Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

28 November 2013*

(Appeal — Access to the documents of the institutions — Regulation (EC) No 1049/2001 — Exceptions to the right of access — Article 4(1)(a), first and third indents — Public security — International relations)

In Case C-576/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2012,

Ivan Jurašinović, residing in Angers (France), represented by N. Amara-Lebret, avocate,

appellant,

the other party to the proceedings being:

Council of the European Union, represented by K. Pellinghelli and B. Driessen, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By his appeal, Mr Jurašinović seeks to have set aside the judgment of the General Court of the European Union of 3 October 2012 in Case T-465/09 *Jurašinović* v *Council* [2012] ECR ('the judgment under appeal'), by which the General Court dismissed his action for annulment of the

* Language of the case: French.

decision of the Council of the European Union of 21 September 2009 ('the decision at issue') granting partial access to some of the reports prepared by the European Union (EU) observers in Croatia, in the Knin region, between 1 August and 31 August 1995 ('the reports').

Legal context

2 Article 2(5) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provides:

'Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.'

3 Article 4(1)(a) of Regulation No 1049/2001 is worded as follows:

'The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

— public security,

…,

— international relations,

…'

4 Paragraph 1 of Article 9 of the regulation, entitled 'Treatment of sensitive documents', provides:

'Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or international organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.'

Background to the dispute

5 By letter of 4 May 2009, Mr Jurašinović, relying on his status as a citizen of the Union with French nationality, applied to the Council under Regulation No 1049/2001 for access to 205 reports, and to documents referenced as 'ECMM RC Knin Log reports', drawn up in the course of a European Community Monitoring Mission in Croatia ('ECMM') carried out at the time of the conflicts in the former Yugoslavia.

6 By the decision at issue, the Council granted only partial access to eight reports.

7 The Council gave as its reason for refusing to disclose the documents referenced as 'ECMM RC Knin Log reports' the fact that it was not in possession of any documents referenced in that way.

8 As regards the reports to which access was sought, the Council put forward as reasons for refusing disclosure the exceptions provided for in the first and third indents of Article 4(1)(a) of Regulation No 1049/2001.

9 More specifically, the Council considered, first, that publication of the entirety of the reports would have undermined the European Union's interests by putting at risk its international relations and those of its Member States with the region of Europe concerned, and would also have undermined public security, particularly the security and physical integrity of observers, witnesses and other sources of information, whose identity and assessments would have been revealed by disclosure of the reports.

10 Next, the Council considered that those reports 'were still highly sensitive despite the fact that 14 years had passed since the events to which they refer'.

11 Finally, to respond to an argument raised by Mr Jurašinović that the documents requested had already been disclosed, the Council acknowledged that it had made the reports in question available to the International Criminal Tribunal for the former Yugoslavia, established by the United Nations ('the ICTY'), in the case of *Gotovina et al.*, which was pending before the ICTY. However, the Council contended that that disclosure had been made to give effect to the principle of international cooperation with an international tribunal and not on the basis of Regulation No 1049/2001.

Proceedings before the General Court and the judgment under appeal

12 By application lodged at the Registry of the General Court on 19 November 2009, Mr Jurašinović brought an action for annulment of the decision at issue. The three pleas in law on which that action was founded were all rejected by the General Court.

13 In the first place, the General Court, in paragraphs 42 and 43 of the judgment under appeal, rejected the first plea put forward by Mr Jurašinović, according to which the allegedly impartial nature of the reports, deriving from the fact that the ECMM was not a party to the conflict in the former Yugoslavia, should have made it possible to grant access to the documents requested. In particular, the General Court considered that that fact, even if established, had no bearing on the question as to whether or not disclosure of the reports would be liable to undermine the protection of the public interest as regards international relations, given that the reports contained assessments and analyses of the political, military and security situation in the area of Knin in August 1995. Thus, if the content of those reports had been disclosed, it would have been liable, first, to have undermined the European Union's policies to contribute to peace, stability and lasting regional reconciliation in that part of Europe and, second, to have created a situation which would have weakened the confidence of the Western Balkan States in the process of integration initiated with regard to the European Union

14 In the second place, the General Court, in paragraphs 50 and 51 of the judgment under appeal, rejected Mr Jurašinović's second plea, according to which the reports should have been disclosed given that they had not previously been classified as 'sensitive' for the purposes of Article 9 of Regulation No 1049/2001. The General Court stated in that regard that it does not follow from either Article 9 or Article 4 of Regulation No 1049/2001 that the fact that a document has not been so classified prevents the institution concerned from refusing access to that document by reason of the putting at risk of the protection of the public interest as regards international relations in the event of the document requested containing sensitive information.

15 In the third place, the General Court, in paragraphs 55 to 63 of the judgment under appeal rejected Mr Jurašinović's third plea, according to which the Council had previously disclosed the reports to the ICTY in the context of the case of *Gotovina et al.* on the basis of Regulation No 1049/2001 and not by virtue of the principle of international cooperation, which in his view did not exist. The General Court

stated in that regard that all the records of the ECMM had been passed to the ICTY in the 1990s to enable the ICTY Prosecutor to institute proceedings against persons suspected of serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991. For the same reason, the Council had, in that case, passed to the Prosecutor, pursuant to Rule 70 (B) of the Rules of Procedure and Evidence of the ICTY, 48 of the reports referred to in Mr Jurašinović's application for access. In any event, the General Court stated that Mr Jurašinović's action for annulment did not concern the legality of the Council's decision authorising the disclosure of those 48 reports. Moreover, nothing in the file gave grounds for assuming that the Council provided the 48 reports to Mr Gotovina following an application for access submitted on the basis of Regulation No 1049/2001.

Forms of order sought

16 Mr Jurašinović claims that the Court should:

— set aside the judgment under appeal and refer the case back to the General Court or, failing this, annul the decision at issue;

— order the Council to authorise access to all the documents requested; and

— order the Council to pay him the sum of EUR 8 000 to cover procedural costs, with interest at the European Central Bank rate as at the date of registration of the application.

17 The Council contends that the Court should dismiss the appeal and order Mr Jurašinović to pay the costs.

The appeal

18 Mr Jurašinović puts forward three grounds of appeal.

First ground of appeal

Arguments of the parties

19 By his first ground of appeal, Mr Jurašinović maintains, in essence, that the General Court, in giving judgment in the action for annulment without first consulting and examining the documents in question, did not respect the requirement for 'due process'.

20 According to the Council, this ground of appeal is, first and foremost, clearly inadmissible, since Mr Jurašinović has failed to identify the legal rule that has allegedly been infringed.

21 Moreover, the Council contends that, in any event, there is no rule obliging the General Court, before giving judgment in an action for the annulment of a decision refusing access to documents access to which has been requested, either to require the production of those documents or to examine them. Neither the case-law nor the provisions of the Rules of Procedure of the General Court concerning measures of organisation of procedure and measures of inquiry impose any obligation to that effect, the General Court having in that respect the right to ask for production of such documents.

Findings of the Court

22 The Court notes at the outset that, contrary to what is maintained by the Council, it is apparent from the arguments put forward by Mr Jurašinović that he clearly submitted that the right to a fair trial had been infringed, in particular because of the General Court's failure to examine the documents requested. The first ground of appeal is therefore admissible.

23 As regards the merits, it is necessary to ascertain whether, as Mr Jurašinović submits, the General Court was obliged to order production of the documents requested in order to give judgment in the action for annulment.

24 It must be stated in that regard that no rule of procedure of the General Court imposes such an obligation.

25 Indeed, as the Council correctly points out, the provisions of the Rules of Procedure of the General Court concerning measures of organisation of procedure and measures of inquiry – in particular Articles 64(3)(d), 65(b) and 67(3) thereof – merely provide that the General Court, may, in certain circumstances, find it necessary to acquaint itself with a document to which public access has been denied and ask the institution concerned to produce that document.

26 It should also be made clear in that regard that the lawfulness of a decision refusing access to documents, such as the decision at issue in the present case, must as a rule be assessed by reference to the reasons on the basis of which it was adopted rather than by reference solely to the content of the documents requested.

27 It is true that, when an applicant challenges the lawfulness of a decision refusing him access to a document on the basis of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, claiming that the exception relied on by the institution concerned was not applicable to the document requested, the General Court is obliged to order production of the document and to examine it, if it is to ensure the applicant's judicial protection. Indeed, if it has not itself consulted the document concerned, the General Court will not be in a position to assess in the specific case whether access to the document could validly be refused by that institution on the basis of the exception relied on or, consequently, to assess the lawfulness of a decision refusing access to that document (see, to that effect, Case C-135/11 P *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2012] ECR, paragraph 75).

28 However, as is apparent from, in particular, paragraphs 18 and 29 of the judgment under appeal, Mr Jurašinović did not argue at first instance that the exceptions provided for by the first and third indents of Article 4(1)(a) of Regulation No 1049/2001 were not applicable to the documents in issue but merely disputed the merits of the arguments put forward by the Council in the decision at issue, whereby it sought to establish that disclosure of the documents would have undermined the interests protected by those exceptions.

29 Where an institution refuses to grant access to a document and does so in reliance on reasons which are based on an exception whose applicability is not disputed, there is no ground for maintaining that, in order to assess the lawfulness of those reasons, the General Court is obliged to order, as a matter of course, production of the whole of the document in respect of which access is sought.

30 The General Court may decide, acting within the margin of discretion it enjoys in the assessment of evidence, whether, in a specific case, it is necessary, for the purpose of examining the merits of the reasons on the basis of which an institution has refused access to the document concerned, for that document to be produced before it.

31 Consequently, the first ground of appeal must be rejected as unfounded.

Second ground of appeal

Arguments of the parties

32 By his second ground of appeal, Mr Jurašinović maintains, first of all, that the General Court, in holding that the Council was justified in refusing to grant access to the documents requested because they contained 'sensitive information', even though it had not previously classified them as 'sensitive documents' within the meaning of Article 9(1) of Regulation No 1049/2001, infringed both Article 9(1) and Article 4(1) of that regulation. He submits that such an interpretation, first, extends the scope of Article 9(1) beyond that provided for by its wording and, second, confers on the institutions a discretion to refuse access to any document whatsoever by classifying a document as 'sensitive' at a later time rather than at the time of its creation.

33 He goes on to argue that such a broad interpretation of Article 9(1) of Regulation No 1049/2001 is even less warranted when, as in the present case, the institution concerned, for reasons based on the protection of international relations, has refused access to documents which are not classified in accordance with that provision. Indeed, Article 9(1) refers only to 'public security, defence and military matters' and makes no mention of the protection of international relations.

34 Finally Mr Jurašinović submits that the fact that the documents requested were, in the present case, drawn up before the entry into force of Regulation No 1049/2001 is irrelevant, as the Council had the power (which it did not use in this case) to classify documents as 'sensitive' within the meaning of Article 9(1) of that regulation after they had been drawn up.

35 In that regard, the Council contends, first, that the premiss on which Mr Jurašinović's arguments is based is clearly incorrect, given that the decision at issue was founded solely on the first and third indents of Article 4(1)(a) of Regulation No 1049/2001, and not on Article 9 thereof. Moreover, the documents at issue pre-dated Regulation No 1049/2001 and by the same token could not have been classified as 'sensitive' in accordance with Article 9(1) of the regulation.

36 The Council then submits that there is an underlying confusion in Mr Jurašinović's reasoning between the concept of 'sensitive documents', which is defined in Article 9(1) of Regulation No 1049/2001, and that of 'sensitive information' used by the General Court. The first concept designates documents which are classified as 'CONFIDENTIEL', 'SECRET' or 'TRÈS SECRET/TOP SECRET', in accordance with Article 9(1) of the regulation, whilst the second concerns information whose disclosure would undermine the protection of the public interest as regards international relations.

37 Lastly, the Council submits that the reading of the provisions in issue which Mr Jurašinović proposes renders the exception concerning the protection of international relations provided for in Article 4 of Regulation No 1049/2001 ineffective, since it means that the exception can be relied on only when Article 9 of the regulation is applicable, although that article does not refer to the protection of the European Union's international relations.

Findings of the Court

38 It should be stated at the outset that it is clear from paragraphs 7 and 43 of the judgment under appeal that the contested decision was adopted solely on the basis of the first and third indents of Article 4(1)(a) of Regulation No 1049/2001, in particular because of the sensitive nature of the information in the reports, which could have undermined the protection of the public interest as regards public security and international relations. The Council did not therefore apply to those reports the special rules for sensitive documents provided for in Article 9 of Regulation No 1049/2001.

39 However, according to Mr Jurašinović, the Council could not rely on the exceptions provided for by Article 4 of Regulation No 1049/2001 for the purpose of refusing access to the reports without first having classified them as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL', in accordance with Article 9(1) of that regulation.

40 The Court does not accept that interpretation of Articles 4 and 9 of Regulation No 1049/2001.

41 In that regard, it is to be noted, first of all, that, as the General Court rightly held in paragraph 51 of the judgment under appeal, it does not follow from either Article 4 or Article 9 of Regulation No 1049/2001 that the fact that a document has not previously been classified pursuant to Article 9(1) prevents an institution from refusing access to that document on the basis of Article 4.

42 Next, those two provisions pursue different objectives.

43 First, as is also apparent from Article 2(5) of Regulation No 1049/2001, Article 9 of the regulation is intended merely to provide for special treatment – in particular with regard to the persons responsible for processing applications for access to documents of the institutions – for documents regarded as sensitive and classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a) of Regulation No 1049/2001.

44 Second, Article 4 of Regulation No 1049/2001, by introducing a set of exceptions to the right of public access to documents of the institutions which is conferred by Article 1 of the regulation, permits the institutions to refuse access to a document in order to prevent disclosure of the document from undermining one of the interests protected by Article 4 (see, to that effect, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62, and Case C-280/11 P *Council* v *Access Info Europe* [2013] ECR, paragraph 29 and the case-law cited).

45 Lastly, according to settled case-law, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and not purely hypothetical (Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237, paragraph 76 and the case-law cited).

46 In that context, the fact that an institution considers a document to be 'sensitive' within the meaning of Article 9 of Regulation No 1049/2001 – whilst it means that an application for access to that document must be subject to the special treatment laid down in that article – cannot, on its own, justify applying to that document the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001.

47 Similarly, and conversely, the mere fact that a document is not classified as 'sensitive' within the meaning of Article 9 of Regulation No 1049/2001 cannot prevent the exceptions provided for in Article 4(1)(a) thereof from applying, unless the latter provision is to be deprived of all practical effect.

48 Consequently the second ground of appeal is unfounded.

Third ground of appeal

Arguments of the parties

49 By his third ground of appeal, Mr Jurašinović complains, in essence, that the General Court made a series of errors of law when it rejected the argument that the Council had erred in refusing to grant him access to the reports even though it had already made them available, on the basis of Regulation No 1049/2001, to third parties, in the event the ICTY Prosecutor and Mr Gotovina's defence counsel.

50 Mr Jurašinović submits in the first place that the reports were made available to the ICTY not on the basis of an alleged principle of international cooperation with an international tribunal, a principle which he maintains does not exist, but rather on the basis of Regulation No 1049/2001. In those circumstances, the Council could not refuse to grant other third parties, such as Mr Jurašinović himself, access to the documents which it had already made available to Mr Gotovina. Mr Jurašinović maintains that such a refusal would amount to discrimination between him and Mr Gotovina, who are both citizens of the Union.

51 In response to those arguments, the Council contends that Mr Jurašinović is confusing public access to the documents of the institutions with privileged access to those documents. Only the first category of access is governed by Regulation No 1049/2001 and applies *erga omnes*. By contrast, where access to a document is granted on a legal basis other than Regulation No 1049/2001, that access is privileged and concerns only the beneficiary. The Council explains that the provision of the documents in question to the ICTY Prosecutor and Mr Gotovina's defence counsel belongs to the second category of access and is covered by the objectives of the Common Foreign and Security Policy of the European Union, which also involves the promotion of international cooperation.

52 In the second place, Mr Jurašinović challenges the General Court's finding that the documents in question were made available to the ICTY Prosecutor and Mr Gotovina's defence counsel on the basis of Rule 70 (B) of the ICTY Rules of Procedure and Evidence inasmuch as that finding is based solely on the explanations provided by the Council in its defence and at the hearing, to the exclusion of any evidence. Mr Jurašinović also takes issue with the General Court's finding that all the records of the ECMM had been passed to the ICTY in the 1990s to enable the ICTY Prosecutor to institute proceedings against persons suspected of serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991, even though, at the hearing, the Council's representative was unable to state the precise date on which the documents had been sent to the ICTY.

53 The Council argues that the question whether the documents at issue were made available on the basis of Rule 70 (B) of the ICTY Rules of Procedure and Evidence is not decisive from the point of view of EU law. In the present case, what is important is to determine whether the documents concerned were passed to the ICTY Prosecutor and Mr Gotovina's defence counsel on the basis of Regulation No 1049/2001 or on the basis of the rule of EU law which was previously applicable, namely Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43). In the Council's view, that is not the case, as the documents in question were passed on in the framework of the Common Foreign and Security Policy of the European Union.

54 In the third place, Mr Jurašinović submits that the General Court made an error of law in failing to annul the contested decision, at least in part, by reason of the fact that 48 of the reports had in fact been passed to Mr Gotovina's defence counsel.

55 The Council submits in that regard that those 48 reports were not in the public domain.

56 Fourth and finally, Mr Jurašinović argues that the General Court erred in law in failing to take account of a letter, dated 30 May 2007, by which Mr Gotovina allegedly asked the Council for access to the reports on the basis of Regulation No 1049/2001, on the ground that that letter had not been produced in Case T-465/09 which gave rise to the judgment under appeal. In that regard, Mr Jurašinović maintains that he became aware of that letter only after the preparatory inquiries in that case had been completed, which prevented him from producing that document, particularly since the General Court had rejected his reply on the ground that it was out of time. However, the same letter was lodged in Case T-63/10 which resulted in the judgment of the General Court of 3 October 2012 in *Jurašinović* v *Council* ([2012] ECR), which involved the same parties before the same Chamber. The General Court could not therefore have had any reasonable doubts about the existence of that letter.

57 In that regard, the Council contends that the request to which Mr Jurašinović refers was not submitted under Regulation No 1049/2001, given that it entailed a request for privileged access. In any event, the Council submits, first, that it did not treat that document as if it was covered by Regulation No 1049/2001 and, second, that the documents were not sent directly to Mr Gotovina's defence counsel.

Findings of the Court

58 In response to those arguments, it is sufficient to observe that, even if – as Mr Jurašinović maintains – the granting to an applicant of access to a document on the basis of Regulation No 1049/2001 were to enable any other applicant for access to obtain that document, the fact remains that it is apparent from the judgment under appeal that Mr Jurašinović did not succeed in showing that Mr Gotovina's defence counsel and the ICTY Prosecutor obtained access to the reports on the basis of Regulation No 1049/2001.

59 Indeed, as can be seen from paragraph 63 of the judgment under appeal, at the hearing the only evidence relied on by Mr Jurašinović in that regard was a letter dated 30 May 2007, whereby Mr Gotovina or his advisors allegedly applied to the Council for access to the reports. That letter has not, however, been produced in the present case.

60 Therefore, the General Court did not err in law in not taking that letter into consideration.

61 Mr Jurašinović acknowledges that he did not produce the letter of 30 May 2007 in the case which gave rise to the judgment under appeal. In that regard, he merely explains the reasons why he failed to produce that item of evidence, namely the fact that his reply, produced out of time, had not been admitted by the General Court and the fact that the preparatory inquiries in that case had been completed.

62 Moreover, in so far as Mr Jurašinović maintains that the General Court could not fail to be aware of the existence of that letter, given that it had in any event been placed on the file in Case T-63/10, suffice it to observe that, in accordance with the applicable rules of procedure, the General Court cannot assess the merits of a plea before it on the basis of evidence which has not been produced in the case in question.

63 As regards the other arguments put forward in support of this ground of appeal, suffice it to state that they are based on the premiss that the reports to which Mr Gotovina's defence counsel and the ICTY Prosecutor had access had been made available to them on the basis of Regulation No 1049/2001.

64 For the reasons stated in paragraphs 58 to 62 of the present judgment, Mr Jurašinović has not succeeded in establishing that that premiss was correct. The abovementioned arguments must accordingly be rejected.

65 It should also be noted that – as the General Court correctly pointed out in paragraph 57 of the judgment under appeal – the legal basis for making the reports available to Mr Gotovina, in his trial before the ICTY, cannot cast doubt on the legality of the decision at issue, given that it has not been established that the decision to make those reports available was adopted on the basis of Regulation No 1049/2001.

66 In view of the foregoing considerations, the third ground of appeal must also be rejected as unfounded and, accordingly, the appeal in its entirety must be dismissed.

Costs

67 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

68 Since Mr Jurašinović has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

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

1. Dismisses the appeal;

2. Orders Mr Ivan Jurašinović to pay the costs.

[Signatures]