

Case T-253/02

Chafiq Ayadi

v

Council of the European Union

(Common foreign and security policy — Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Competence of the Community — Freezing of funds — Principle of subsidiarity — Fundamental rights — Jus cogens — Review by the Court — Action for annulment)

Judgment of the Court of First Instance (Second Chamber), 12 July 2006 . . . II - 2148

Summary of the Judgment

1. *Procedure — Intervention — Application not limited to supporting the form of order sought by one of the parties*
(Statute of the Court of Justice, Art. 40, fourth para.; Rules of Procedure of the Court of First Instance, Arts 113 and 116(3))

2. *Actions for annulment — Action directed against an act confirming a previous act not challenged within the period prescribed*
(Art. 230 EC)
3. *Actions for annulment — Jurisdiction of the Community judicature*
(Arts 5, second para., EC, 60 EC, 230 EC, 301 EC and 308 EC)
4. *Public international law — Charter of the United Nations — Decisions of the Security Council*
5. *European Communities — Judicial review of the legality of the acts of the institutions*
(Council Regulation No 881/2002)
6. *European Communities — Judicial review of the legality of the acts of the institutions*
(Council Regulation No 881/2002, as modified by Regulation No 561/2003, Art. 2a)
7. *European Communities — Judicial review of the legality of the acts of the institutions*
(Council Regulation No 881/2002)
8. *Actions for annulment — Community act implementing resolutions of the United Nations Security Council — Regulation No 881/2002*
(Art. 230 EC; Council Regulation No 881/2002)
9. *European Communities — Community act implementing resolutions of the United Nations Security Council — Regulation No 881/2002*
(Art. 6 EU; Council Regulation No 881/2002)
10. *Acts of the institutions — Statement of reasons — Obligation — Scope*
(Art. 253 EC; Council Regulation No 881/2002)

1. Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.

An intervener is not, therefore, entitled to raise a plea of inadmissibility not raised by the party it supports. However, under Article 113 of the Rules of Procedure of the Court of First Instance, the latter may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by the inter-

veners. A plea alleging a bar to proceeding that concerns the admissibility of the action raises such a matter of public policy.

(see paras 64, 67, 68)

2. An action for annulment directed against an act which merely confirms a previous act, not challenged within the period prescribed, is inadmissible. An act is a mere confirmation of an earlier act if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier act was addressed.

(see para. 70)

3. The Community judicature reviews the lawfulness of Community acts in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC. However, this general principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community. With regard to the interruption or reduction of economic relations with third coun-

tries, those very articles provide for action by the Community when that is 'deemed necessary' in the form of a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy (CFSP). In the sphere of application of Articles 60 EC and 301 EC, the EC Treaty thus confers on the Union the power to determine whether action by the Community is necessary. Such determination falls within the ambit of the exercise of discretion by the Union. It excludes any right for individuals to challenge, in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC, the lawfulness of the action subsequently taken by the Community in accordance with the CFSP common position or joint action of the Union. Moreover, since the sphere of application of Articles 60 EC and 301 EC may be extended, by having recourse to the additional legal basis of Article 308 EC, to the adoption of economic and financial sanctions imposed on individuals in the battle against international terrorism even when no connection with third countries has been established, it must follow that the lawfulness of Community measures adopted on that basis in accordance with a CFSP common position or joint action of the Union cannot be challenged by individuals in the light of the principle of subsidiarity either.

In any event, even assuming that the principle of subsidiarity finds application

in the sphere of application of Articles 60 EC and 301 EC, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level.

in the same way as its Member States, by virtue of the Treaty establishing it. First, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.

(see paras 107-112)

(see para. 116)

4. From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention on Human Rights and Fundamental Freedoms and, for those that are also members of the Community, their obligations under the EC Treaty. That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations.
5. In light of the principle of the primacy of the law of the United Nations over Community law, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law.

Although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations

The resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations therefore fall, in principle, outside the ambit of the

Court's judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

(see para. 116)

6. The freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation No 561/2003, infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.

Moreover Regulation No 881/2002 and the Security Council resolutions implemented by that regulation do not prevent the persons concerned from leading a satisfactory personal, family and social life, given that the use for strictly private ends of the frozen economic resources is not forbidden per se by those measures. Likewise, those measures do not of themselves prevent such persons from carrying on business or trade activities, whether as an employee or as a self-employed person, but in substance concern the receipt of income from such activity. In particular, by virtue of Article 2a of the regulation in question, Article 2 may be inapplicable, subject to the conditions set by that provision, to any kind of funds or economic resources, including therefore the economic resources needed for the carrying on of employed or self-employed professional activities and the funds received or receivable in connection with such activity. Although Article 2a constitutes a provision derogating from Article 2, it is not to be interpreted strictly in the light of the humanitarian objective that it plainly pursues. It is for the national authorities, which are best placed to take into consideration the special circumstances of each case, to determine in the first place whether such a derogation may be granted and then to ensure that it is reviewed and implemented in keeping with the freezing of the funds of the person concerned.

(see paras 116, 126, 127, 130, 132)

7. The right of the persons concerned to be heard has not been infringed, given that the resolutions of the Security Council imposing sanctions on Usama bin Laden, the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities do not provide such a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list of persons whose funds are to be frozen and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned. In particular, in a situation in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it.
8. In dealing with an action for annulment of Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. The Court also reviews the lawfulness of that regulation having regard to the Security Council's resolutions which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions. The Court then reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

Nor were the Community institutions obliged to hear the persons concerned before Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban was adopted or in the context of the adoption and implementation of that act.

(see para. 116)

On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order. Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it

has taken or yet, subject to the limited extent of the review carried out in the light of *jus cogens*, to check indirectly the appropriateness and proportionality of those measures. To that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it appropriate to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.

However, that lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*. The right of access to the courts is in fact not absolute. The limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, must be held to be inherent in that right. Such a limitation is, moreover, justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued. Last, in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a formalised procedure involving the governments concerned, constitute another reasonable method of

affording adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens*.

(see para. 116)

9. The right of interested persons to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list of persons and entities whose funds must be frozen, must be classed as a right guaranteed not only by resolutions of the Security Council, as interpreted by the Sanctions Committee, but also by the Community legal order.

It follows that, both in examining such a request for review and in the context of the consultations between States and other actions that may take place, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations. The Member States must thus ensure, so far as is possible, that interested persons are put in a

position to put their point of view before the competent national authorities when they present a request for their case to be reviewed. Furthermore, the margin of assessment that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them. Thus, the Member States would not be justified in refusing to initiate the review procedure provided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence. Similarly, having regard to the fact that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied.

review based on the domestic law of the State of the government to which their request to be removed from the list was addressed, indeed even relying directly on Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban and on the relevant resolutions of the Security Council which that regulation puts into effect, against any breach by the competent national authority of the right of the persons involved to request the review of their case in order to be removed from the list of persons to whom sanctions are applicable. In such an action, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, which may lead it to refrain from applying, if need be, a national rule preventing that result, such as a rule excluding from judicial review a refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals.

(see paras 145-150, 152)

What is more, it is open to the persons concerned to bring an action for judicial

10. The statement of reasons required by Article 253 EC must show clearly and unequivocally the Council's reasoning so as to enable the persons concerned to ascertain the reasons for the measures and to enable the Community judicature to exercise its power of review. Furthermore, the question whether a statement of reasons is adequate must be assessed

by reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. In the case of a measure intended to have general application, as here, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other.

tain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and recitals 1 to 7, in particular, in the preamble thereto, fully satisfy those requirements. The fact that the assertion that there was a risk of competition's being distorted, a result which according to its preamble the contested regulation seeks to prevent, is unconvincing cannot call that finding in question. Indeed, even if one recital of a measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons.

In this regard, the cited legal bases of Regulation No 881/2002 imposing cer-

(see paras 164-167)