



C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, judgment of 3 September 2008

Institutional matters – exercise of Community powers and respect for fundamental rights in the fight against terrorism

The Court makes clear the requirement of absolute respect for fundamental rights when exercising Community powers.

Following various resolutions of the United Nations Security Council, all UN Member States were called upon to freeze the funds and other financial assets controlled directly or indirectly by individuals or entities designated by the sanctions committee of the Security Council as being associated with Usama bin Laden, Al-Qaeda or the Taliban.

In order to implement those resolutions, the Council adopted a common position within the framework of the CFSP concerning restrictive measures against the persons concerned and then, on the basis of Articles 60, 301 and 308 EC, adopted Regulation 881/2002, which provides, *inter alia*, for the freezing of the funds and other economic resources of those individuals and entities, which also appear in a list annexed to the regulation and are regularly updated on the basis of successive UN resolutions.

Mr Kadi, a Saudi resident, and the Al Barakaat International Foundation, established in Sweden – both of which appear in the list annexed to the abovementioned regulation – brought actions for annulment before the Court of First Instance, claiming that the Council was not competent to adopt that regulation and that the regulation breached several of their fundamental rights, in particular the right to property and the rights of the defence. By its judgments of 21 September 2005 (Case T-306/01 *Yusuf and Al Barakaat Foundation v Council* and Case T-315/01 *Kadi v Council and Commission*), the Court of First Instance dismissed these actions, taking the view, *inter alia*, that the Member States were required to comply with the Security Council resolutions under the terms of the Charter of the United Nations, an international Treaty which prevails over Community law. Consequently, in the view of the Court of First Instance, the Community judicature may review the legality of the regulation at issue only in the light of higher-ranking rules of general international law – understood to constitute a public international legal system from which neither the Member States nor the UN courts can derogate (*jus cogens*) – which were not infringed in this case.

Mr Kadi and Al Barakaat then lodged appeals against those judgments before the Court of Justice.

The Court confirmed that Articles 60, 301 and 308 are the correct legal basis for the contested regulation. In particular, the Court pointed to the relevance of Article 308 EC not, as the Court of First Instance had held, to the pursuit of the objective of combating international terrorism – which is a CFSP objective and does not therefore fall under the “*objectives of the Community*” within the meaning of Article 308 EC – but rather with regard to enabling the adoption of restrictive measures of an economic nature under a Community instrument in order to implement the actions decided upon within the framework of the CFSP.

However, the Court did point out that the full review by the Community judicature of the validity of any act subject to its jurisdiction in the light of fundamental rights is the expression of a constitutional guarantee stemming from the EC Treaty. The fact that the Community judicature may have to review the legality of a Community act which seeks to implement a resolution of the UN Security Council does not permit derogation



from that constitutional guarantee; however, this does not call into question the primacy of such a resolution from the perspective of international law. The Court therefore concluded that the Court of First Instance erred in law by holding that the Community judicature was not competent to review the legality of Regulation 881/2002 with regard to *jus cogens*. The judgments appealed against were consequently set aside.

The Court then decided to give its own ruling on the substance of the case as it is permitted to do under Article 61 of its Statute.

Examining the plea in law relating to respect for the rights of the defence, the Court stated that the effectiveness of judicial review means that the Community authority is bound to communicate to the person concerned the grounds on which the measure adversely affecting him/her is based in order to enable him/her to exercise his/her right to bring an action. The Court acknowledged that the effectiveness of measures to freeze funds requires that those measures take advantage of the element of surprise and apply with immediate effect. Consequently, even though the Community authorities were not required to provide a statement of grounds or hold a hearing of the persons concerned prior to the inclusion of their names in the list, those authorities should nevertheless have done so within a reasonable period after those measures were enacted. As this did not occur in this case, the appellants' rights of defence, in particular their right to be heard were not respected. This breach also resulted in an infringement of the right to judicial review, since the appellants were likewise unable to defend their rights in satisfactory conditions before the Community judicature.

With regard to the plea in law relating to the restriction of the right to property, while, on the one hand, the Court did accept in principle that such a restriction could be justified in the fight against the threats to international peace and security posed by acts of terrorism, on the other hand, it pointed out that the contested regulation was adopted without furnishing any guarantee enabling Mr Kadi to put his case to the competent authorities, whereas, having regard to the general application and effective continuation of the fund freezing measures affecting him, such a guarantee is necessary to ensure that his right to property is respected.

In the light of these breaches, the Court was prompted to annul Regulation 881/2002 to the extent that it concerns Mr Kadi and Al Barakaat. However, taking into account the fact that annulment with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures and that, furthermore, it cannot be ruled out that imposing such measures on Mr Kadi and Al Barakaat may nonetheless prove to be justified, the Court maintained the effects of that regulation for a period of three months in order to allow the Council to remedy the infringements found.