



Secret rendition and detention by the CIA in Poland of two men suspected of terrorist acts

The cases [Al Nashiri v. Poland](#) (application no. 28761/11) and [Husayn \(Abu Zubaydah\) v. Poland](#) (no. 7511/13) concerned allegations of torture, ill-treatment and secret detention of two men suspected of terrorist acts. The applicants allege that they were held at a CIA “black site” in Poland.

In today’s Chamber judgments, which are not final¹, the European Court of Human Rights held, unanimously:

in both cases, that Poland had failed to comply with its obligation under **Article 38** of the European Convention on Human Rights (**obligation to furnish all necessary facilities for the effective conduct of an investigation**);

in both cases, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention, in both its substantive and procedural aspects;

a violation of Article 5 (right to liberty and security);

a violation of Article 8 (right to respect for private and family life);

a violation of Article 13 (right to an effective remedy); and,

a violation of Article 6 § 1 (right to a fair trial).

As regards Mr Al Nashiri, the Court further held that there had been a **violation of Articles 2 (right to life) and 3 of the Convention taken together with Article 1 of Protocol No. 6 (abolition of the death penalty)**.

Having regard to the evidence before it, the Court came to the conclusion that the applicants’ allegations that they had been detained in Poland were sufficiently convincing. The Court found that Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and it ought to have known that by enabling the CIA to detain the applicants on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

Principal facts

The applicants in the two cases are Abd Al Rahim Hussayn Muhammad Al Nashiri, a Saudi Arabian national of Yemeni descent who was born in 1965; and Zayn Al-Abidin Muhammad Husayn, also

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

known as Abu Zubaydah, a stateless Palestinian, who was born in 1971 in Saudi Arabia. Both men are currently detained in the Internment Facility at the United States (US) Guantanamo Bay Naval Base in Cuba.

Mr Al Nashiri has been suspected of the terrorist attack on the US Navy ship USS Cole in the harbour of Aden, Yemen, in October 2000. He has also been suspected of playing a role in the attack on the French oil tanker MV Limburg in the Gulf of Aden in October 2002. At the time of his capture, Mr Husayn was considered by the US authorities to be one of the key members of the terrorist network Al' Qaeda, who allegedly played a role in several terrorist operations, including planning the 11 September 2001 attacks. Since his capture in March 2002, he has not been charged with any criminal offence and remains in "indefinite detention" in Guantanamo. The only review of his detention was carried out by a panel of officials of a US military tribunal in March 2007, which found that he was to remain in detention.

Both applicants allege that they were victims of an "extraordinary rendition" by the US Central Intelligence Agency (CIA), that is, of apprehension and extrajudicial transfer to a secret detention site in Poland with the knowledge of the Polish authorities for the purpose of interrogation, during which they were tortured. Both men state that in December 2002 they were taken to Poland on board the same "rendition plane".

Mr Al Nashiri submits that, having been captured in Dubai, the United Arab Emirates, in October 2002, and subsequently transferred to secret CIA detention facilities in Afghanistan and Thailand, he was brought to Poland on 5 December 2002. He was placed in a CIA secret detention facility and held there until 6 June 2003, when he was secretly transferred on board the rendition plane – with the assistance of the Polish authorities – to Morocco and, in September 2003, to the US Naval Base in Guantanamo Bay. He was subsequently transferred to two other sites before eventually being moved back to Guantanamo Bay.

According to Mr Al Nashiri, he was subjected to torture and ill-treatment while being held in unacknowledged detention in Poland. In particular, so-called "enhanced interrogation techniques" (EITs) were used against him. He was also subjected to "unauthorised" interrogation methods, which included, among other things, two mock executions, prolonged stress positions – kneeling on the floor and leaning back – and he was threatened with his family being brought to the site and abused in front of him if he did not comply and provide information. Mr Al Nashiri maintains that, when he was transferred from Poland, there was no attempt by the Polish Government to seek diplomatic assurances from the United States to avert the risk of his being subjected to further torture, incommunicado detention, an unfair trial and the death penalty when in US custody. The US Government brought charges against Mr Al Nashiri in June 2008 for trial before a military commission, but so far he has not been convicted and he remains in detention in Guantanamo Bay. The date for his trial has been set for 2 September 2014.

Mr Husayn submits that, having been seized in Pakistan in March 2002 and subsequently transferred to a secret CIA detention facility in Thailand, he was brought to Poland on 5 December 2002 where he was held in a secret CIA detention facility until 22 September 2003. He was then taken to Guantanamo Bay and consecutively to several secret detention facilities in a number of countries before eventually being transferred back to Guantanamo Bay.

According to his submission, Mr Husayn was subjected to various forms of abuse and ill-treatment during his detention in Poland. According to Mr Husayn's lawyers, communication with him is extremely restricted, making it impossible to pass on information or evidence directly from him to the European Court of Human Rights. The presentation of his case is principally based on publicly available sources.

Both Mr Al Nashiri and Mr Husayn note, in support of their submissions, that the circumstances surrounding their extraordinary rendition have been the subject of various reports and

investigations, including reports prepared by Swiss Senator Dick Marty, in 2006, 2007 and 2011, as rapporteur for the investigation conducted by the Parliamentary Assembly of the Council of Europe into allegations of secret detention facilities being run by the CIA in several Member States (the “Marty Reports”). The Marty Reports detail an intricate network of CIA detention and transfer in certain Council of Europe States. Among other things, the reports identify the secret detention centre in Poland as being located in the Stare Kiejkuty intelligence training base near the town of Szczytno in Northern Poland.

The submissions by Mr Al Nashiri and Mr Husayn are also based on various CIA documents that were disclosed to the public. In particular, the applicants rely on a report prepared by the CIA Inspector General in 2004 – “Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003”. The report, previously classified as “top secret”, was released by the US authorities in August 2009 with large parts being blackened out. It shows that Mr Al Nashiri and Mr Husayn fell into the category of “High-Value Detainees” (HVD) – terrorist suspects likely to be able to provide information about current terrorist threats against the United States – against whom the “enhanced interrogation techniques” (EITs) were being used, which included the “waterboard technique”, confinement in a box, wall-standing and other stress positions. The applicants’ submissions also refer to a 2007 report by the International Committee for the Red Cross on the treatment of “High-Value Detainees” in CIA custody, based on interviews with 14 such detainees, including Mr Al Nashiri and Mr Husayn, which describes the treatment to which they were subjected in CIA custody.

A criminal investigation in Poland against persons unknown concerning secret CIA prisons on Polish territory was opened in March 2008. It has been extended a number of times and remains pending. The authorities have not disclosed the exact terms of reference or the precise scope of the investigation.

Complaints, procedure and composition of the Court

Mr Al Nashiri’s and Mr Husayn’s complaints before the European Court of Human Rights related to three principal issues: their torture, ill-treatment and incommunicado detention in Poland while in US custody; their transfer from Poland; and Poland’s failure to conduct an effective investigation into those events. They maintained in particular that Poland had knowingly and intentionally enabled the CIA to hold them in secret detention in the Stare Kiejkuty facility, for six and nine months, respectively, without any legal basis or review and without any contact with their families. They complained that Poland had knowingly and intentionally enabled their transfer from Polish territory despite the real risk of further ill-treatment and incommunicado detention, allowing them to be transferred to a jurisdiction where they would be denied a fair trial. Finally, they complained that Poland had failed to conduct an effective investigation into the circumstances surrounding their ill-treatment, detention and transfer from the Polish territory.

They relied in particular on Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights. Mr Al Nashiri also invoked Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), and Article 1 of Protocol No. 6 to the Convention (abolition of the death penalty) as regards his transfer from Poland, alleging that there had been substantial grounds for believing that there was a real and serious risk that he would be subjected to the death penalty.

The applications were lodged with the European Court of Human Rights on 6 May 2011 and on 28 January 2013 respectively. In the case of *Al Nashiri v. Poland*, the Helsinki Foundation for Human Rights was granted leave to submit written comments as a third party (under Article 36 of the Convention); the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also submitted comments as a third party. He was

subsequently invited to take part in the public hearing. In both cases, Amnesty International and the International Commission of Jurists were granted leave to jointly submit written comments as third parties. Prior to the public hearing on 3 December 2013, the Court held a fact-finding hearing on 2 December 2013, during which it heard evidence from three experts, Claudio Fava, former Member of the European Parliament and rapporteur, in 2006 and 2007, of the Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners; Swiss Senator Dick Marty; Mr J.G.S., a lawyer and investigator; and from a witness, Senator Józef Pinior, former Member of the European Parliament and currently a member of the Polish Senate. The fact-finding hearing was followed by a hearing with the parties. The hearing on 2 December 2013 was not open to the public (held *in camera*).

Judgment was given by a Chamber of seven judges, composed as follows:

Ineta Ziemele (Latvia), *President*,
Päivi Hirvelä (Finland),
George Nicolaou (Cyprus),
Ledi Bianku (Albania),
Zdravka Kalaydjieva (Bulgaria),
Vincent A. de Gaetano (Malta),
Krzysztof Wojtyczek (Poland),

and also Françoise Elens-Passos, *Section Registrar*.

Decision of the Court

Preliminary objection

As regards the admissibility of the cases, the Court joined to the merits the Government's preliminary objection of non-exhaustion of domestic remedies – on the grounds that the criminal investigation in Poland was still pending – and dismissed it.

Article 38

The Court held that, in view of the Polish Government's refusals to comply with the Court's requests for the submission of evidence and, in consequence, Poland's failure to discharge its obligations under Article 38 – to furnish all necessary facilities for the effective conduct of an investigation – it was entitled to draw negative inferences from the Government's conduct.

Establishment of the facts and responsibility

Having regard to the evidence before it, including evidence heard from the experts and the witness, and evidence obtained through several international inquiries and various documents, the Court found that the applicants' allegations that they had been detained in Poland were sufficiently convincing.

It also found that Poland had known of the nature and purposes of the CIA's activities on its territory at the material time. Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory in the following manner: by enabling the CIA to use its airspace and the airport; by its complicity in disguising the movements of rendition aircraft; and, by providing logistics and services, including special security arrangements, a special procedure for landings, the transportation of CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention. Having regard to the widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

Article 3

The Court found a violation of **Article 3 in its procedural aspect**. It held that the criminal investigation in Poland had failed to meet the requirements of a “prompt”, “thorough” and “effective” investigation for the purposes of that provision.

The Court also found a violation of **Article 3 in its substantive aspect**. It held that the treatment to which the applicants had been subjected by the CIA during their detention in Poland had amounted to torture. It was true that the interrogations and, therefore, the ill-treatment of the applicants at the Stare Kiejkuty facility had been the exclusive responsibility of the CIA and it was unlikely that the Polish officials had witnessed or known exactly what had happened inside the facility. However, under Article 1 of the Convention, taken together with Article 3, Poland had been required to take measures to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment. For all practical purposes, Poland had facilitated the whole process, had created the conditions for it to happen and had made no attempt to prevent it from occurring. Accordingly, the Polish State, on account of its acquiescence and connivance in the HVD Programme had to be regarded as responsible for the violation of the applicants’ rights committed on its territory. Furthermore, Poland had been aware that the transfer of the applicants to and from its territory was effected by means of “extraordinary rendition”. Consequently, by enabling the CIA to transfer the applicants to its other secret detention facilities, the Polish authorities exposed them to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3.

Article 5

As regards Article 5, the Court found that its conclusions concerning Article 3 applied in the context of the applicants’ complaint about their undisclosed detention and that Poland’s responsibility had been engaged in respect of their detention on its territory and their transfer from Polish territory.

Article 8

As regards Article 8, the Court found that the interference with the applicants’ right to respect for their private and family life had not been in accordance with the law and lacked any justification.

Article 13

As regards Article 13, the Court found that the criminal investigation by Poland had fallen short of the standards of an “effective investigation”. The applicants had thus been denied the right to an “effective remedy”.

Article 6

As regards Article 6 § 1, the Court held that in view of the publicly available information, Poland had known that any terrorist suspect would be tried before a military commission in Guantanamo in a procedure which did not meet the standard of a “fair trial”. Accordingly, Poland’s cooperation and assistance in the transfer of the applicants from its territory, despite a real and foreseeable risk that they could face a flagrant denial of justice, had engaged the Polish State’s responsibility under this provision.

Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6

In the case of Mr Al Nashiri, the Court found that Poland had also violated of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 by having enabled the CIA to transfer him to the jurisdiction of the military commission and thus exposing him to a foreseeable serious risk that he could be subjected to the death penalty following his trial.

Just satisfaction (Article 41)

The Court held that Poland was to pay each applicant 100,000 euros (EUR) in respect of non-pecuniary damage. In the case of *Husayn (Abu Zubaydah)* it also awarded the applicant EUR 30,000 in respect of costs and expenses. No claim for costs and expenses was made in the case of *Al Nashiri*.

Individual measures in *Al Nashiri* (Article 46 – execution of judgments)

The Court decided that Poland, in order to comply with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention, was required to seek to remove, as soon as possible, the risk that Mr Al Nashiri could be subjected to the death penalty by seeking assurances from the US authorities that such penalty would not be imposed on him.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.