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Meeting: 1514th meeting (December 2024) (DH)

Item reference: Action Plan (14/10/2024)

Communication from Lithuania concerning the case of al-Hawsawi v. Lithuania (Application No. 6383/17)
(Group Abu Zubaydah)

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Réunion : 1514^e réunion (décembre 2024) (DH)

Référence du point : Plan d'action (14/10/2024)

Communication de la Lituanie concernant l'affaire al-Hawsawi c. Lituanie (requête n° 6383/17) (Groupe Abu Zubaydah) **(anglais uniquement)**



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Department for the Execution of Judgments of the ECHR
DGI Directorate General of Human Rights and Rule of Law
Council of Europe

14 October 2024

Cc:

Permanent Representation of Lithuania to the Council of Europe

ACTION PLAN REGARDING THE EXECUTION OF THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN CASE AL-HAWSAWI V. LITHUANIA (NO. 6383/17)

The Agent of the Republic of Lithuania before the European Court of Human Rights submits information concerning the execution of the judgment of the European Court of Human Rights (hereafter – also the Court) of 16 January 2024 in case *Al-Hawsawi v. Lithuania* (application no. 6383/17). In accordance with Article 44 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention) the judgment became final on 16 April 2024.

Description of case

The case concerns violations of a number of Convention rights arising from the fact that the applicant was the victim of an “extraordinary rendition” operation. The Court has established Lithuania’s responsibility under the Convention for the applicant’s undisclosed detention and inhuman treatment in Lithuania, on account of its involvement in the execution of the United States Central Intelligence Agency (CIA) High-Value Detainee Programme, as well as for the applicant’s subsequent transfer from its territory, which exposed him to a serious risk of continued secret and arbitrary detention, further inhuman treatment and flagrant denial of justice in capital punishment proceedings.

The Court found the following violations of the Convention:

- violation of Article 3 (procedural) on account of the Lithuanian authorities’ failure to carry out an effective investigation into the applicant’s allegations of violations of the Convention;
- violation of Article 3 (substantive) on account of Lithuania’s complicity in the CIA’s High-Value Detainee Programme;



- violation of Article 5 on account of the applicant's secret detention on Lithuanian territory and the fact that the Lithuanian authorities had enabled the U.S. authorities to transfer him to another secret CIA detention site;
- violation of Article 8 because the interference with the applicants' private and family life was not in accordance with the law and lacking justification under paragraph 2 of Article 8;
- violation of Article 6 § 1 because of the applicant's transfer from Lithuanian territory, despite a real and foreseeable risk that could face a flagrant denial of justice;
- violation of Article 13 on account of the lack of effective remedies in respect of the applicant's complaints under Articles 3, 5 and 8;
- violation of Articles 2 and 3 of the Convention in conjunction with Article 1 of Protocol No. 6 on account of the transfer of the applicant from the respondent State's territory in spite of a substantial and foreseeable risk that he would be subjected to the death penalty.

Regarding individual measures

Payment of just satisfaction

The applicant was awarded EUR 100,000 for compensation of sustained non-pecuniary damage. The non-governmental organisation REDRESS, which represented the applicant before the European Court of Human Rights, was awarded EUR 30,000 for litigation costs.

Payment of EUR 30,000 for litigation costs was made on 30 April 2024 to the indicated account of REDRESS.

On 2 July 2024 the payment of EUR 100,000 was made to the account of the beneficiary authorized by the applicant to receive awards on his behalf.

Diplomatic assurances

Continuing the bilateral consultations with the U.S. authorities¹ in April 2024 the Lithuanian authorities addressed the Department of State presenting the Court's judgment in *Al-Hawsawi* case drawing particular attention to the Court's adjudication on Article 46 of the Convention and indicated concrete implementation measures in this regard requesting to provide information about the legal grounds and justifiability of the continuous deprivation of liberty of Al-Hawsawi, also to provide information about any *habeas corpus* proceedings; taking into account the particular concern raised by the representatives of Al-Hawsawi concerning his state of health the information on the accessible medical treatment in Guantanamo facility and in particular updated information on the state of health of Al-Hawsawi was requested; also the information about the status of the relevant proceedings before the Military Commission where Al-Hawsawi is facing capital charges was requested, at the same time requesting specification whether alternative to death penalty could be imposed by the Military Commission or this is the only possible sanction in case of Al-Hawsawi.

In June 2024 in their reply, the U.S. authorities at the outset reiterated their views already presented within the course of the execution of the Court's judgment in *Abu Zubaydah v. Lithuania* case, namely that both military commissions and federal courts are appropriate for

¹ The consultations with the U.S. Department of State at the expert level began back in December 2022 within the context of the execution of the judgment in case *Abu Zubaydah v. Lithuania*.

addressing the cases of Guantanamo Bay detainees in a manner that comports with all applicable international and domestic law.

It was specified that the United States has legal authority under the law of war to detain individuals who are part of or substantially supported al-Qaeda or associated forces until the end of hostilities with those groups, consistent with U.S. law and applicable international law. Detainees have the right to challenge the legality of their detention in U.S. court through a petition for the writ of *habeas corpus*.

Further it was submitted that the military commission proceedings at Guantanamo Bay are undertaken pursuant to the Military Commissions Act (MCA), 10 United States Code §§ 948-949. They incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 of the Geneva Conventions, Article 15 of the Convention Against Torture, and other applicable laws, and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions (to which the United States is not a party). The MCA provides for a number of safeguards, including the presumption of innocence, the beyond-a-reasonable-doubt burden of proof standard, the right to counsel at government expense, the right to counsel "learned" in death penalty law and practice when the military commission is one empowered to adjudge the death penalty, and the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commissions Review (USCMCR). A defendant also has a right to appeal a USCMCR decision to the U.S. Court of Appeals for the District of Columbia Circuit and may ultimately seek review from the United States Supreme Court. The MCA prohibits the use of statements obtained by either torture or cruel, inhumane, or degrading treatment (10 U.S.C. § 948r(a)). Moreover, the United States has many additional procedural protections for individuals facing capital punishment. Also, it was noted that the United States remains committed to ensuring the transparency of commission proceedings. To that end, proceedings are transmitted via live video feed to locations at Guantanamo Bay and in the United States, so that the press and the public can view them with a 40-second delay to protect against the disclosure of classified information. Court transcripts, filings, and other materials are also available to the public online via the website of the Office of Military Commissions <www.mc.mil>.

The U.S. authorities assured that they take very seriously the responsibility to provide for the safe and humane treatment of detainees at Guantanamo Bay, including providing appropriate medical care and attention as required by any conditions of the detainees. Detainees at Guantanamo Bay receive a quality of medical care comparable to that which U.S. military personnel receive at Guantanamo. The Joint Medical Group (JMG), Joint Task Force Guantanamo Bay (JTF-GTMO), consists of licensed, board-certified physicians of different specialties. The U.S. Naval Hospital, Guantanamo Bay, provides additional consultative services from numerous medical professionals, and the JMG routinely brings in subspecialists as needed.

With regard to the individual situation of the applicant Al-Hawsawi, the following information was provided:

- Al-Hawsawi has been charged before a Military Commission convened in accordance with the MCA for his alleged role in planning the 9/11 attacks. He is charged with conspiracy, attacking civilians, intentionally causing serious bodily injury, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property, hijacking or hazarding a vessel or aircraft, and terrorism. The case is currently

in the pre-trial litigation phase, which has involved extensive briefings on pre-trial motions and the collection of discovery;

- Al-Hawsawi has previously brought three habeas cases in the U.S. Federal courts, but they have all been closed. His most recent case, 21-cv-02907, was brought in the U.S. District Court for the District of Columbia asserting three claims under the Eighth Amendment to the U.S. Constitution and one claim for medical repatriation by a mixed medical commission pursuant to Army Regulation 190-8. The court dismissed the case on March 12, 2024. On April 10, 2024, Al-Hawsawi filed a motion for reconsideration of one of his Eighth Amendment claims;
- As a matter of policy, for privacy and other reasons, the U.S. could not provide the details or results of any medical examinations or other health-related information concerning the applicant Al-Hawsawi.

Lithuanian authorities were following the developments within so called “September 11” case, in particular with regard to a plea agreement between the Guantánamo Military Commission prosecutors and Al-Hawsawi, on the basis that any possibility of the imposition of the death penalty would be withdrawn in exchange for a guilty plea. As this deal was revoked by the U.S. Secretary of Defence, the Lithuanian authorities addressed the U.S. Department of State requesting for clarification whether the possibility of a deal whereby the accused plead guilty in exchange for a life sentence rather than a death penalty is no longer an option, or this is still under consideration and subject to further certain procedures. The Ministry of Foreign Affairs is carefully analysing the Court’s judgment in Al-Hawsawi case and depending on the information received on the possibilities of further development concerning the mentioned plea deal, options shall be discussed and a decision shall be made on how best to proceed with the request for diplomatic assurances, including the precise contents of such a request.

Criminal investigation

Turning to the execution measures related to the obligation to conduct effective investigation into the circumstances and conditions under which the applicant Al-Hawsawi was brought into Lithuania, treated in Lithuania and thereafter removed from Lithuania, at the outset it must be noted that since November 2018 the legal qualification was modified and the relevant domestic criminal investigation was continued under Article 100 of the Criminal Code which provides for the liability for treatment of persons which is prohibited under international law, i.e. the crime which is not subject to the statute of limitations.

The Government would like to stress that the complexity of the domestic criminal investigation is predetermined by the fact that the main evidentiary material is in the possession of foreign jurisdictions, whereas possibilities to collect any of the relevant evidence are limited to the international co-operation instruments in criminal matters, however international cooperation in this case to a large extent is aggravated by the fact that data relevant to the investigation relate to the issues of national security and intelligence and may constitute a state secret.

The Lithuanian investigative authorities continue their efforts with a view to advance the pre-trial investigation and overcome the challenges where the main evidence is in the possession of foreign jurisdictions, and the possibilities to collect any of the relevant evidentiary material are

very limited. With the assistance of EUROJUST in March 2024 there was a coordination meeting in Hague held between the Lithuanian and Polish prosecuting authorities in charge of the domestic investigations concerning the CIA's Detention and Interrogation Program with a view to share the experience in investigating similar cases, including on the best practices collecting the relevant data. It was agreed to meet once again to discuss in more detail some questions raised during the meeting.

Taking into account the applicable standard of proof (admissibility of evidence presupposes that evidence in criminal proceedings is lawfully obtained data which can be verified by the procedural actions prescribed by the Code of Criminal Procedure) the applicant has not been granted victim status yet. Recent decision of 6 September 2024 of the prosecutor to reject the respective request of the legal representative of Al-Hawsawi confirmed that the position of the prosecuting authorities concerning the possibility to grant victim status to the applicant Al-Hawsawi remains unchanged due to lack of corroborating evidence that the damage has been inflicted on the applicant. In this context it should be explained that for the institution of a pre-trial investigation the evidentiary standard is lower and pre-trial investigation could be lounged on the reasonable justification that a criminal offence has been committed, whereas for the granting of victim status the evidentiary standard is stricter, all the more for charging someone with committing a crime there has to be convincing and consistent evidence being corroborated and being subject to verification by other admissible evidence.

Regarding general measures

The present case has been classified as a repetitive case of the leading case *Abu Zubaydah v. Lithuania*, wherein by the decision of 3 December 2020 adopted in the 1390th DH meeting the Committee of Ministers decided to close the supervision of the execution of general measures².

Dissemination

It should be observed that under the Constitution of the Republic of Lithuania the Convention upon its ratification became a constituent part of the Lithuanian legal system and pursuant to the well-established case-law of the Constitutional Court, the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania, the Convention and the Court's case-law have a direct effect in Lithuania. Thus, the dissemination of the judgment is to be considered as a general measure.

Explanatory note regarding the Court's judgment in the case at issue was placed on the official website of the Ministry of Justice, the judgment was translated and following finalisation of its authentication also will be made public. The domestic courts and prosecutor's offices as usually will be separately informed about the judgment by sending explanatory note together with the translation of the Court's judgment.

The Ministry of Foreign Affairs was in detail informed by the Government Agent about the required implementation measures in the present case, also there is a constant dialogue maintained with the Prosecutor General's Office concerning the ongoing investigation into the relevant circumstances of the CIA's High-Value Detainee Programme.

² [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1390/H46-15E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1390/H46-15E)

The Committee of Ministers will be informed on further developments in the execution of the Court's judgments in the present case.

Respectfully,

A handwritten signature in black ink, consisting of a stylized capital 'R' followed by a horizontal line extending to the right.

Ričard Dzikovič

Agent of the Government of the Republic of Lithuania

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