

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

6 April 2000 \*

In Case T-188/98,

**Aldo Kuijer**, residing in Utrecht (Netherlands), represented by O.W. Brouwer and F.P. Louis, of the Brussels Bar, and D. Curtin, Professor at the University of Utrecht, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

applicant,

v

**Council of the European Union**, represented by M. Bauer and M. Bishop, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

\* Language of the case: English.

APPLICATION for annulment of the Council's decision of 28 September 1998, as amended by its decision of 18 May 1999, refusing the applicant access to certain documents,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,  
Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 October 1999,

gives the following

Judgment

**Legal background**

1 On 6 December 1993 the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission Documents (OJ 1993 L 340, p. 41, 'the Code of Conduct'), designed to establish the principles governing access to the documents held by them. The Code of Conduct

sets out the following principle: ‘The public will have the widest possible access to documents held by the Commission and the Council’.

2 The Code of Conduct also provides that: ‘The Commission and the Council will severally take steps to implement these principles before 1 January 1994’.

3 In order to put that commitment into effect, the Council adopted Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

4 Article 1 of Decision 93/731 provides as follows:

‘1. The public shall have access to Council documents under the conditions laid down in this Decision.

2. “Council document” means any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2).’

5 Article 4(1) reads as follows:

‘Access to a Council document shall not be granted where its disclosure could undermine:

— the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

— ...’.

6 Article 5 of the Decision provides:

‘The Secretary-General shall reply on behalf of the Council to applications for access to Council documents, except in the cases referred to in Article 7(3), in which the reply shall come from the Council.’

7 Article 7(1) and (3) provide as follows:

‘1. The applicant shall be informed in writing within a month by the relevant departments of the General Secretariat either that his application has been approved or that the intention is to reject it. In the latter case, the applicant shall

also be informed of the reasons for this intention and that he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

...

3. Any decision to reject a confirmatory application, which shall be taken within a month of submission of such application, shall state the grounds on which it is based...’.

### **Facts of the case**

- 8 The applicant is a university lecturer and researcher in asylum and immigration matters.
  
- 9 By letter of 3 July 1998 addressed to the General Secretariat of the Council, he requested access to certain documents related to the activities of the Centre for Information, Discussion and Exchange on Asylum (‘CIREA’). The following documents were requested:

— joint Common Foreign and Security Policy (CFSP) reports, analyses or evaluations drawn up by or in connection with CIREA between 1994 and

1997 and, if available, those for 1998 concerning the situation in third countries or regions from which many asylum-seekers originate or in which they reside, particularly 28 countries listed in the application ('CIREA reports');

- reports of any joint missions or reports on missions carried out by Member States in third countries and sent to CIREA ('reports drawn up for CIREA');
  
- a list drawn up by or in connection with CIREA of the contact persons in the Member States involved with asylum cases ('the list of contact persons'), with any subsequent changes to that list.

10 By letter of 28 July 1998 to the applicant, the Secretary-General replied that CIREA reports had been prepared between 1994 and 1998 on the situation of asylum-seekers returning to their own country for the following countries: Albania, Angola, Sri Lanka, Bulgaria, Turkey, China, Zaïre, Nigeria and Vietnam. He nevertheless rejected the application for access to those documents and to the list of contact persons, pursuant to Article 4(1) of Decision 93/731. With regard to reports drawn up for CIREA, the Secretary-General informed the applicant that such documents did not exist.

11 By letter of 25 August 1998, the applicant made a confirmatory application pursuant to Article 7(1) of Decision 93/731. In respect of CIREA reports, he stated that he was surprised that the 'Council also [intended] to keep confidential e.g. the reports on countries like Nigeria, Iran and Iraq, while it [could] hardly be argued that relations between the Union and those countries [were] cordial'. With

regard to reports drawn up for CIREA, the applicant set out his specific reasons for believing that the Secretary-General's reply to the effect that such documents did not exist was wrong. He also challenged the part of the decision concerning the list of contact persons.

- 12 By letter of 28 September 1998, the Secretary-General informed the applicant that the Council had rejected his confirmatory application ('the contested decision'). The letter is couched in the following terms:

'After careful consideration, the Council has decided to confirm [the decision of the Secretary-General] as set out in the letter of 28 July 1998 in respect of the requests [concerning CIREA reports and the list of contact persons]. After examination of each of the following documents, the Council has decided not to disclose them for the following reasons:

(a) [number of document]: Accompanying note by the Council's General Secretariat to CIREA: report of the Heads of Missions of the Twelve on the situation of [country] asylum-seekers returning to [same country]. This report contains very sensitive information about the political, economical and social situation in [country], which was provided by the Heads of the European Union Member State Missions. The Council is of the opinion that disclosure of this information might damage the relations between the European Union and [country]. The Council has therefore decided that access to this document has to be denied on the basis of Article 4(1) of the Decision [93/731] (international relations).

...

(b) List of CIREA contact persons who deal with applications for asylum: the General Secretariat has not been able to find a specific Council document with [such] a list.

The Council will furthermore try to trace (from as far back as 1994) documents in which the reports [drawn up for CIREA] can be found... The applicant will be informed of the result of these investigations in due course.'

- 13 On 14 October 1998, the applicant was informed that, following investigations by the competent service of the General Secretariat, it had been decided that he could be granted access to 10 reports prepared by the Danish authorities on fact-finding missions in third countries. With regard to four other reports drawn up for CIREA by the authorities of other Member States (listed in the letter), access was denied for the following reason, repeated for each document:

'The General Secretariat is of the opinion that disclosure of the very detailed, sensitive information of this report may endanger European Union relations with [the country concerned], as well as the bilateral relations of [the Member State whose authorities had carried out the mission] with this country. Access to this document is therefore denied on the basis of Article 4(1) of the Decision [93/731] (international relations).'

- 14 By letter of 18 May 1999, the General Secretariat notified to the applicant a fresh reply from the Council to the confirmatory application of 25 August 1998. In

that reply the Council indicated that a list of contact persons did exist and appeared in document 5971/2/98 CIREA 18. In consequence, it admitted that the contested decision was wrong on that point.

- 15 The Council nevertheless refused to authorise access to that document pursuant to Article 4(1) of Decision 93/731. It stated in its reply: '[The document in question] contains a list of contact persons designated by each Member State between which information on asylum seekers may be exchanged. It gives information on the countries of origin for which they are responsible and indicates their office address and their direct telephone and fax number.' The Council went on to assert that it was for the Member States to decide if and to what extent that type of information could be made publicly available. It indicated that a number of Member States opposed such a course in order to safeguard the operational efficiency of their public service. Were the Council to release such information, which had been provided to the Council for the specific purpose of establishing an internal network of contact persons to facilitate cooperation and coordination on asylum matters, the Member States would be reticent about providing such information in the future. In those circumstances, disclosure of that document could undermine the public interest in the functioning of the exchange of information and coordination between Member States in the field of asylum and immigration.

### **Procedure and forms of order sought by the parties**

- 16 By application lodged at the Registry of the Court of First Instance on 4 December 1998, the applicant brought the present action.
- 17 The written procedure was concluded on 28 April 1999 when the applicant chose not to lodge a reply.

- 18 By letter of 26 May 1999, the Council informed the Court of First Instance that, after re-examining the applicant's request for access to the list of contact persons, it had decided to refuse access to that document, and enclosed the text of the fresh reply to the applicant dated 18 May 1999.
- 19 The Court invited the applicant to submit observations on that decision which he did on 8 July 1999. In his observations he challenges that fresh decision and asks the Court, in so far as the decision is confined to giving new reasons for the refusal and for reasons of economy of procedure, to accept the amendment to the pleas in law relied on in support of his application for annulment of the contested decision with regard to the list of contact persons.
- 20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and asked the parties to reply in writing to certain questions. At the Court's request, the Council produced a copy of the Danish reports prepared for CIREA to which the applicant had been granted access.
- 21 The parties presented oral argument and gave replies to the Court's questions at the hearing on 14 October 1999.
- 22 The applicant claims that the Court should:
- annul the contested decision;
  
  
  - order the Council to pay the costs.

23 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

### Substance

24 The applicant is seeking annulment of the contested decision in so far as it refuses his request for access to CIREA reports, reports drawn up for CIREA and the list of contact persons. He puts forward three pleas in law in support of his application. By the first plea he alleges breach of Decision 93/731, in that access to the documents requested would not affect the international relations of the European Union, the refusal was not based on a concrete assessment of the content of those documents and the Council refused to grant partial access to them. By the second plea he alleges breach of the obligation to state reasons. By the third plea he alleges breach of a fundamental principle of Community law requiring access to be given to the documents of the Community institutions.

25 The applicant also asks the Court, pursuant to the duty of sincere cooperation between the Community institutions, to order the Council to produce all the documents in question should the Council not do so voluntarily.

- 26 As already mentioned, on 18 May 1999 the Council adopted a fresh decision in response to the confirmatory application with regard to the list of contact persons. The institution admitted that the contested decision contained a factual error and justified its refusal with a fresh statement of reasons. In the circumstances, the Court will assess the lawfulness of the contested decision as amended by the decision of 18 May 1999, in the light of the pleas put forward in the application as reformulated by the applicant in his observations lodged on 8 July 1999, in accordance with his request.
- 27 The Court will first examine the plea of breach of the obligation to state reasons.

*Plea of breach of the obligation to state reasons*

Arguments of the parties

- 28 The applicant considers that the reasons given in the contested decision do not satisfy the requirements of Articles 190 of the EC Treaty (now Article 253 EC) and 7(3) of Decision 93/731.
- 29 As regards CIREA reports, the Council simply stated that they contained detailed information on the political situation in the countries concerned, without explaining how their disclosure could damage European Union relations with those countries. The applicant has not been given any indication as to why, in relation to each country, the documents could not be released, and consequently

he was not able to protect his interests in accordance with the case-law of the Court of Justice.

30 Despite the diversity of the situations in each of the countries involved, the institution confined itself to giving a short, identical and ritualistic response in respect of each report, containing the same declaration; it did not identify the nature of the information contained in each of documents or examine whether disclosure of that information was likely to damage the public interest. Access to a document may never be denied merely by reference to the category to which the document belongs.

31 With regard to reports drawn up for CIREA, the applicant maintains that when confronted with proof of their existence, the Council again confined itself to replying to the application for access in a vague way, without even identifying the type of information which they contained. That shows that the Council carried out a very mechanical and blanket assessment of the scope of the public interest exception relating to international relations, contrary to the requirements set out in the case-law. It is impossible for the applicant, on the basis of such a response, to assess whether the Council applied that exception correctly.

32 In addition the applicant maintains that when a rejection of an application for access is confirmed on grounds other than those given in the initial refusal and, in effect, contradictory, the reasons for that change must be explained clearly and unequivocally in the decision on the confirmatory application.

33 The Council claims, first, that the use of the same terms for describing identical situations does not necessarily amount to rubber-stamping with a standard formula, but represents a justified and even necessary practice when the reports in question share common features.

- 34 Secondly, the Council points out that the applicant is a practitioner and researcher working in the field of asylum and immigration law. Taking into account, too, the information contained in the application, it is therefore legitimate to assume that he is aware of the typical content of joint reports on third countries. It was not therefore necessary to describe to him in detail the nature of the information contained in those reports.
- 35 Thirdly, the Council maintains that the reasons given for refusing access to CIREA reports and reports drawn up for CIREA, both in the initial reply from the Secretary-General and in the contested decision, are not contradictory but perfectly consistent, inasmuch as they refer to sensitive information contained in the reports, disclosure of which to the public could damage the European Union's relations with third countries. Citing Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others II* [1995] ECR I-3799, paragraph 16, the Council submits that the statement of reasons given in the contested decision discloses the essential objective pursued by the Council and that it is therefore sufficient.

### Findings of the Court

- 36 The duty to give reasons for a decision has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Community judicature to exercise its power to review the legality of the decision (see, in particular, Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 15, and Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 66). Whether a statement of reasons satisfies those requirements is a question to be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29).

- 37 It is also clear from the case-law of the Court of First Instance that the Council is obliged to consider, in the case of each document to which access is sought, whether, in the light of the information available to the Council, disclosure is in fact likely to undermine one of the facets of public interest protected by the first category of exceptions (Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 112).
- 38 It follows that in its statement of reasons for its decision the Council must show that it has carried out a concrete assessment of the documents in question.
- 39 On this point, the Council claims that the CIREA reports and reports drawn up for CIREA all belong to the same category in that they share common features. That argument cannot be accepted. Those reports contain information relating to various periods between 1994 and 1998 and concern very different third countries, such as Zaïre and China, with whom the European Union has changeable diplomatic relations.
- 40 Moreover, examination of the 10 reports drawn up for CIREA by the Danish authorities, to which the applicant has had access, shows that the information contained in those documents varies considerably, not only in its nature (description of the political, economic, legal and military system, the human rights situation, relations between clans or minorities, level of public safety and so forth), but also in its degree of sensitivity.
- 41 It is not clear from the statement of reasons for the contested decision, in which the Council confined itself to indicating that the reports contained sensitive information disclosure of which to the public could damage the European Union's

relations with the countries concerned (see paragraph 15 above), that the Council had examined each of the documents individually, however briefly, or even in groups having the same essential features.

- 42 Moreover, it appears from the documents before the Court that access to four other reports drawn up for CIREA was refused although, according to the Council, their content was very similar to that of the 10 Danish reports referred to above. That decision was taken without the Council putting forward any reasons which would have enabled the applicant to understand why there was a risk that disclosure of those four reports might have a different impact on the diplomatic relations of the European Union.
- 43 In those circumstances, even though the Council maintains that it analysed each individual document requested, the statement of reasons for the contested decision contains no evidence of any such analysis.
- 44 Moreover, when a reply confirms the rejection of an application on the same grounds, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information available to the applicant about the nature and content of the requested documents.
- 45 Whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances.
- 46 That is the case where, during the procedure in which application is made for access to documents, the applicant puts forward factors capable of casting doubt on whether the first refusal was well founded. In those circumstances, the

requirements governing the statement of reasons mean that the institution is obliged, when replying to a confirmatory application, to state why those factors are not such as might warrant a change in its position. Otherwise, the applicant would not be able to understand the reasons for which the author of the reply to the confirmatory application has decided to confirm the refusal on the same grounds.

- 47 In the present case, the applicant, in his confirmatory application, set out, in connection with CIREA reports, the arguments which led him to believe that the fears expressed by the Secretary-General of the Council concerning the release of the documents in question were unjustified. In the contested decision, however, the Council did not give any reason for dismissing those arguments such as would enable the applicant to understand the reasons for maintaining its refusal.
- 48 It follows that the contested decision does not satisfy the requirements governing the statement of reasons under Article 190 of the Treaty and must be annulled.

*Plea of breach of Decision 93/731, in that the Council did not grant partial access to the documents*

#### Arguments of the parties

- 49 The applicant maintains that, in dismissing the possibility of granting partial access to the documents, the Council disregarded the principle of proportionality.

If the disclosure of certain reports could undermine the protection of the public interest, the Council should at least grant access to those parts of the reports which are not covered by the exception. That solution is necessary to ensure the widest possible access to Council documents.

- 50 As regards the list of contact persons, the Council could have given effect to the applicant's right of access to that list without thereby undermining the proper functioning of the information exchange network on asylum cases established between the Member States' authorities by merely removing direct telephone numbers and e-mail addresses.
- 51 The Council denies that it was possible to give partial access to the documents. It bases its decision, first of all, on an interpretation which it claims is consistent with the letter and spirit of Decision 93/731: that decision refers to a right of access to 'documents' of the Council, not to information held by the Council, and the objective of that decision is to allow the public to have access to the Council's documents, not to the information contained in them.
- 52 Secondly, the Council relies on the features of the reports requested by the applicant. It maintains that it cannot give access to certain passages of those documents because the difficulty lies precisely in determining which passages do not give rise to a risk of causing problems in relations with certain third countries. The only way to obviate any such risk would be to enter into consultations with the country concerned, which would obviously be likely to jeopardise the interests which the Council must protect.

- 53 Concerning the list of contact persons, it states that, when a document contains information emanating from several Member States, the fact of limiting access to the data communicated by some of them would isolate the others with regard to public opinion.

### Findings of the Court

- 54 It must be borne in mind, at the outset, that the Court of First Instance has already held that Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions (Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraph 87).
- 55 Moreover, the principle of proportionality would allow the Council, in particular cases where the size of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration (*Hautala v Council*, cited above, paragraph 86).
- 56 In any event, as pointed out in paragraph 37 above, the Council is obliged to carry out a specific assessment of the risk that disclosure of the documents to

which access is sought could entail for the public interest. In those circumstances, the removal of sensitive passages from the documents should not necessarily involve an intolerable burden of work for the institution.

57 Moreover, the Council's arguments based on the features of the reports requested by the applicant and the difficulty of determining in this case which passages are not covered by the exception cannot be accepted. Examination of the 10 Danish reports drawn up for CIREA to which the applicant was granted access shows that a large part of the information which they contain is made up of descriptions and findings of fact which clearly do not fall under the exception relied on.

58 With regard to the refusal to grant access to the list of contact persons, the applicant expressly confirmed in his observations to the Council's response of 18 May 1999 that he does not wish to have access to the telephone numbers and e-mail addresses of the persons on the list.

59 In relation to the argument that partial access, confined to the data communicated by certain Member States, would lead to isolating the others with regard to public opinion, it need merely be pointed out that the Council has not shown how such considerations can fall within the exceptions provided for in Article 4 of Decision 93/731.

- 60 It follows from all the foregoing that, in refusing to grant access to passages in the documents requested that are not covered by the public interest exception on which the Council relies, the Council applied that exception in a disproportionate manner.
- 61 In those circumstances, the contested decision must be annulled without there being any need for the Court to address the question whether the plea of breach of the fundamental principle that access should be given to documents is well founded.
- 62 In so far as the Court considers that it has sufficient information to uphold the applicant's claims and to annul the contested decision in its entirety, it does not consider it necessary to ask the Council to furnish the documents in question to it.

## Costs

- 63 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, having regard to the applicant's pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Annuls the Council's decision of 28 September 1998, as amended by the decision of 18 May 1999, refusing the applicant access to certain reports drawn up by the Centre for Information, Discussion and Exchange on Asylum, to certain reports of joint missions or reports of missions undertaken by Member States sent to the Centre, and to the list of contact persons in the Member States involved with asylum cases;
2. Orders the Council to pay the applicant's costs and to bear its own costs.

Moura Ramos

Tiili

Mengozzi

Delivered in open court in Luxembourg on 6 April 2000.

H. Jung

Registrar

V. Tiili

President