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## USA: Judge orders Mohammed Jawad's release from Guantánamo; administration still mulling trial

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On 30 July 2009, US District Court Judge Ellen Segal Huvelle ordered the release, “beginning on August 21, 2009”, of Afghan national Mohammed Jawad from the US Naval Base at Guantánamo Bay in Cuba, where he has been held since early 2003. Although Amnesty International is concerned by the three-week delay in the release of a detainee unlawfully held – a delay stemming from legislation passed by US Congress in a climate in which the human rights of Guantánamo detainees have fallen foul of domestic politics – it nevertheless welcomes the beginning of remedy for Mohammed Jawad.

In the six and a half years that he has been in US custody, Mohammed Jawad has been subjected to interrogation techniques and detention conditions that have violated the prohibition of torture and other cruel, inhuman or degrading treatment, and to prolonged incommunicado detention, arbitrary detention, and unfair trial proceedings under the Military Commissions Act of 2006.<sup>1</sup> Moreover, the USA never took account of Mohammed Jawad's young age at the time of his arrest in its treatment of him, as it was required to do under international law – he was no older than 17 when taken into custody in 2002; the Afghan authorities have asserted that he was as young as 12 years old at that time.

Judge Huvelle's order comes three years and a half years after a habeas corpus petition was first filed on Mohammed Jawad's behalf, and more than a year after the US Supreme Court ruled that the Guantánamo detainees were entitled to a “prompt” hearing to challenge the lawfulness of their detention. The order follows a flurry of legal activity in the case over the past two weeks, beginning with a hearing on 16 July, at which Judge Huvelle berated the government over its handling of this “shocking” case, and warned it against generating further delays.<sup>2</sup> She also ruled to suppress “as a product of torture” every statement made by Mohammed Jawad since his arrest in Kabul on 17 December 2002 following a grenade attack in which two US soldiers and their Afghan interpreter were injured. Without the statements, she said, the government's case was “gutted” and the “US Government knows it is lousy”.

In a legal brief filed on 24 July, the administration revealed that it would no longer treat Mohammed Jawad as “detainable under the Authorization for Use of Military Force (AUMF) as informed by the laws of war”, effectively conceding that it had lost the habeas corpus case brought on his behalf challenging the lawfulness of his detention.<sup>3</sup> However, the administration said that the Attorney General had ordered further investigation of the allegations against Mohammed Jawad in relation to the grenade attack, including in light of witness evidence “not previously available”, with a view to his possible prosecution.<sup>4</sup> It “advised” Judge Huvelle that “any relief” should take account of legislation recently passed by

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<sup>1</sup> See USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’, 13 August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>

<sup>2</sup> See USA: Sounding a note of urgency: Judge loses patience over Guantánamo case; detention and interrogation policy Task Forces delay reports, 21 July 2009, <http://www.amnesty.org/en/library/info/AMR51/084/2009/en>.

<sup>3</sup> The Obama administration has cited the AUMF, passed by Congress following the attacks of 11 September 2001, as providing the authority for it to continue to detain those held at the US Naval Base at Guantánamo Bay in Cuba.

Congress in relation to Guantánamo detainee transfers and “logistical and other arrangements with the receiving government”.<sup>5</sup>

On 28 July, Mohammed Jawad's lawyers challenged the government's assertion that it had “new” evidence, adding that it was unclear why it was even mentioning “new” evidence in the context of a trial in which the burden to prove guilt would be “beyond a reasonable doubt”, when in the same document the government was acknowledging that it could not even prove by the lower standard of a “preponderance of the evidence” that Mohammed Jawad was detainable. The lawyers argued that the “consideration that should guide this Court's relief is not the mythical logistical difficulties concocted by [the government], but the urgency of returning this young man home to his family after nearly seven years of now admittedly illegal detention. Enough is enough”. Later that day, Judge Huvelle ordered the government to file in writing by 5pm on 29 July how it would propose to resolve the case.

Shortly before the deadline on 29 July, the government filed its proposal, namely that Judge Huvelle should order the government to “promptly” release Mohammed Jawad 22 days from the date of the order. This timeline, it said, would comply with Section 14103 of the Supplemental Appropriations Act of 2009, recently passed by Congress, under which no funds provided in this or any prior legislation may be used to transfer or release any Guantánamo detainee to his or another country unless the President submits to Congress, 15 days prior to such a transfer, certain classified information, including the terms of any agreement with the receiving country, and “an assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.” The administration said it would need seven days to provide this information to Congress.

The government's brief accompanying its proposal asserted that the administration was “not suggesting that the Court lacks authority to order his release or transfer, consistent with statutory requirements”. However, Section 14103, or at least the administration's interpretation of it, would appear in effect to challenge the power of the courts to order *and obtain* the immediate release of a detainee who is unlawfully held.

The administration also argued that the three-week timeframe would allow “the practical steps” it said were necessary to arrange for Mohammed Jawad's departure from Guantánamo. For example, it asserted that “the assignment of an appropriate military aircraft” would take “approximately 12 days”, and that a further five days would be required to train and prepare the on-board security personnel assigned to the case. It said that the preparations for this “transoceanic flight on a military aircraft would make it infeasible, in any event, to transfer him to the receiving country on an ‘immediate’ basis, as he requests”.

In its 29 July brief, the government opposed other relief that had been requested by Mohammed Jawad's lawyers. The latter had, for example, sought a judicial determination that Mohammed Jawad had been unlawfully held and ill-treated by the USA, and an order requiring the preservation of all evidence relating to his detention and treatment in US custody. They had also sought an order by Judge Huvelle that Mohammed Jawad not be subjected to hooding or shackling during his transfer out of Guantánamo, and that for any remaining period in US custody he be offered a “full range of social, educational, recreational and mental health services” to assist his reintegration into society. The government opposed such “ancillary relief” as being outside the scope of habeas corpus. To the extent that the purpose of such relief was to insulate Mohammed Jawad from “any moral stigma owing to his detention at Guantánamo Bay”, the administration asserted, under US law “that sort of alleged reputational injury has never been considered redressable in habeas”. On the question of judicial supervision of the preparations for, and conduct of, his transfer out of Guantánamo, the administration argued that any such oversight would “inappropriately involve the judiciary in matters of foreign relations and military operations”.

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<sup>4</sup> In its subsequent 29 July brief, the administration denied that in proposing a three-week delay in Mohammed Jawad's release, it was “asserting authority to detain an individual to pursue a criminal investigation”.

<sup>5</sup> USA: Moving the goalposts, prolonging the detention. Mohammed Jawad no longer detained under AUMF, but still held, 27 July 2009, <http://www.amnesty.org/en/library/info/AMR51/087/2009/en>.

The order issued by Judge Huvelle on 30 July closely followed that proposed by the administration. She ordered the administration to provide Congress by 6 August 2009 with the information required under the Supplementary Appropriations Act, and then “beginning on August 21, 2009, when 15 days following the submission of the aforesaid information to the Congress have passed”, the government “shall promptly release petitioner Jawad from detention at the US Naval Station at Guantánamo Bay and transfer him to the custody of the receiving government”. She declined to order the other measures sought by Mohammed Jawad’s lawyers, only ordering the government to treat him “humanely consistent with [its] legitimate security and operational concerns”.

It is not yet guaranteed that Mohammed Jawad will be released, however. The administration has kept open the option of charging him pursuant to the criminal investigation ordered by the US Attorney General and transferring him to the USA to face trial. During the hearing on 30 July, Judge Huvelle conceded that the government still had this option, but warned that there would be serious obstacles if it chose to go down that path, including as a result of the delays there have already been in bringing Mohammed Jawad to trial and the torture to which he has been subjected.

In its 29 July brief opposing Mohammed Jawad’s immediate release, the administration argued that habeas corpus is an “equitable remedy” [rooted in moral justice], one that “allows the Court sufficient flexibility to provide for the timely release and transfer” of Mohammed Jawad while “still permitting” the government time to meet its reporting requirements to Congress and practical and logistical arrangements. Amnesty International would remind the administration, then, that the right to remedy under international human rights law must be adaptable, especially so in the case of children.<sup>6</sup>

While Judge Huvelle’s ruling has the effect of providing the US authorities three more weeks in which to decide whether to prosecute Mohammed Jawad, Amnesty International recalls the years of unlawful treatment to which Mohammed Jawad has been subjected by the USA, and of the USA’s legal obligation to ensure that he has access to effective remedy for the human rights violations committed against him in US custody. It must also ensure that all necessary measures are put in place to facilitate his successful reintegration into society after his release from detention.

Meanwhile, Amnesty International remains concerned both by the slow pace at which the Guantánamo detainee cases are being resolved – 95 percent of the detainees who were in Guantánamo at the time of the presidential inauguration on 20 January 2009 are still there – and at the stance taken by the administration on the question of judicial remedy. A number of detainees whose custody has been ruled unlawful by federal judges have remained in indefinite detention months after their release was ordered by those judges. Twenty-nine detainees have been ordered released by federal judges following habeas corpus proceedings (and five detentions upheld), but 20 of the 29 remain in detention, pending diplomatic negotiations over their transfers or a decision by the US authorities to allow into the USA released detainees for whom no other solution is presently available. The administration has resisted any such releases into the USA, even when ordered by federal judges. Now, under Section 14103 of the Supplemental Appropriations Act, “none of the funds made available in this or any prior Act” may be used to release any Guantánamo detainee “into the continental United States, Alaska, Hawaii, or the District of Columbia”.

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<sup>6</sup> The UN Human Rights Committee has stated that the International Covenant on Civil and Political Rights requires not only that the right to remedy (Article 2) be realized, but that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”. General Comment 31. The nature of the general legal obligation imposed on state parties to the Covenant, UN Doc.: CCPR/C/21/Rev.1/Add.13, 26 May 2004.