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Case Comment

Subject

Human rights

Other related subjects

Extradition

Keywords

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Cases cited

Al-Hawsawi v Lithuania (6383/17) unreported 16 January 2024 (ECHR)

Legislation cited

ECHR

Background

The case concerns the extraordinary rendition, unacknowledged incommunicado detention, and ill-treatment of Mustafa al-Hawsawi in Lithuania, during the operation of the CIA-led rendition, detention and interrogation programme (2002–2008).¹ Between February 2005 and March 2006, the CIA ran a secret detention site ("black site")² in Lithuania, codenamed Detention Site Violet in the US Senate Report on the CIA programme.³ Despite being heavily redacted, the report names the applicant as one of the individuals detained at Detention Site Violet.

Al-Hawsawi, a Saudi citizen born in 1968, is one of the 17 CIA "high-value detainees", deemed such because of the quality of intelligence they were alleged to possess. He was captured in Pakistan alongside Khalid Sheikh Mohammed in March 2003 and was rendered by the CIA to various secret detention sites where he was subjected to prolonged and intense torture.⁴ In September 2006, he was transferred to US military custody at Guantánamo Bay, where he remains detained in complete isolation and suffers from severe medical conditions caused by torture and the lack of adequate medical care. In 2012, al-Hawsawi was charged with four others by a US Military Commission for crimes in connection with the 11 September 2001 attacks. The case has been mired in pre-trial proceedings for more than a decade. *E.H.R.L.R. 256⁵ Al-Hawsawi alleges that he was detained by the CIA in Lithuania in 2005–2006, where he was held in secret incommunicado detention, ill-treated, and rendered to further ill-treatment and unlawful detention, as well as to the risk of an unfair trial and the imposition of the death penalty. He further alleges that Lithuania has failed to conduct an effective investigation into his allegations and failed to provide him with an effective remedy.

This decision constitutes the seventh ECtHR judgment relating to the CIA programme, the fifth concerning black sites, and the second against Lithuania.⁶

Held

1. The Court unanimously found the application to be fully admissible and the acts complained of to be within Lithuania's jurisdiction, engaging Lithuania's responsibility.
2. The Court found violations of art.3 (prohibition of torture, cruel, inhuman and degrading treatment) in its procedural and substantive aspects, on account of Lithuania's failure to conduct an effective investigation into the applicant's allegations of ill-treatment on Lithuanian territory and of Lithuania's complicity in the CIA programme, enabling the CIA to "subject the applicant to inhuman treatment on Lithuanian territory and to transfer him from that territory in spite of a real risk that he would be subjected to treatment contrary to Article 3" (unanimous).⁷
3. The Court also found a violation of art.5 (right to liberty and security of the person) "on account of the applicant's undisclosed detention on the respondent State's territory and the fact that the respondent State enabled the US authorities to transfer him from its territory, in spite of a real risk that he would be subjected to further undisclosed detention" (unanimous).⁸
4. The Court further held that Lithuania violated art.8 (right to respect for private and family life), art.6(1) (right to a fair trial in criminal matters), art.2 (right to life) and art.3 taken together with art.1 of Protocol No.6 (abolition of the death penalty), and art.13 (right to an effective remedy) in conjunction with arts 3, 5, and 8 (unanimous).
5. In addition to Lithuania's general obligations under art.46 (binding force and execution of judgments), the Court specifically ordered Lithuania to conduct an effective investigation into the applicant's allegations⁹ and to make representations to the US to seek assurances that al-Hawsawi would not suffer the death penalty.¹⁰
6. The applicant was awarded €100,000 in respect of non-pecuniary damages, and his representative, REDRESS, was awarded €30,000 in respect of costs and expenses.

Analysis

This judgment strictly follows the Court's previous case law regarding black sites, unanimously finding violations of multiple Convention articles in respect of the applicant's rendition, detention, and interrogation by the CIA on Lithuanian territory.

To establish the facts of the case and the knowledge of Lithuanian authorities, the Court followed the same procedure as in previous CIA-related cases, relying on declassified CIA documents, the 2014 US Senate Committee report (redacted executive summary), international inquiries, and experts' testimonies.¹¹ Indeed, as the applicant has virtually no contact with the outside world and the US administration consistently refuses to cooperate with foreign investigations in the CIA programme, rebuttable inferences and procedural adaptations are required. This includes shifting the burden of proof onto the respondent state. As the Court unswervingly remarks in such cases, "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, ... the burden of proof ... may be regarded as resting on the authorities to provide a satisfactory and convincing explanation".¹² In this case, the Court also repeatedly cites its findings in *Abu Zubaydah v Lithuania* as establishing beyond reasonable doubt the circumstances of the applicant's detention in Lithuania¹³ and the knowledge of Lithuanian authorities.¹⁴

The Court's reliance on its findings in *Abu Zubaydah* poses a strategic problem for Lithuania. Nevertheless, the state presents a preliminary objection as to compatibility *ratione personae* with the Convention, arguing a lack of knowledge about the CIA's actions on its territory. In this regard, Lithuania walks a fine line, attempting to object to a finding that the applicant was under its jurisdiction without appearing to explicitly contest the Court's findings in *Abu Zubaydah*.¹⁵ As the Court summarises, however, "the Government's objection to Lithuania's jurisdiction and to its responsibility under the Convention amounts, for all practical purposes, to challenging the Court's findings as to the Lithuanian authorities' knowledge of and complicity in the CIA rendition operations on their territory in *Abu Zubaydah v Lithuania*".¹⁶ In the absence of any new element in this regard, the Court unsurprisingly reiterates its previous findings concerning jurisdiction and the engagement of responsibility.¹⁷

When assessing substantive violations, the Court also relies heavily on its conclusions in previous CIA-related cases, emphasising that it "does not see any reason to hold otherwise in the present case".¹⁸ In fact, the Court's findings in this case are identical to those of *Al Nashiri v Romania*, both applicants having been charged in the Military Commissions system, thus exposing them to an unfair trial and the imposition of the death penalty in addition to violations of arts 3, 5, and 8 ECHR. This additional finding of violations of art.6(1), arts 2 and 3 taken together with art.1 of Protocol No.6, and art.13 in conjunction with arts 2 and 8 constitutes the sole difference between the two cases against Lithuania, as *Abu Zubaydah*, the applicant in the other Lithuanian case, remains detained without charge.

It bears mentioning that, in both cases, Lithuanian authorities were never in contact with the applicants during their detention in Detention Site Violet. In consequence, Lithuania's responsibility is engaged on account of its "acquiescence and connivance", i.e. for its complicity in the applicant's ill-treatment by a third state. Unlike in the 2014 cases against Poland, Lithuania and Romania were not found responsible for torture, since so-called "enhanced interrogation techniques" were apparently not used on their territory. Rather, they are responsible for inhuman treatment, on account of the applicants' conditions of detention and previous torture.¹⁹ Indeed,

"the Court finds that during his detention in Lithuania the applicant was subjected to an extremely harsh detention regime including a virtually complete sensory isolation from the outside world and suffered from permanent emotional and psychological distress and anxiety also caused by the past *E.H.R.L.R. 258 experience of torture and cruel treatment in the CIA's hands and fear of his future fate. Even though at that time he had apparently not been subjected to interrogations with the use of the harshest methods, the applicant—having beforehand experienced the most brutal torture—inevitably faced the constant fear that, if he failed to "comply", the previous cruel treatment would at any given time be inflicted on him again."²⁰

In its conclusions on the violation of art.3 for the applicant's ill-treatment in Lithuania, the Court abstains from naming the US as the primary right violator, instead resorting to an awkward passive voice.²¹ This circumvents the admittedly controversial establishment of US responsibility by a Court lacking jurisdiction over it, as a necessary prior step to a finding of complicity, as the Court had done in the Polish cases.²² Nevertheless, as in all previous "black sites" cases, the Court does name the US in the operative paragraphs of the judgment, finding a violation of art.3 for "complicity", as Lithuania "enabled the US authorities to subject the applicant to inhuman treatment on Lithuanian territory" (operative paragraph 4).

Regarding all the other violations, Lithuania's responsibility is engaged for its own acts and omissions rather than for complicity with the US' wrongful acts. In addition to a violation of the procedural limb of art.3 and to Lithuania's failure to provide an effective remedy (art.13 in conjunction with arts 2, 3, and 8), these violations all concern refoulement to further violations. With this line of cases, the Court further enshrines the fact that, on top of refoulement to torture and ill-treatment (art.3), refoulement to unlawful detention (art.5 and, consequently, art.8), and to the risks of an unfair trial (art.6(1)) and of being subjected to the death penalty (arts 2 and 3 together with art.1 of Protocol No.6) also constitute violations of the Convention.

Overall, this is an unsurprising judgment, without any substantive or procedural novelty, which further establishes the Court's case law regarding the operation of the CIA programme on European soil. As for previous related judgments, however, its effective implementation remains the real issue. While Lithuania has done slightly more than Poland or Romania in terms of representations to the US,²³ such limited efforts have failed to yield any advancements. Throughout its submissions before the Court, the Lithuanian government repeatedly emphasises that the lack of cooperation of US authorities prevents it from remedying its own violations.²⁴ Lithuania made the same remarks in its correspondence with the Council of Ministers regarding the implementation of Abu Zubaydah.²⁵ While the Court acknowledges the difficulties stemming from the US' lack of cooperation,²⁶ it nevertheless rightly highlights Lithuania's own reluctance to effectively investigate the facts and hold the responsible Lithuanian officers accountable,²⁷ for which it finds "no insurmountable practical obstacle".²⁸ Yet, regardless of the advancement of domestic investigations by European states, the Court's lack of jurisdiction over the US means that, so far, its judgments in black sites cases have had virtually no effect on the applicants' situations, all three of whom remain detained in Guantánamo Bay. Unfortunately, it is unlikely that this new decision will be any different.

Sophie Duroy

Footnotes

1. For a summary of the facts and legal aspects of the programme, see S. Duroy, *The Regulation of Intelligence Activities under International Law* (Edward Elgar Publishing, 2023) Ch.3.
2. S. Duroy, "Black Sites" (2022) *Elgar Encyclopedia of Human Rights* 218.
3. United States Senate Select Committee on Intelligence, *Torture Report: Committee Study of Central Intelligence Agency's Detention and Interrogation Program: Executive Summary* (2014).
4. The Rendition Project's page on al-Hawsawi, <https://www.therenditionproject.org.uk/prisoners/hawsawi.html>.
5. For updates, see *The New York Times*, "The Guantánamo Docket", <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current>.
6. See, regarding black sites, *Al Nashiri v Poland* (App. No.28761/11), judgment of 24 July 2014; (2015) 60 E.H.R.R. 16; *Husayn (Abu Zubaydah) v Poland* (App. No.7511/13), judgment of 24 July 2014; (2015) 60 E.H.R.R. 16; *Al Nashiri v Romania* (App. No.33234/12), judgment of 31 May 2018; (2019) 68 E.H.R.R. 3; and *Abu Zubaydah v Lithuania* (App. No.46454/11), judgment of 31 May 2018. See also, regarding the CIA programme more generally, *El-Masri v the former Yugoslav Republic of Macedonia* [GC]

- (App. No.39630/09), judgment of 13 December 2012; (2013) 57 E.H.R.R. 25; and Nasr and Ghali v Italy (App. No.44883/09), judgment of 23 February 2016.
7. Al-Hawsawi v Lithuania (App. No.6383/17), judgment of 16 January 2024 at operative paragraph [4].
 8. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at operative paragraph [5].
 9. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [278]–[279].
 10. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [276].
 11. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [142].
 12. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [183].
 13. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [143], [152], [156].
 14. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [161].
 15. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [118]–[121].
 16. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [157].
 17. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [164]–[165].
 18. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [226] regarding the breach of art.5 ECHR.
 19. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [214]. See also Al Nashiri v Romania (App. No.33234/12), judgment of 31 May 2018; (2019) 68 E.H.R.R. 3 at [675] and Abu Zubaydah v Lithuania (App. No.46454/11), judgment of 31 May 2018 at [640].
 20. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [213].
 21. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [214].
 22. Al Nashiri v Poland (App. No.28761/11), judgment of 24 July 2014; (2015) 60 E.H.R.R. 16 at [516]; Husayn (Abu Zubaydah) v Poland (App. No.7511/13), judgment of 24 July 2014; (2015) 60 E.H.R.R. 16 at [511].
 23. See "The implementation of judgments of the European Court of Human Rights" Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Doc. 15123, 15 July 2020.
 24. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [90]–[104].
 25. Action plan (8 April 2019), Communication from Lithuania concerning the case of Abu Zubaydah v Lithuania (App. No.46454/11), DH-DD(2019)396.
 26. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [192], [277].
 27. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [193]–[195].
 28. Al-Hawsawi (App. No.6383/17), judgment of 16 January 2024 at [279].