

/image: coat-of-arms of the Republic of Lithuania/

**VILNIUS REGIONAL COURT
R U L I N G**

30 June 2016
Vilnius

Loreta Ulbienė, judge of the Criminal Division of the Vilnius Regional Court, having read and examined the appeal of Mustafa al Hawsawi's representative, attorney Ingrida Botyrienė, against the 6 June 2016 ruling of the Vilnius District Court dismissing the appeal of attorney Ingrida Botyrienė against the 27 November 2015 resolution of Ona Rajutė, a prosecutor at the Organized Crime and Corruption Investigation Department of the Prosecutor General's Office of the Republic of Lithuania, in which it was refused to grant victim status to Mustafa al Hawsawi in the pre-trial investigation, and the 4 April 2016 resolution of Raimondas Petrauskas, Deputy Chief Prosecutor of the Organized Crime and Corruption Investigation Department of the Prosecutor General's Office of the Republic of Lithuania, to dismiss the appeal,

f o u n d t h a t :

The Organized Crime and Corruption Investigation Department of the Prosecutor General's Office of the Republic of Lithuania is currently carrying out pre-trial investigation No. 01-2-00015-14 into the possible unlawful transportation of persons across the state border and abuse of authority under articles 292(3) and 228(1) of the Criminal Code (CC) of the Republic of Lithuania. The factual circumstances of the investigation are tied to the potential transportation and imprisonment of detainees by the United States Central Intelligence Agency in the territory of the Republic of Lithuania.

Attorney Ingrida Botyrienė filed an application with the Prosecutor General's Office to grant victim status to Mustafa al Hawsawi (born 5 August 1968 in Jeddah, Saudi Arabia) in pre-trial investigation No. 01-2-00015-14.

On 27 November 2015, Ona Rajutė, a prosecutor of the Organized Crime and Corruption Investigation Department of the Prosecutor General's Office of the Republic of Lithuania, rejected the appellant's application. The prosecutor argued that since Mustafa al Hawsawi had not been granted victim status in accordance with Art. 28 CCP of the Republic of Lithuania, he did not have any of the procedural rights available to victims, including the right to an authorized representative, and as such attorney I. Botyrienė was not considered a party to the proceedings allowed to make applications in the present pre-trial investigation.

Furthermore, she noted that the evidence collected in the pre-trial investigation showed no procedural grounds for granting victim status to Mustafa al Hawsawi and the materials submitted by the attorney contained no factual evidence supporting the assertion that Mustafa al Hawsawi, who has not been interviewed in this case, could have suffered any non-material, material or physical harm as a result of the criminal activities currently under investigation. The prosecutor concluded that, since this person had not been recognized as a victim within the meaning of Article 28 of CCP, he could not exercise any of the procedural rights accorded to victims, including the right to an authorized representative.

On 4 April 2016, Raimondas Petrauskas, Deputy Chief Prosecutor of the Organized Crime and Corruption Investigation Department of the Prosecutor General's Office of the Republic of Lithuania, adopted a resolution rejecting the Appellant's appeal. He agreed with the findings of the resolution under appeal, namely, that the attorney's application to the Prosecutor's Office did not specify any piece of evidence or objective circumstance confirming that Mustafa Ahmed Adam al Hawsawi, a citizen of Saudi Arabia, suffered any non-material, material or physical harm as a result of the criminal offences currently the subject of pre-trial investigation No. 01-2-00015-14. He further argued that the Appellant relied on unsupported assumptions, excerpts from the (censored and anonymized) 9 December 2014 report of the United States Senate,

applications submitted by NGOs as well as their opinions, findings, studies, reports and other information in the public domain. However, prosecutors cannot base their decisions solely on the subjective assessments, assumptions and declarations of interested parties. He noted that victim status at the pre-trial stage is granted solely at the discretion of the pre-trial officer or prosecutor, and that no one else may decide in place of the prosecutor whether certain procedural steps are necessary or whether any procedural decisions must be taken in a pre-trial investigation. The prosecutor found that, since the case materials submitted by the Appellant and those available in the pre-trial investigation failed to specify any factual grounds for granting victim status to Mustafa Ahmed Adam al Hawsawi, it was impossible to adopt a resolution to that effect.

On 6 June 2016, the Vilnius District Court ruled to leave the resolutions of the prosecutor and the higher prosecutor as they are. The court noted that not a single piece of the appellant's so-called indisputable evidence confirmed that Mustafa al Hawsawi was illegally transported across the border of the Republic of Lithuania and that it was him specifically that had suffered (or could have suffered) great harm due to the relevant officials of the Republic of Lithuania abusing their authority. No such facts have been established at this stage in the pre-trial investigation. Otherwise, if we only go by the arguments laid out in the appeal and their sources, victim status would have to be granted to every person that was held at the aforementioned unlawful detention facilities at some point.

The court drew attention to the fact that the Appellant relied on what is, in essence, contradicting evidence - she argued that the detention of the person in question in the Republic of Lithuania in pursuance of the Central Intelligence Agency's Detention and Interrogation Program was unlawful in and of itself, and at the same time argues that it was illegal to transport him out of the Republic of Lithuania (the arguments concerning his impending punishment suggest that the violation of said person's rights is more severe because he was allegedly not left in Lithuania). The Appellant further alleges that the ECtHR and various international organizations (including those that, according to the Appellant, carried out their own extensive research into CIA interrogation methods, unlawful detention et al. and those that analyzed and summarized the results of said research, such as the International Committee of the Red Cross, the United Nations and others) have found the evidence she relies on to be sufficient for concluding that the natural persons (including Mustafa al Hawsawi) identified in the US Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program as "high-value" detainees (HVD) of CIA's Detention and Interrogation Program must be recognized as victims who had suffered physical and non-material harm as a result of their unlawful detention, subjection to unlawful interrogation methods and forced disappearance. However, pre-trial investigation No. 01-2-00015-14 is not concerned with criminal activities relating to unlawful detention or any other of the above offences. The Court notes that the object of the present appeal is not related to opening up or refusing to open a pre-trial investigation, and, as such, the only thing to consider is whether there is any objective evidence to recognize Mustafa al Hawsawi as a victim in the context of the circumstances actually under investigation.

In her appeal to the regional court, attorney Ingrida Botyrienė asks for the ruling in question as well as the resolutions of the prosecutor and the higher prosecutor to be annulled, and to grant victim status to Mustafa al Hawsawi. She points out that the mere fact that there is an on-going pre-trial investigation in the Republic of Lithuania into criminal activities relating to CIA's secret and unlawful detention facilities possibly established within the country inevitably leads to the conclusion that there are real people who could have suffered harmed as a result of these criminal activities, and that Mustafa al Hawsawi is actually one such victim, who, based on the evidence available in the present pre-trial investigation, is likely to actually have been unlawfully detained in the Republic of Lithuania. As such, it is necessary to grant him victim status in this pre-trial investigation, objectively and thoroughly investigating the circumstances of the physical and non-material harm he had suffered while in the Republic of Lithuania as opposed to refusing to do so on formal grounds, as is happening in this pre-trial investigation.

The attorney stressed that the investigating judge that adopted the ruling under appeal, just as the prosecutors who have adopted the resolutions that have been appealed under the law, completely failed to analyze (and therefore properly assess) the entirety of the written evidence submitted in the pre-trial investigation, which, though not direct evidence of Mustafa al Hawsawi's illegal detention and torture in Lithuania, gives sufficient factual basis to reliably conclude at this stage of the proceedings that Mustafa al Hawsawi could have suffered harm as a result of the criminal activities under investigation. At the

same time, the argument advanced in the ruling under appeal - namely, that the evidence specified in the appeals submitted by the counsel of Mustafa al Hawsawi does not directly confirm that Mustafa al Hawsawi was illegally transported across the border of the Republic of Lithuania and that it was him specifically that had suffered (or could have suffered) great harm due to any abuse of authority on the part of the officials of the Republic of Lithuania - is completely baseless, because, first of all, the circumstances relevant to the investigation may be established from a logical chain of the entirety of circumstantial evidence taken as a whole; and second of all, considering the secretive nature of the illegal activities that Mustafa al Hawsawi was subjected to, there is absolutely no reason to expect any direct evidence to be forthcoming in this case, since it is either very difficult or outright impossible to obtain such evidence.

It is stressed in the appeal that the current criminal proceedings fundamentally violate his right to a fair trial and that it must be assumed that Lithuania is also in breach of its international obligations stemming from the aforementioned provisions of the Convention. As such, the criminal activities under investigation, at the very least, resulted in Mustafa al Hawsawi being unlawfully deprived of liberty (Art. 5 of the Convention, Art. 9 of the International Covenant on civil and political rights), subjected to inhuman treatment and torture (Art. 3 of the Convention, Art. 7 of the International Covenant on civil and political rights, Articles 1, 2, 3 and 16 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), stripped of his right to a fair trial (Art. 6 of the Convention, Art. 14 of the International Covenant on civil and political rights) and unlawfully handed over for continued unlawful detention and inhuman treatment (Articles 3 and 5 of the Convention, Art. 7 of the International Covenant on civil and political rights, Art. 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), which resulted in him eventually being transferred to a state where he now faces capital punishment in proceedings that do not guarantee his right to a fair trial (Articles 2 and Protocol No. 6 of the Convention).

No responses to the submissions were received in the case.

The appeal shall be dismissed.

According to Article 28(1) of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as the CCP), victim status is granted to natural persons who have suffered physical, material or non-material harm. Victim status is granted by way of a pre-trial officer's or prosecutor's resolution or a court ruling to that effect. Victim status is granted to a natural person when there are factual grounds and a legal basis for doing so. The physical, material or moral harm suffered by a person as a result of the criminal offence form the factual grounds for granting victim status. The legal basis in this case is the pre-trial officer's or prosecutor's resolution or a court ruling to grant victim status to the person. Granting victim status to a person during a pre-trial investigation is done at the discretion of the pre-trial officer or prosecutor.

The appeal to the regional court is concerned with the issue of Mustafa al Hawsawi's potential victim status in pre-trial investigation No. 01-2-00015-14. Within the bounds set by the appeal, the regional court shall only consider those legal arguments that relate to Mustafa al Hawsawi's procedural status in the case.

The appeal to the regional court emphasized that, at the pre-trial investigation stage of the proceedings there is no requirement, when deciding whether to grant victim status, to fully and accurately establish the circumstances of the potential offence, with the attorney systemically noting that both Mustafa al Hawsawi's procedural status and the circumstances of the offence (or at least the fact that the offence had been committed) are clear and have been proven. The higher court disagrees with this position. Both during the investigation and, subsequently, when examining the case in full, the evidence and information that was collected must be evaluated following the provisions of the CCP of the Republic of Lithuania. The mere fact that certain foreign or international bodies or organizations, such as the International Committee of the Red Cross et al., have claimed certain facts in published statements is not relevant to the pre-trial investigation, which follows the law on criminal procedure of the Republic of Lithuania.

The "logical chain" of circumstances (which supposedly confirm Mustafa al Hawsawi's procedural status) referred to in the appeal is not entirely reasonable or consistent. The attorney repeatedly draws attention to the general facts and observations regarding the US Central Intelligence Agency detention facilities in foreign countries (including Lithuania), the possible transportation of prisoners across state borders, and others. Nevertheless, the Regional Court notes that the present case is concerned with whether it would be reasonable to grant victim status to Mustafa al Hawsawi, not with the presence of secret foreign detention facilities in the Republic of Lithuania. When deciding whether to grant victim status to Mustafa al Hawsawi, it

is important to collect sufficient evidence showing that he had suffered material, physical or non-material harm as a result of unlawful acts while in the territory of the Republic of Lithuania. The attorney essentially focuses on the unlawfulness and dangerousness of the offence itself, but does so in general terms, without specifying any individual circumstances which could be used as a legal basis for granting victim status to Mustafa al Hawsawi. Moreover, the mere fact that Mustafa al Hawsawi could theoretically be part of a group of individuals that were potentially detained in Lithuania does not mean that the grounds specified in Art. 28(1) of the CCP have been satisfied.

Neither the prosecutor nor investigating judge or court is or even can be obliged to respond in detail to all of the arguments of the appeal or statement, unless doing so is necessary in order to adopt a lawful and reasoned decision. The ruling of the investigating judge is reasonable and based on the totality of the evidence (documents) submitted in the case – the fact that it does not list all of the attorney’s written sources word by word does not constitute grounds for questioning its validity.

At the same time, it must be emphasized, with reference to the present appeal, that refusal to grant victim status to a person at this stage does not mean that he or she is permanently barred from ever being granted such a status. Should the prosecutor in charge of the investigation determine that it would be reasonable to grant victim status to someone, he or she can do it on their own initiative. The evidence available in this case gives no cause to doubt the validity and impartiality of the prosecutor's actions, and as such both the resolutions and the ruling under appeal shall be left as they are.

With reference to ECtHR case law, the right to a fair trial (protected by Art. 6(1) of European Convention on Human Rights) includes the right of the parties to submit any arguments to the court which they deem to be relevant to the issue at hand. Since the purpose of the Convention is to grant rights that are real and actionable, not merely theoretical or illusory, this right can only be given effect if the arguments are actually "heard", i.e. properly examined by the trial court (12 February 2004 Grand Chamber judgment in *Perez v France*, App No. 47287/99, § 80). One of the functions of reasoned decisions is to show the parties that they have been heard. The right to be heard therefore includes not only the possibility to make submissions to the court, but also a corresponding duty of the court to show, in its reasoning, the reasons for which the relevant submissions were accepted or rejected. The Court may consider it unnecessary to respond to arguments which are clearly irrelevant, unsubstantiated, abusive or otherwise inadmissible owing to clear legal provisions or well-established judicial practice in respect of similar types of arguments. (*Fomin v Moldova*, § 31). ECtHR case law further states that reasoned decisions allow the parties to appeal them and request that they be reviewed by a higher court, whereas if the lower court fails to set out its reasons, the person is deprived of the ability to effectively challenge the decision (see, for e.g., the 15 January 2013 judgment in *Mitrofan v Republic of Moldova*, App No. 50054/07; *Fomin v Moldova*, § 31). In the present case, Mustafa al Hawsawi’s representative appeal shall be rejected and the ruling of the Regional Court be declared final and not subject to appeal, but this does not violate the fundamental principles of judicial process enshrined in the Convention. As was already stated, Mustafa al Hawsawi may be granted victim status in this pre-trial investigation when the grounds specified in the CCP of the Republic of Lithuania have been satisfied.

At the same time, the Regional Court agrees with the lower court's conclusion that Mustafa al Hawsawi’s representative, that is, attorney I. Botyrienė, must be considered a proper representative because of the warrant of attorney she had submitted. In the instant case, signing and presenting a contract for the provision of legal services is a complicated and difficult affair due to both the distance between Mustafa al Hawsawi and by I. Botyrienė and the constraints on Mustafa al Hawsawi’s liberty in Guantanamo Bay. If the attorney is not deemed to be a rightful representative in the proceedings based solely on formal grounds, this would unduly make Mustafa al Hawsawi’s legal situation more onerous and make it more difficult to defend his interests. It should be noted that the law provides that the procedural actions of pre-trial officers or prosecutors may be appealed to the court by not only the parties to the proceedings, but also by individuals that are or may be legally affected by the decisions in question.

With reference to the above, it must be held that there are no objective legal grounds for annulling the ruling based on the arguments set out in I. Botyrienė’s appeal.

The court, in accordance with Art. 442(1)(1) of the CCP,

r u l e s :

To dismiss the appeal of Mustafa al Hawsawi's representative, attorney Ingrida Botyrienė, and leave the 6 June 2016 ruling of the Vilnius District Court in effect.

The ruling shall take effect from the date of its adoption and is not subject to appeal.

Judge

/signature/

Laureta Ulbienė