establishment of key facts related to the existence of the CIA secret prison in Poland and the identification of persons responsible for its existence;
 - c. obtain effective diplomatic guarantees for the applicants, in particular, that no death penalty will be imposed;
 - d. maintain effective control over the activities of special services in Poland

¹⁶ *Ibid.*, p. 7.

¹⁷ Action plan (21/06/2018)..., p. 36.

¹⁸ Updated action plan (03/02/2020)..., p. 12.

¹⁹ A. Bodnar, T. Borkowski, J. Cichocki, W. Klicki, P. Kładoczny, A. Rapacki, Z. Rudzińska-Bluszcz, *Osiadłać Pegaza...*, pp. 8-9.

- e. take necessary measures to prevent similar violations of human rights in the future.

In the present case, the recommendations of the Committee against Torture (“CAT”, “the Committee”) concerning Rendition Program, which were incorporated in the Concluding observations on the seventh periodic report of Poland²⁰, should also be mentioned. CAT stressed that it is important to “complete the investigation into allegations of its involvement in the Central Intelligence Agency High Value Detainees Programme of rendition and secret detention between 2001 and 2008 and to ensure that persons involved in the alleged crimes of torture and ill-treatment are held accountable”²¹. The Committee also urged Poland “to expedite, to the extent possible, the investigation by the Regional Prosecutor’s Office in Kraków of case ref. no. PR II Ds. 16.2016”²².

The Helsinki Foundation for Human Rights wishes to express its willingness to further assist the Committee of Ministers of the Council of Europe in the monitoring of the proper execution of the judgment of the European Court of Human Rights entered in the cases *Abu Zubaydah v. Poland* and *Al Nashiri v. Poland*.

This communication was prepared by Julia Gerlich, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights.

On behalf of Helsinki Foundation for Human Rights,

Piotr Kłodoczny

Secretary of the Board

Helsinki Foundation for Human Rights

Danuta Przywara

President of the Board

Helsinki Foundation for Human Rights



²⁰ Committee against Torture, *Concluding observations on the seventh periodic report of Poland*, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf [accessed on: 14.02.2020].

²¹ *Ibid.*, p. 7.

²² *Ibid.*, p. 7.



Warsaw, 6 March 2020

Republic of Poland
Ministry
of Foreign Affairs

Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPT.432.120.2019/106

DGI

06 MARS 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Mr Fredrik Sundberg
Head of the Department for the Execution
of Judgments of the European Court
of Human Rights
Council of Europe
Strasbourg

Dear Sir,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 21 February 2020 by the Helsinki Foundation for Human Rights, concerning the execution of the judgments of the European Court of Human Rights in the cases *Al Nashiri v. Poland* (28761/11) and *Abu Zubaydah v. Poland* (7511/13), I should like to submit the following comments.

Yours sincerely,

Jan Sobczak

Government Agent

Encl.

DGI

06 MARS 2020

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Enclosure

In reply to the communication of 21 February 2020 of the Helsinki Foundation for Human Rights (hereinafter: the HFHR) concerning execution of the judgments of the European Court of Human Rights in the cases of *Al Nashiri v. Poland* and *Abu Zubaydah v. Poland*, the Government of Poland should like to submit the following comments with regard to the recommendations to the State Party presented therein.

First and foremost, with regard to the issue of the domestic investigation and the implementation of the general measures (effective control over special services and necessary measures to prevent similar violations of human rights in future) the Government wish to point to the information presented in its latest Action Plan of 3 February 2020 (document DH-DD(2020)100) and will not repeat it here.

As regards the HFHR's comment concerning the Kraków Regional Prosecutor's refusal to disclose information concerning the investigation, requested by the HFHR on the basis of the provisions regulating the access to public information, the Government should like to clarify that the HFHR was informed by the Kraków Regional Prosecutor's Office that due to the stage of the investigation (preparatory proceedings) the provisions of the Act on access to public information did not apply to the disclosure of information on the findings of the investigation. At the same time the HFHR was informed about another legal possibility of obtaining the requested information, *i.e.* on the ground of a motion based on Article 156 § 5 of the Code of Criminal Procedure. It should be noted that in accordance with the unified case law of domestic administrative courts in cases concerning information or documents of pending preparatory proceedings, Article 156 § 5 or § 5a of the Code of Criminal Procedure constitutes a *lex specialis* to the Act on access to public information and, at the same time, it excludes the application of this Act (see, for example, the resolution of the Supreme Administrative Court of 9 December 2013, case no. I OPS 7/13 and the judgement of the Supreme Administrative Court of 19 December 2019, case no. I OSK 357/19). No request based on the said provision was submitted by the HFHR to the Kraków Regional Prosecutor's Office.

As regards the HFHR's recommendation concerning the public access to up-to-date information on the course of criminal proceedings concerning CIA secret prisons, the Government should like to underline that as it was indicated above, there are other legal ways of obtaining the information about the investigation than publishing them in an online bulletin.

Furthermore, with respect to the HFHR's recommendation on obtaining effective diplomatic guarantees for the applicants from the United States, the Government should like to underline that since the delivery of the judgments in the *Al Nashiri v. Poland* and *Abu Zubaydah v. Poland* cases, the Polish authorities undertook numerous actions aimed at obtaining diplomatic assurances that Mr. Al Nashiri will not be subjected to the death

penalty and that both applicants will not continue to be subjected to a flagrant denial of justice. In particular, the Ministry of Foreign Affairs submitted three diplomatic notes to the Embassy of the United States in Warsaw (on 6 March 2015, 13 May 2015 and 24 February 2020), the Polish authorities of high political level send three letters to their American counterparts and four meetings were held with the U.S. authorities, both in Warsaw and Washington. The most recent attempt to obtain the above-specified assurances, *i.e.* a request submitted *via* diplomatic note of 24 February 2020, was undertaken in reply to the Committee of Ministers' decision of 6 June 2019, which called on the Polish authorities to renew their request to the U.S. authorities for the diplomatic guarantees to the applicants.