

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 *

In Case C-27/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 19 January 2009,

French Republic, represented by E. Belliard and by G. de Bergues and A. Adam, acting as Agents,

appellant,

the other parties to the proceedings being:

People's Mojahedin Organization of Iran, established at Auvers-sur-Oise (France), represented by J.-P. Spitzer, avocat, D. Vaughan QC and M.-E. Demetriou, Barrister,

applicant at first instance,

* Language of the case: English.

Council of the European Union,

defendant at first instance,

European Commission, represented by S. Boelaert and P. Aalto, acting as Agents,
with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur),
K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, E. Juhász, G. Arestis, A.
Borg Barthet, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Arabadjiev and C. Toader,
Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 September
2010,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2011,

gives the following

Judgment

- 1 By its appeal, the French Republic seeks to have set aside the judgment of the Court of First Instance of the European Communities of 4 December 2008 in Case T-284/08 *People's Mojahedin Organisation of Iran v Council* [2008] ECR I-3487 ('the judgment under appeal'), by which that court upheld the action brought by the People's Mojahedin Organization of Iran ('the PMOI') for annulment of Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC (OJ 2008 L 188, p. 21, 'the contested decision'), insofar as it concerned the PMOI.

Legal context

United Nations Security Council Resolution 1373 (2001)

- 2 On 28 September 2001, the United Nations Security Council ('the UN Security Council') adopted Resolution 1373 (2001) on strategies to combat terrorism and, in particular, the financing of terrorism, by any means. Point 1(c) of the Resolution provides,

inter alia, that all States are to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of or at the direction of such persons and entities.

- 3 This resolution does not provide a list of persons to whom the restrictive measures must be applied.

Common Position 2001/931/CFSP

- 4 On 27 December 2001, on the view that action by the European Community was necessary in order to implement Security Council Resolution 1373 (2001), the Council of the European Union adopted, inter alia, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).
- 5 Article 1(1) of that Common Position provides:

‘This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.’

- 6 Article 1(2) and (3) of Common Position 2001/931 defines what is meant by ‘persons, groups and entities involved in terrorist acts’ and ‘terrorist act’, respectively.

- 7 Article 1(4) and (6) of that Common Position provides:

‘4. The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

For the purposes of this paragraph, “competent authority” shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.’

- 8 The PMOI was added to the list in the Annex to Common Position 2001/931 by Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75).
- 9 The PMOI's inclusion in the list appearing in the Annex to Common Position 2001/931 was then maintained by a series of subsequent decisions taken by the Council in accordance with Article 1(6) of that Common Position.

Regulation (EC) No 2580/2001

- 10 On 27 December 2001 the Council adopted Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).
- 11 Recital 5 in the preamble to Regulation No 2580/2001 states:

'Action by the Community is necessary in order to implement the CFSP [common foreign and security policy] aspects of Common Position 2001/931/CFSP'

¹² In the words of Article 2 of that regulation:

‘1. Except as permitted under Articles 5 and 6:

(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP..’

¹³ The PMOI was added to the list referred to in Article 2(3) of Regulation No 2580/2001 by Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2001/927/EC (OJ 2002 L 116, p. 33).

- 14 Subsequently, the PMOI's inclusion in the list referred to in Article 2(3) of Regulation No 2580/2001 was continued by further Council decisions, adopted in accordance with Article 2(3) of Regulation No 2580/2001, including the contested decision.
- 15 The PMOI was removed from that list by Council Decision 2009/62/EC of 26 January 2009 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2008/583/EC (OJ 2009 L 23, p. 25).
- 16 Recital 5 in the preamble to Decision 2009/62 states:

'Following the judgment [under appeal], one group has not been included in the list of persons, groups and entities to which Regulation (EC) No 2580/2001 applies.'

- 17 It is not disputed that the group referred to in that recital is the PMOI.

Background to the case

- 18 For an account of the earlier background to the present dispute, paragraph 1 of the judgment under appeal makes reference to the judgments of the General Court in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, paragraphs 1 to 26, and Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019, paragraphs 1 to 37.

19 Paragraphs 1, 2, 12 and 16 of *Organisation des Modjahedines du peuple d'Iran v Council state* as follows:

1. As appears from the case-file, [the PMOI] was founded in 1965 and set itself the objective of replacing the regime of the Shah of Iran, then the mullahs' regime, by a democracy. In 1981 it took part in the foundation of the National Council of Resistance of Iran (NCRI), a body defining itself as the "parliament in exile of the Iranian resistance". At the time of the facts giving rise to the present dispute, it was composed of five separate organisations and an independent section, making up an armed branch operating inside Iran. According to [the PMOI], however, it and all its members have expressly renounced all military activity since June 2001 and it no longer has an armed structure at the present time.

2. By order of 28 March 2001, the United Kingdom Secretary of State for the Home Department ("the Home Secretary") included [the PMOI] in the list of organisations proscribed under the Terrorism Act 2000. The applicant brought two parallel actions against that order, one an appeal before the Proscribed Organisations Appeal Commission ("POAC"), the other for judicial review before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) ("the High Court").

...

12. By judgment of 17 April 2002 [that court] dismissed the action for judicial review brought by the applicant against the Home Secretary's order of 28 March 2001 ..., considering, essentially, that the POAC was the appropriate forum to hear

[the PMOI]'s arguments, including those alleging infringement of the right to be heard.

...

16. By judgment of 15 November 2002 the POAC dismissed the appeal brought by the applicant against the Home Secretary's order of 28 March 2001 ..., considering, inter alia, that there was no requirement to hear [the PMOI]'s views beforehand, such a hearing being impractical or undesirable in the context of legislation directed against terrorist organisations. According to that same decision, the legal scheme of the Terrorism Act 2000 provides a genuine opportunity for the applicant's views to be heard before the POAC.'

²⁰ The more recent background to the dispute is summarised as follows in paragraphs 2 to 10 of the judgment under appeal:

'2. By judgment of 7 May 2008, the Court of Appeal of England and Wales (United Kingdom) ("the Court of Appeal") dismissed the application of [the Home Secretary] for permission to appeal to that court against [the POAC]'s decision of 30 November 2007 by which it had allowed an appeal against the Home Secretary's decision of 1 September 2006 refusing to lift the proscription of [the PMOI] as an organisation concerned in terrorism and ordered the Home Secretary to lay before the United Kingdom Parliament the draft of an Order removing the applicant from the list of organisations proscribed in the United Kingdom under the Terrorism Act 2000....

3. In that decision, the POAC inter alia described as "perverse" the Home Secretary's conclusion, in his decision of 1 September 2006 refusing to lift the applicant's

proscription, that the applicant was, at that period, still an organisation “concerned in terrorism” within the meaning of the Terrorism Act 2000....

...

5. In its judgment, the Court of Appeal upheld the POAC’s findings and moreover stated that the closed material adduced by the Home Secretary reinforced the Court of Appeal’s conclusion that the Home Secretary could not reasonably have considered that the PMOI intended in future to revert to terrorism.

6. By order of 23 June 2008, which entered into force on 24 June 2008, the Home Secretary therefore removed the PMOI’s name from the list of organisations proscribed under the Terrorism Act 2000, and this was approved by both Houses of Parliament in the United Kingdom.

7. By [the contested decision], the Council nonetheless maintained, with others, [the PMOI]’s name on the list in the Annex to ... Regulation ... No 2580/2001 ...

8. Recital 5 in the preamble to the contested decision which, it is common ground, refers to the PMOI, states:

“In the case of one group, the Council has taken account of the fact that the decision by a competent authority on the basis of which the group was included on the list has not been in force since 24 June 2008. However, new information concerning the group has been brought to the Council’s attention. The Council considers that this new information warrants the group’s inclusion [in] the list.”

9. The contested decision was notified to [the PMOI] under cover of a letter from the Council dated 15 July 2008... In that letter, the Council stated, in particular, the following:

“The Council has again decided to include [the PMOI] on the list ... The Council has taken note of the fact that the competent authority decision which served as a basis for including [the PMOI] on the list is no longer in force as of 24 June. However, the Council has been provided with new information relevant to this listing. Having considered this new information, the Council has decided that [the PMOI] should still be included on the abovementioned list. Therefore, the Council has amended the statement of reasons accordingly.”

10. In the statement of reasons enclosed with the letter of notification ..., the Council stated the following:

“The [PMOI] is a group formed in 1965 with the initial aim of overthrowing the imperial régime. Its members participated in the elimination of several thousand “agents” of the old régime and were among the leaders in the taking of hostages at the US Embassy in Teheran. Although initially one of the most radical groups of the Islamic revolution, after being banned the PMOI went into hiding and carried out a number of attacks against the régime in place in Iran. The organisation was behind terrorist attacks, ... Members of this organisation, located in various Member States of the European Union, are moreover currently being prosecuted for criminal activities aimed at funding their activities. These acts fall within Article 1(3), points (a), (b), (d), (f), (g), (h) and (i) of Common Position 2001/931/CFSP, and were committed with the aims set out in Article 1(3), points (i) and (iii) thereof.

The [PMOI] falls within Article 2(3)(ii) of Regulation (EC) No 2580/2001.

In April 2001, the anti-terrorist prosecutor's office of the court of first instance [sic] of Paris opened a judicial inquiry into the charges of "criminal associations for the preparation of terrorist acts" as provided for under French law by Act No 96/647 of 22 July 1996. The investigations conducted in the course of that judicial inquiry resulted in the targeting of alleged members of the [PMOI] for a series of offences all having a principal or subsidiary link with a collective undertaking whose aim is to seriously disrupt public order through intimidation or terror. In addition to the aforementioned criminal offence, the inquiry also focused on the "financing of a terrorist group" as provided for under French law by Act No 2001/1062 of 15 November 2001 on security in everyday life.

On 19 March 2007 and 13 November 2007, the Paris anti-terrorist prosecutor's office brought supplementary charges against alleged members of the PMOI. These proceedings were prompted by the need to enquire into further elements arising from the investigations conducted between 2001 and 2007. They particularly focused on the charges of "laundering the direct or indirect proceeds of fraud offences against particularly vulnerable persons and organised fraud" having a link with a terrorist undertaking as provided for under French law by Act No 2003/706 of 2 August 2003.

A decision in respect of the [PMOI] has therefore been taken by a competent authority within the meaning of Article 1(4) of Common Position 2001/931/CFSP.

The Council notes that these proceedings are still in progress and were given wider scope in 2007 as part of the combating of financing operations conducted

by terrorist groups. The Council is satisfied that the reasons for including [the PMOI] on the list of persons and entities subject to the measures set out in Article 2(1) and (2) of Regulation (EC) No 2580/2001 remain valid.

Having considered these elements, the Council has decided that the [PMOI] should continue to be subject to the measures set out in Article 2(1) and (2) of Regulation (EC) No 2580/2001.”

The action before the General Court and the judgment under appeal

²¹ By application lodged at the Registry of the General Court on 21 July 2008, the PMOI brought proceedings against the Council seeking annulment of the decision at issue and claiming that that court should:

— annul the contested decision, insofar as it applies to the applicant, and

— order the Council to pay the costs.

²² The French Republic and the European Commission were granted leave to intervene in those proceedings in support of the form of order sought by the Council.

- 23 In support of its claims, the PMOI advanced, in essence, five pleas in law: the first, alleging a manifest error of assessment of the evidence; the second, breaches of Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and of the rules relating to the burden of proof; the third, breach of the applicant's right to effective judicial protection; the fourth, breach of the rights of the defence and of the obligation to give reasons for a decision and the fifth, abuse or misuse of powers or procedures.
- 24 With regard to the fourth plea, alleging breach of the rights of the defence, the General Court stated, at paragraph 36 of the judgment under appeal, that it was common ground that the Council adopted the contested decision without first informing the applicant of the new information or new material in the file which, in its view, justified continuing to include it in the list referred to in Article 2(3) of Regulation No 2580/2001, namely, that relating to the judicial inquiry opened in April 2001 by the anti-terrorist prosecutor's office of the Tribunal de grande instance of Paris and to the two supplementary charges brought in March and November 2007. The General Court added that, *a fortiori*, the Council had not enabled the applicant to make known its view of the matter effectively, before the contested decision was adopted.
- 25 The General Court concluded therefrom, at paragraph 37 of the judgment under appeal, that it must be held that the contested decision had been adopted in disregard of the principles stated, in particular, in *Organisation des Modjahedines du peuple d'Iran v Council*, paragraphs 120, 126 and 131, so far as the rights of the defence were concerned.
- 26 In addition, at paragraphs 39 to 44 of the judgment under appeal, the General Court considered, in the first place, the Council's argument that that institution was justified in so acting because of the particular situation in which it found itself in the circumstances of the case, in particular, the urgency with which the contested decision had to be adopted.

- 27 In this connection, the General Court held, at paragraph 40 of the judgment under appeal, that the urgency alleged had by no means been established.
- 28 The General Court noted that more than two months had elapsed between 7 May 2008, when the Court of Appeal gave its judgment making it definitively impossible for the Council still to rely on the Home Secretary's order of 28 March 2001, and 15 July 2008, the date on which the contested decision was adopted. The Council has not, however, explained why it could not, immediately after 7 May 2008, take steps with a view either to removing the applicant from the list referred to in Article 2(3) of Regulation No 2580/2001 or to maintaining it in that list on the basis of new evidence.
- 29 In addition, the General Court held, at paragraph 41 of the judgment under appeal, that, even assuming that the new material was not communicated to the Council by the French authorities until June 2008, this does not explain why that new material could not be communicated forthwith to the PMOI, if the Council intended to rely on it against the latter.
- 30 It added that while, in its observations in the case giving rise to the judgment of 23 October 2008 in *People's Mojahedin Organization of Iran v Council*, the Council expressly stated its intention of taking a position, as a matter of urgency, on 'new elements' brought to its attention, that institution nevertheless refrained from forwarding them to the PMOI, without claiming that any factual or legal obstacle prevented its doing so, even though the General Court had, by its judgment in *People's Mojahedin Organization of Iran v Council*, annulled one of its earlier decisions, precisely on the ground that no such communication had been made before the decision was adopted.
- 31 At paragraph 42 of the judgment under appeal, the General Court observed that neither the Court of Appeal's judgment of 7 May 2008 nor the Home Secretary's order of 23 June 2008 had an automatic, immediate effect on Council Decision 2007/868/EC of 20 December 2007 implementing Article 2(3) of Regulation No 2580/2001 and

repealing Decision 2007/445/EC (OJ 2007 L 340, p. 100), then applicable, that decision remaining in force and legally binding, in accordance with the presumption of legality attaching to acts of the European Union, for so long as it was not withdrawn, declared void in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.

32 In the second place, the General Court rejected the Council's argument that the statement of reasons of which the PMOI was notified enabled the latter's rights of defence to be observed.

33 In this regard, the General Court ruled, at paragraph 46 of the judgment under appeal, that this argument arises from a confusion of the safeguarding of the rights of the defence in the context of the administrative procedure with the safeguarding of the right to an effective judicial remedy against the act having adverse effects adopted at the end of that procedure.

34 The General Court concluded therefrom, at paragraph 47 of the judgment under appeal, that, the fourth plea in law being well founded, the contested decision had to be annulled in so far as it concerned the PMOI.

35 At paragraph 48 of the judgment under appeal, the General Court indicated that, even though it considered it unnecessary in the circumstances, it would none the less examine the second and third pleas in law, having regard to their importance in relation to the fundamental right to effective judicial protection.

36 With regard to those pleas, the General Court concluded, at paragraph 78 of the judgment under appeal, first, that it had not been satisfactorily proved that the contested decision had been adopted in accordance with the provisions of Article 1(4) of Common Position 2001/931 and of Article 2(3) of Regulation No 2580/2001 and, second,

that the very circumstances of its adoption infringed the applicant's right to effective judicial protection.

37 In consequence, the General Court held, at paragraph 79 of the judgment under appeal, that the second and third pleas in law were founded.

Forms of order sought on appeal

38 By its appeal, the French Republic claims that the Court of Justice should:

- set aside the judgment under appeal; and

- itself give final judgment in the matter, dismissing the PMOI's action, or refer the case back to the General Court.

39 The PMOI contends that the Court should:

- declare the appeal inadmissible;

- or, alternatively, declare that it is unnecessary to adjudicate on the appeal;

- or, in the further alternative, dismiss the appeal; and

- in any event, order the appellant to pay the respondent's costs.

Concerning the appeal

- ⁴⁰ The French Republic puts forward three grounds of appeal, alleging that the General Court committed errors of law in its assessment of the principles relating to the rights of defence, of Article 1(4) of Common Position 2001/931 and of the principles relating to the right to effective judicial protection, respectively.

Admissibility of the appeal

Arguments of the parties

- ⁴¹ The PMOI, recalling that the contested decision has been repealed and replaced by Decision 2009/62, which no longer includes it in the list referred to in Article 2(3) of Regulation No 2580/2001, argues that the French Republic has no legal interest in bringing this appeal and that the latter is therefore inadmissible. It maintains, in the alternative, that the Court ought to refuse to rule on the appeal on the ground that it has no purpose.

- 42 The French Republic takes the view that the appeal is admissible and, in this respect, argues that, in accordance with the third paragraph of Article 56 of the Statute of the Court of Justice, it need not substantiate any legal interest in bringing proceedings.

Findings of the Court

- 43 The Court has consistently held that for an appellant to have an interest in bringing proceedings the appeal must be capable, if successful, of procuring an advantage to the party bringing it (see, in particular, Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051, paragraph 24 and case-law cited).
- 44 However, once the French Republic intervened in proceedings before the General Court, it follows from the second paragraph of Article 56 of the Statute of the Court of Justice that that Member State may bring an appeal even when the General Court's decision does not directly affect it.
- 45 In addition, it follows from the third paragraph of that article that the Member States, whether or not they were parties to the case at first instance, do not have to show interest in order to bring an appeal against a judgment of the General Court (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 171).
- 46 Moreover, and contrary to what the PMOI maintains, this appeal has not become devoid of purpose because the contested decision including the PMOI in the list referred to in Article 2(3) of Regulation No 2580/2001 was repealed and replaced by Decision 2009/62 which, making reference to the judgment under appeal, no longer includes the PMOI in the updated version of the list.

- 47 First, if the Court were to uphold the appeal and dismiss on its merits the PMOI's application for annulment of the contested decision, the result, as the French Republic has rightly maintained, would be that the decision would be restored in the legal order of the European Union so far as concerns the period from 16 July 2008, the date of entry into force of the contested decision, and 27 January 2009, the date of entry into force of Decision 2009/62 repealing, without retroactive effect, the contested decision and removing the PMOI's name from the list referred to in Article 2(3) of Regulation No 2580/2001.
- 48 Nor, secondly, does it appear that, as a consequence of the adoption of Decision 2009/62, the dispute between the parties has been brought to an end and that the appeal has therefore become devoid of purpose for that reason (see, by analogy, the order of 1 December 2004 in Case C-498/01 P *OHIM v Zapf Creation* [2004] ECR I-11349, paragraph 12).
- 49 The French Republic still maintains that there were valid reasons for the inclusion by the contested decision of the PMOI's name in the list referred to in Article 2(3) of Regulation No 2580/2001, and it has argued before the Court that it retains an interest in having the errors made by the General Court in the judgment under appeal recognised by the Court, in order that it may request the Council to include the PMOI in that list once more.
- 50 In the circumstances, the appeal not having become devoid of purpose, the Court must adjudicate.

Substance

The first ground of appeal: error of law committed in the assessment of the principles relating to the rights of the defence

— Arguments of the parties

- 51 The French Republic complains that, at paragraph 37 of the judgment under appeal, the General Court held that the contested decision had been adopted in breach of the principles relating to the rights of the defence, inasmuch as the Council had adopted the decision without first informing the PMOI of the new information or new material in the file which, in its view, justified the continued inclusion of the PMOI in the list referred to in Article 2(3) of Regulation No 2580/2001.
- 52 The Court's case-law makes it clear that the requirement of prior notification of a fund-freezing measure is subject to exceptions, in particular in the case of an initial decision to freeze, when such notification would harm the effectiveness of those restrictive measures (Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paragraphs 339 to 341).
- 53 The French Republic maintains that, when the contested decision was adopted, there was clearly a threat that the fund-freezing measure applicable to the PMOI might be interrupted and, therefore, a danger that the effectiveness of the measure might be jeopardised.

- 54 Nor, since the Home Secretary had, by order of 23 June 2008 which entered into force the following day, struck the PMOI's name from the list of organisations proscribed under the Terrorism Act 2000, could the Home Secretary's order of 28 March 2001, a decision of a competent authority that formed the basis for Decision 2007/868, any longer serve as grounds for the inclusion of the PMOI in the list referred to in Article 2(3) of Regulation No 2580/2001, on pain of contravening Article 1(4) of Common Position 2001/931.
- 55 The French Republic adds that although that order of 23 June 2008 admittedly had no automatic, immediate effect on Decision 2007/868, the fact remains that the Council could not allow a situation to continue in which that decision lacked any basis, but had rather to act thereupon as soon as possible.
- 56 Given that on 9 June 2008 the Council had received, from the French authorities, new information, namely, the judicial inquiry opened on 9 April 2001 in relation to 17 alleged members of the PMOI and the judicial investigation of 24 persons, warranting, according to those authorities, their request for the PMOI to be included in the list referred to in Article 2(3) of Regulation No 2580/2001, the Council ought, in order to guarantee the effectiveness of the sanctions, to have avoided any interruption of the freezing of funds and, therefore, to have adopted as swiftly as possible a new decision including the PMOI in that list.
- 57 In addition, the French Republic recalls that, in accordance with Article 1(6) of Common Position 2001/931, at the end of June 2008 the Council was obliged to review, as soon as possible, the list as drawn up by Decision 2007/868.

58 The PMOI maintains that, in the judgment under appeal, the Court correctly rejected that line of argument put forward by the Council and taken up again in this appeal, holding, in particular, that in the circumstances of the case the Council was not entitled not to notify the PMOI in advance of the new matters at issue on the ground that, if it had done so, the freezing of the PMOI's funds would have been interrupted. The General Court's assessment relied, in addition, on matters of fact, which may not be challenged in an appeal.

— Findings of the Court

59 At paragraphs 36 and 37 of the judgment under appeal, the General Court held that, by adopting the contested decision without first informing the PMOI of the new information or new material in the file which, in its view, justified maintaining it in the list referred to in Article 2(3) of Regulation No 2580/2001 and, *a fortiori*, by failing to give it the opportunity of making known to advantage its views on the matter, the Council breached the principles relating to the observance of the rights of the defence set forth, in particular, in paragraphs 120, 126 and 131 of *Organisation des Modjahedines du peuple d'Iran v Council*.

60 The principles thus referred to by the General Court, and not challenged by the French Republic, may also be found in the Court of Justice's case-law (see, in connection with Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9), *Kadi and Al Barakaat v Council and Commission*, paragraphs 338 to 341).

- 61 It is to be borne in mind that, in the case of an initial decision to freeze funds, the Council is not obliged to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely in order to include that person or entity's name in the list referred to in Article 2(3) of Regulation No 2580/2001. So that its effectiveness may not be jeopardised, such a measure must be able to take advantage of a surprise effect and to apply immediately. In such a case, it is as a rule enough if the institution notifies the person or entity concerned of the grounds and affords it the right to be heard at the same time as, or immediately after, the decision is adopted.
- 62 In contrast, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or entity already appearing in the list referred to in Article 2(3) of Regulation No 2580/2001 is maintained, that surprise effect is no longer necessary in order to ensure that the measure is effective, with the result that the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard.
- 63 In the judgment under appeal, the General Court applied those principles to the facts of the case and rightly concluded that, given that the PMOI's name had been maintained, by the contested decision, in the list referred to in Article 2(3) of Regulation No 2580/2001, a list in which it had appeared ever since its original inclusion on 3 May 2002 pursuant to Decision 2002/334, the Council might not, as it did in that case, communicate the new incriminating evidence against the PMOI at the same time as it adopted the contested decision. The Council was bound, imperatively, to ensure that the PMOI's rights of defence were observed, that is to say, notification of the incriminating evidence against it and the right to be heard, before that decision was adopted.
- 64 In this regard, it is to be stressed, as the Advocate General did in point 103 of her Opinion, that the element of protection afforded by the requirement of notification of incriminating evidence and the right to make representations before the adoption

of a measure, such as the contested decision, that sets in motion the application of restrictive measures is fundamental and essential to the rights of defence. This is all the more the case because such measures have a considerable effect on the rights and freedoms of the persons and groups concerned.

⁶⁵ The purpose of the rule that the addressee of a decision affecting him adversely must be placed in a position to submit his observations before that decision is adopted is to enable the authority concerned effectively to take into account all relevant information. In order to ensure that the addressee is in fact protected, the object of that rule is, in particular, to enable him to correct an error or produce such information relating to his personal circumstances as will tell in favour of the decision's being adopted or not, or of its having this content or that (see, to this effect, Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 49).

⁶⁶ That right, fundamental to observance of the rights of defence during a procedure preceding the adoption of a restrictive measure such as the contested decision, is moreover expressly affirmed in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, recognised by Article 6(1) TEU as having the same legal value as the Treaties.

⁶⁷ If, as has been noted at paragraph 61 above, an exception to that fundamental right has been allowed with regard to initial decisions to freeze funds, that is justified by the need to ensure that the freezing measures are effective and, in short, by overriding considerations to do with safety or the conduct of the international relations of the Union and of its Member States (see, to this effect, *Kadi and Al Barakaat International Foundation v Council and Commission*, paragraph 342).

68 In paragraphs 39 to 44 of the judgment under appeal, the General Court nevertheless considered the Council's argument that that institution was justified in communicating the new incriminating evidence against the PMOI at the same time as the contested decision was adopted and not before, despite the fact that it was not an initial decision to freeze funds, because of the particular situation in which the Council found itself in that case, more specifically, the urgency with which the contested decision had to be adopted.

69 That line of argument is in substance repeated by the French Republic in this appeal.

70 The General Court held, first, that as of 7 May 2008, the date on which the Court of Appeal delivered its judgment, it became once and for all impossible for the Council to rely on the order of the Home Secretary of 28 March 2001 as a decision of a competent authority for the purpose of Article 1(4) of Common Position 2001/931 in order to maintain the inclusion of the PMOI in the list referred to in Article 2(3) of Regulation No 2580/2001. In addition, by order of 23 June 2008, which entered into force the following day, the Home Secretary acted on that judgment, striking the PMOI's name from the list of organisations proscribed under the Terrorism Act 2000.

71 Secondly, it is not disputed that on 9 June 2008 the Council received from the French Republic new information relating to legal proceedings brought in France against alleged members of the PMOI, which that Member State considered could warrant the continued inclusion of the organisation in the list referred to in Article 2(3) of Regulation No 2580/2001.

72 It must be pointed out here that the Council had, therefore, within a very short period of time, to examine that new material in order to decide whether it could constitute the decision of a competent authority for the purpose of Article 1(4) of Common Position 2001/931 in order to justify the continued inclusion of the PMOI in that list or whether that group must be removed forthwith from the list.

- 73 While it is indeed true, as the French Republic has maintained, that, at the very least as from 24 June 2008, the Council could not possibly allow a situation to continue in which Decision 2007/868 lacked any basis, but had as soon as possible to take appropriate action, the fact nevertheless remains, as indeed that Member State accepts and as the General Court rightly pointed out at paragraph 42 of the judgment under appeal, that neither the judgment of the Court of Appeal nor the Home Secretary's order of 23 June 2008 had an automatic, immediate effect on Decision 2007/868, then applicable.
- 74 In fact, that latter decision remained in force by reason of the presumption that acts of the institutions of the European Union are lawful, which, according to the Court's settled case-law, means that those acts produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see, inter alia, Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 60 and case-law cited).
- 75 In consequence, having regard too to the fundamental importance that must attach, as indicated in paragraphs 64 and 65 above, to observance of the rights of the defence in the procedure preceding the adoption of a decision such as the contested decision, the General Court did not err in law in holding, at paragraphs 39 and 43 of the judgment under appeal, that the Council had not established that the contested decision had so urgently to be adopted that it was impossible for that institution to notify the PMOI of the new evidence adduced against it and to allow the PMOI to be heard before the contested decision was adopted.
- 76 It follows from all those considerations that the first ground of appeal is unfounded.

The second and third grounds of appeal

- 77 The second and third grounds of appeal, claiming breach of Article 1(4) of Common Position 2001/931 and an error of law in the assessment of the principles relating to the right to effective judicial protection, respectively, are directed against the second part of the judgment under appeal in which the General Court examined, and held well founded, the second and third pleas in law put before it by the PMOI.
- 78 In this regard, it is to be noted that the General Court, after finding at paragraph 47 of the judgment under appeal, that the contested decision must be annulled by reason of breach of the PMOI's rights of defence, considered at paragraph 48 that, although it was not necessary, in those circumstances, to consider the other pleas in law in the action, it would none the less examine the second and third pleas in law raised before it, having regard to their importance in relation to the fundamental right to effective judicial protection.
- 79 According to settled case-law, the Court of Justice will reject outright complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness, since they cannot lead to the judgment's being set aside and are therefore ineffective (see, inter alia, Case C-399/08 P *Commission v Deutsche Post* [2010] ECR I-7831, paragraph 75, and Case C-96/09 P *Anheuser-Busch v Budějovický Budvar* [2011] ECR I-2131, paragraph 211 and case-law cited).
- 80 In those circumstances, it must be held that the second and third grounds of appeal are ineffective.
- 81 None of the grounds of appeal raised by the French Republic having been successful, the appeal must be dismissed.

Costs

⁸² Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, 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 French Republic has been unsuccessful and the PMOI has applied for an order for costs, the French Republic must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders the French Republic to pay the costs.**

[Signatures]