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USA: Judge orders release of detainee held in Guantánamo as child 'enemy combatant'

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On 14 January 2009, Judge Richard Leon on the US District Court for the District of Columbia (DC) ordered the release from Guantánamo Bay of Mohammed el Gharani, who has been held there as a so-called "enemy combatant" since he was reportedly 14 years old.¹ He has been subjected to ill-treatment in Guantánamo, where coercive interrogations and conditions of detention in violation of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment have been an integral part of an unlawful detention regime.

Mohammed el Gharani, a Chadian national born and brought up in Saudi Arabia, was taken into custody by Pakistani forces in Pakistan in late 2001, handed over to the USA and taken to Kandahar air base in Afghanistan before being transferred to Guantánamo in January 2002. He has spent nearly a third of his life in indefinite US custody.

The question before Judge Leon was whether, by the relatively low standard of "a preponderance of the evidence", the government had shown that the detainee was an "enemy combatant". This broadly-defined status is a core ingredient in the USA's notion of a global armed conflict which it has invoked as part of its refusal to respect its obligations under international human rights law.² Even applying a test that thereby allowed the government overbroad grounds for detention, Judge Leon found that the government had failed to make a sufficient case for holding Mohammed el Gharani.

Judge Leon revealed the paucity of the government's case. He said that "the Government's evidence is a mosaic of allegations made up of statements by the petitioner, statements by several of his fellow detainees, and certain classified documents that allegedly establish in greater detail the most likely explanation for, and significance of, petitioner's conduct". The judge stated that, unlike most other cases before him, the government's evidence against Mohammed el Gharani "consists principally of the statements made by two other detainees while incarcerated at Guantánamo Bay. Indeed, these statements are exclusively, or jointly, the *only* evidence offered by the Government to substantiate the majority of their allegations. In addition, unlike the other cases reviewed by this Court to date, the credibility and reliability of the detainees being relied upon by the Government has either been directly called into question by Government personnel or has been characterized by Government personnel as undetermined". Judge Leon stated that the

¹ According to his lawyers, he was born in July 1987. The Pentagon has previously given his year of birth as 1986. Judge Leon's ruling indicates that Mohammed el Gharani left Saudi Arabia sometime "in or around 2001" when he was 14.

² Judge Leon has adopted the definition of "enemy combatant" developed by the US administration for use in administrative review of Guantánamo detentions by the Combatant Status Review Tribunals: "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

government was “unable to either sufficiently establish the reliability of its detainee witnesses, or produce other reliable evidence to corroborate them”.

“Simply stated”, Judge Leon concluded, “a mosaic of tiles bearing images this murky reveals nothing about the petitioner with sufficient clarity, either individually or collectively, that can be relied upon by this Court. Accordingly, the Court must, and will, grant the detainee’s petition for a writ of habeas corpus and order the [government] to take all necessary and appropriate diplomatic steps to facilitate his release forthwith”.

The USA should comply with Judge Leon’s order, and immediately release Mohammed el-Gharani to Saudi Arabia where he resided and has immediate family. If this cannot be promptly arranged, as he wishes, he should be released to Chad, the country of his nationality where he has extended family.

The USA must ensure he has access to remedy for the human rights violations to which he has been subjected in US custody, including ill-treatment and the failure of the US authorities to take account of his age after arrest. Under international law and standards, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

Some details of the teenager’s treatment in Guantánamo were revealed in May 2008 in a report by the Inspector General at the US Department of Justice. FBI agents described how during an interrogation period in September 2003, when still only 16 years old, Mohammed el Gharani was “short-chained”, whereby a chain was placed around his waist and bolted to the floor, preventing him from being able to stand up straight. He was left like this for several hours. Another FBI agent stated that a military interrogator had ordered guards to place Mohammed el Gharani in a “stress position”, described as being “shackled on the hands and feet and then chained to the floor to force him to sit on the floor or crouch without a chair”. Left like this for several hours, Mohammed el Gharani was forced to urinate on himself. Mohammed el Gharani himself told investigators of another occasion when military guards chained him overnight for 12 to 16 hours. The report also revealed that the teenager had been subjected to the “frequent flyer program”, a program of disorientation and sleep disruption and deprivation that has been used against numerous detainees in Guantánamo.³ Mohammed el Gharani has alleged that during interrogations in 2003, he was subjected to racist abuse, physical assaults, loud music, and doused with cold water. Amnesty International is not aware of anyone having been brought to account for such abuses, as required under international law.

The government alleged that Mohammed el Gharani was associated with *al-Qa’ida*, including that he “fought against US and allied forces at the battle of Tora Bora” during the international armed conflict in Afghanistan in December 2001. He has denied ever have been to Afghanistan or being associated with *al-Qa’ida*, but if the USA believed the allegations it made against him to be true (Judge Leon has now said they are unsubstantiated), it should have ensured that its treatment of the teenager adhered, among other things, to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol), which the USA signed in July 2000 and ratified in December 2002. This treaty among other things prohibits

³ For more on this program, see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’, August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>.

the recruitment or use in hostilities by non-state armed groups of under-18-year-olds, and requires states to provide any such child who comes within their jurisdiction "all appropriate assistance for their physical and psychological recovery and their social reintegration". States ratifying the Optional Protocol reaffirm that this international instrument "will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children". However, the USA's treatment of Mohammed el Gharani and other children has been conducted through the prism of its own perceived national security interests rather than the best interests of the child.

Mohammed el Gharani had no access to a lawyer until after the US Supreme Court ruled in *Rasul v. Bush* in June 2004 that the federal courts had the jurisdiction to consider habeas corpus petitions from Guantánamo detainees. Such a petition was filed in his case on 2 March 2005, by which time he was still only 17 years old and had spent more than three years in custody at the naval base. His petition would not be heard for another three and a half years, however. The US administration pursued litigation and legislative strategies that blocked justice and remedy for the detainees, culminating in the passage of the 2006 Military Commissions Act (MCA). This purported to strip the courts of jurisdiction to consider habeas corpus petitions from anyone held as an "enemy combatant" by the USA. It was not until June 2008 that the Supreme Court ruled this provision of the MCA unconstitutional, in *Boumediene v. Bush*. On 17 and 18 December 2008, seven years after he was first detained, habeas corpus proceedings were held in District Court in Mohammed el Gharani's case, and the thinness of the government's allegations were laid bare.⁴

Mohammed el Gharani's lawyers are urging the government not to appeal Judge Leon's ruling. Amnesty International joins their call.

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⁴ To date, Judge Leon is the only judge to have made rulings on the merits of detainees challenges the lawfulness of their detention as "enemy combatants" since the *Boumediene* ruling. In his first case, he ruled on 20 November 2008 that five detainees should be released, three of whom have since been freed (see <http://www.amnesty.org/en/library/info/AMR51/141/2008/en>). In the same ruling, he found that a sixth detainee was lawfully held. In two rulings issued on 30 December 2008, Judge Leon found that the government had shown that Tunisian national Hisham Sliiti and Yemeni national Moath Hamza Ahmed Al Alwi were "enemy combatants" and were therefore lawfully detained.