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Meeting: 1514<sup>th</sup> meeting (December 2024) (DH)

Communication from the authorities (17/10/2024) concerning AL NASHIRI Group v. Poland (Application No. 28761/11)

Information made available under Rule 8.2a 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 : 1514<sup>e</sup> réunion (décembre 2024) (DH)

Communication des autorités (17/10/2024) relative au Groupe AL NASHIRI c. Pologne (requête n° 28761/11) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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## Ministry of Foreign Affairs Republic of Poland

Plenipotentiary of the Minister of Foreign Affairs  
for cases and procedures before  
the European Court of Human Rights  
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Agnieszka Kozińska-Makowska

DGI

17 OCT. 2024

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

DPT.731.353.2024 / 216  
Warsaw, 16 October 2024

**Mr Frederic Dolt**  
**Head of Department for the Execution of Judgments**  
**of the European Court of Human Rights**  
**Council of Europe**  
**Strasbourg**

*Dear Sir,*

With reference to the process of execution of the judgments of the European Court of Human Rights of 24 July 2014 in the cases of *Al Nashiri v. Poland* (application no. 28761/11) and *Abu Zubaydah v. Poland* (application no. 7511/13), and bearing in mind the inclusion of the above cases in the agenda of the CM DH meeting in December 2024, I would like to present the following information with regard to the implementation of individual and general measures.

### **I. Individual measures**

#### **1. The applicant's situation**

**Al Nashiri** – the applicant has been charged before a military commission with perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel. The proceedings before the military commission are pending at pre-trial stage, with the last hearing (on motion) on 21-23 August 2024 and the next one scheduled for 9-13 December 2024. All the documents related to the proceedings in the applicant's case are available on the Office of Military Commissions' website: <https://www.mc.mil/Cases/MC-Cases>.

Once the trial concludes, if convicted, the applicant would have the right to appeal to the United States Court of Military Commission Review, and then to the Court of Appeals for the D.C. Circuit.

**Abu Zubaydah** – the applicant remains in detention under the U.S. authority; no charges against him have been presented and no court or military commission proceedings have been conducted in his case. The Government of Poland does not have information concerning possible trial or change of status of the applicant.

The applicant is eligible for a periodic review of the necessity of his continued detention by the Periodic Review Board. It is a discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantanamo Bay remains

necessary to protect against a continuing significant threat to the security of the United States. It does not address the legality of any individual's detention. The Periodic Review Board conducts full reviews of each eligible detainee, which include a hearing, every three years, and file reviews to consider any new information every six months in between full reviews. The Periodic Review Board does not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment. As regards the review of the applicant's war detention, the last Periodic Review Board's determination in his case was made in June 2023, and currently the third full review of his detention is pending (a hearing took place in June 2024, however the date of the final determination has not been set yet).

## **2. Diplomatic assurances**

Firstly, it must be reiterated that the Polish authorities have undertaken numerous actions aimed at obtaining diplomatic guarantees for both applicants from the U.S. authorities, with the latest attempt, at the highest political level yet (Minister of Foreign Affairs and U.S. Secretary of State) taking place on 9 December 2022. As a follow up to that meeting, on 15 May 2023 the representatives of the Embassy of the Republic of Poland in Washington met with their counterparts from the U.S. Department of State, who indicated that they were unable to support the Poland's demands.

However, it should be underlined that in a [brief](#) dated 31 January 2022 (issued in the context of Mr. Al Nashiri's proceedings) the U.S. authorities stated that no statements obtained by torture or by cruel, inhuman or degrading treatment are admissible at any phase of the trial or pre-trial proceedings.

Bearing in mind the obligations under Article 46 § 1 of the European Convention of Human Rights stemming from the Court's judgments in the *Al Nashiri* and *Abu Zubaydah* cases, the Government of Poland will continue their efforts in good faith to seek diplomatic assurances that the death penalty will not be ruled or carried out with respect to Mr. Al Nashiri and to the effect that both applicants, who find themselves under the U.S. jurisdiction, will not be deprived of the right to a fair trial.

Simultaneously, the Government believes that the numerous efforts of various Polish authorities aimed at obtaining the diplomatic assurances for the applicants from the American side appropriately prove the determination of Poland for the full implementation of the judgments in question.

At the same time one cannot disregard the firm position of the U.S. authorities not to support in any form Polish requests when assessing how Polish authorities are fulfilling their obligations stemming from the Court's judgments in the cases at hand. In this regard, and in reference to the Committee of Minister's last decision in the present group of cases of 21 September 2023 inviting the Polish authorities to reflect on changing the focus and extending in practice the scope and the basis for its requests for diplomatic guarantees, the Government of Poland believes that the subject matter of the examination by the Committee of Ministers of the implementation by Poland of the Court's judgments in the *Al Nashiri* and *Abu Zubaydah* cases should stay within the findings of the Court.

While the Government of Poland holds great appreciation for the independent mechanisms of the United Nations, supports their mandates and acknowledges their important work, those UN bodies and their recommendations cannot be treated in the same manner as the international tribunal such as the European Court of Human Rights and its judgments. It should be underlined that different UN human rights mandates have different working methods, including as regards the collection of evidence, which may differ to a large extent from those of the European Court. They also do not offer the adversary judicial proceedings. Therefore, while noting the report of the UN Special Rapporteur on the promotion and

protection of human rights and fundamental freedoms while countering terrorism from her technical visit to Guantanamo Bay facility and the two opinions of the UN Working Group on Arbitrary Detention, the Government of Poland is of the opinion that the assessments and recommendations raised by them cannot be treated as creating obligations under international law, which, moreover, fall under the Committee of Ministers of the Council of Europe's review.

It should further be noted that the Government of Poland is engaging with the UN mandates independently from any processes within the Council of Europe and in the proceedings or inquires it is involved in. It also points out that it was not involved in the UN SR on the protection of human rights while countering terrorism visit to the Guantanamo Bay facility. In this respect Poland notes that the U.S. authorities did engage in a dialogue with the Special Rapporteur and addressed some of her concerns in their [response](#) of 22 June 2023. Therefore, aside from the above-stipulated arguments, it would seem redundant to extend the scope of the requests to the U.S. government concerning the diplomatic assurances for the applicants with the findings of the UN bodies with whom the U.S. authorities have already directly engaged.

### **3. Domestic investigation**

The Government wish to recall that a criminal investigation, conducted by the Regional Prosecutor Office in Cracow in the case of exceeding in the period from 2001 to 2005 in different places on the territory of the Republic Poland by the public officials their powers by allowing detention places to function on the territory of the Republic of Poland, in which – with a breach of law – persons suspected after 11 September 2001 of terrorist activities were detained over seven days, i.e. an act under Article 231 § 1 of the Criminal Code (Abuse of power) and Article 189 § 2 of the Criminal Code (Unlawful deprivation of liberty) in connection with Article 11 § 2 of the Criminal Code (Concurrence of provisions) and others, was opened on 11 March 2008.

On 30 November 2020 it was partially discontinued with regard to the alleged participation of the Polish officials in the deprivation of liberty of identified persons suspected of terrorist activities which supposedly took place in the period from 5 December 2002 to 22 September 2003 in Kiejkuty Stare, i.e. an act under Article 124 § 1 of the Criminal Code (Other violations of international law) and Article 123 § 2 of the Criminal Code (Attack on a person) in connection with Article 11 § 2 of the Criminal Code. The investigation in this part was discontinued based on the recognition that the act does not have the features of a prohibited act (Article 17 § 1 point 2 of the Code of Criminal Procedure), and against a person suspected of an act under Article 124 § 1 of the Criminal Code – based on the recognition that the person in question did not commit the alleged act (Article 322 § 1 Code of Criminal Procedure).

The decision of 30 November 2020 has been subjected to judicial review and in consequence upheld by the Warsaw Regional Court on 7 September 2021.

Bearing in mind the assessment of the Department of the Executions of Judgments of the European Court of Human Rights of the Council of Europe concerning the insufficient character of the above-presented information for conducting an in-depth analysis of the domestic investigation vis-à-vis Poland's obligations under Article 46 of the Convention, as well as in reference to the outcome of the consultations with the Department's representatives during their working visit in Poland on 3 October 2024, the Government wish to inform that, with the consent of the lead prosecutor on the domestic case, it is now able to submit, on a confidential basis, a copy of the unclassified part of the decision of 30 November 2020 for the information of the Execution Department, and not to be shared further or made public. At the same time, the Government undertakes to prepare a summary

information about the content of the decision in question – for the information of the Committee of Ministers of the Council of Europe, and not to be shared outside of the Committee or made public.

Further on, with regard to the remaining part of the domestic investigation, it should be noted that after its resumption it remains pending. The subject matter of these proceedings is the imposition of “the enhanced interrogation techniques” on the indicated individuals and deprivation of their liberty on the territory of Poland by the U.S. officials.

Having regard to the subject matter of the case and the type of documents gathered, it is not possible to disclose information about the evidence collected so far and on the procedural activities undertaken in the course of the investigation. It should also be underlined that the prosecution capabilities to conduct evidence in the proceedings in question are very limited due to the fact that the evidentiary material is predominantly with the U.S. authorities, which refused on numerous occasions to provide any international assistance in this case. However, legal representatives of the victims have access to all collected documents, both in the open and classified parts, and have full knowledge of the ongoing proceedings.

With regard to the issue of maintaining public scrutiny over this investigation, the Government reiterates that in their view the current approach towards informing the public about the ongoing investigation seems to be sufficient and matches the public interest expressed in the case. It is also in line with the current scope and form of informing the public about other proceedings conducted by the public prosecutor’s office. The public’s access to information about the present investigation was and is being implemented as a result of the activity of media representatives inquiring about the case and is carried out through the press spokesman of the Regional Prosecutor Office in Cracow, who provides information on the questions received to the extent possible, also in the field of the partly discontinued investigation.

## **II. General measures**

### **1. Democratic oversight of special services and the so-called zero tolerance message**

As concerns the democratic oversight of special services, firstly, the Government should like to reiterate that in their opinion the current system of control and supervision of secret services in Poland is considered as an effective way to control their functioning.

As the Government indicated in their previous submissions to the Committee of Ministers, the oversight of special services in Poland is exercised on three levels of powers: by the Government (the Prime Minister and ministers), Sejm (Lower Chamber of the Parliament), common courts and other bodies. Within the executive branch, one of the most important elements of supervision over secret services is carried out by the Minister-Coordinator of Special Services, who is also a member of the Council of Ministers. Another layer of strengthened democratic supervision over secret services in Poland, supplementing to the entire system of democratic control, is the Committee of the Council of Ministers for National Security and Defence Affairs (*Komitet Rady Ministrów do spraw Bezpieczeństwa Narodowego i Spraw Obronnych*). The Committee meets on a weekly basis, however, due to the nature of the matters under consideration, its meetings are usually held in secret. Therefore, it is not possible to publicly present detailed information on the impact of the Committee’s activities on high-level decision-making regarding the activities of secret services.

The activities of secret services are also subject to effective and continuous control by the legislative and judicial authorities.

The Government therefore maintains its position that the normative solutions of the functioning of the current system of oversight of special services in Poland is complete and effective and that any potential irregularities that might have occurred, including those identified by the European Court of Human Rights, should be considered as a one-off case. Any actions of individuals who once performed public functions divulging such possible irregularities should therefore be subjected to verification by the competent authorities.

Regardless of the above, it should be noted that the legal framework of the broadly understood democratic oversight over secret services are the subject of constant analysis and evaluation as regards meeting the standards of a democratic state of law. The outcome of such continuing assessment includes various initiatives aimed at improving the level of the democratic supervision. The latest example of strengthening oversight of special services - in this case by the judiciary - is the draft proposal for legislative changes which would require more detailed information to be provided to the court about an operational control requested by the special services. It will give the court, who approves the use of operational control, a better knowledge about the means planned to be used by the special service. In addition, the draft provides for the obligation of the court to give reasons for its decision, which will ensure compliance with constitutional and international standards in the procedural aspect.

It should therefore be noted that the system of supervision over special services is constantly being expanded with new elements and is now much more effective than in the time the events covered by the judgments took place.

With regard to the message on the importance of respecting human rights when carrying out tasks by the special services, it should be underlined that such a message is systematically sent by high-level decision-makers within various formats of control and supervision over the activities of these services. A key role in this respect is performed by the Council on Secret Services (*Kolegium ds. Służb Specjalnych*), chaired by the Prime Minister, with members consisting of, among others: Minister-Coordinator of Special Services, the Minister of Foreign Affairs, as well as heads of all secret services. Having regard to the membership of the Council, it should be deemed as an appropriate forum to send a clear signal to the secret services on the fundamental importance of the respect for human rights and lack of tolerance for their violation.

At the same time, acknowledging the value and importance of such high-level declarations being public, both for the civil society, as well as for the secret service officers, the Government of Poland will continue to search for the most appropriate format of the zero tolerance message, which would take into account the existing institutional framework, and at the same time would reach the public opinion at large.

## **2. Ensuring unhindered communication with the European Court**

As it concerns the problem with access to the documents in the *Al Nashiri* and *Abu Zubaydah* cases by the Court, which led to the finding of violation of Article 38 of the European Convention of Human Rights, the Government wish to reiterate its position that the above problem did not result from the deficiencies in the domestic law (given the fact that the relevant prosecutor had issued appropriate decision allowing the Court's judges to consult the case-file of the domestic investigation, in accordance with the domestic law) but rather from the lack of appropriate guarantees on the handling of the classified documents within the Registry of the Court. It is therefore commendable that the Registry of the Court has

recognized the existence of such an issue and undertook to prepare rules on the treatment of the classified information.

The Government of Poland welcomes the conclusion of the Registry's works and adoption of a new Rule 44F on *Treatment of highly sensitive documents*, in September 2023. The Government analyzes the new rule in order to assess whether it could be deemed as sufficient to ensure the compatibility with the domestic procedures on the treatment of classified information. Since making unequivocal declaration *in abstracto* on this issue is difficult, it would also seem useful to learn how the new rules are applied within the framework of the proceedings pending before the Court.

Yours faithfully,



Agnieszka Kozińska-Makowska  
Government Agent