Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

14 July 2021 *

(Common foreign and security policy – Restrictive measures taken in view of the situation in Venezuela – Freezing of funds – Lists of persons, entities and bodies subject to the freezing of funds and economic resources – Retention of the applicant's name on the lists – Error of assessment)

In Case T-35/19,

Antonio José Benavides Torres, residing in Caracas (Venezuela), represented by L. Giuliano and F. Di Gianni, lawyers,

applicant,

v

Council of the European Union, represented by S. Kyriakopoulou, V. Piessevaux, P. Mahnič and A. Antoniadis, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking annulment of Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10), and of Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1), in so far as those acts concern the applicant,

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos, President, I. Reine (Rapporteur) and L. Truchot, Judges,

Registrar: B. Lefebvre, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 September 2020,

gives the following

Judgment [1]

...

* Language of the case: English.

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Law

...

Substance

...

43 To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (see judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 120 and the case-law cited; judgment of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraph 65).

44 That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 121, and of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraph 66).

45 For that purpose, there is no requirement that that authority produce before the Courts of the European Union all the information and evidence underlying the reasons alleged in the act sought to be annulled. It is however necessary that the information or evidence produced should support the reasons relied on against the person concerned (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 122, and of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraph 67).

46 So far as concerns the types of evidence which may be relied on, the prevailing principle of EU law is the unfettered evaluation of the evidence available (judgment of 6 September 2013, *Persia International Bank* v *Council*, T-493/10, EU:T:2013:398, paragraph 95 (not published)).

47 It is in the light of those principles that it is appropriate to examine whether the Council committed an error of assessment when it, by the contested acts, decided to retain the applicant's name on the lists at issue following the periodic review.

48 At the outset, it must be noted that the fact that the grounds for including the applicant's name on the lists at issue refer to conduct which occurred before the adoption of the contested acts and which had ended on that date does not necessarily mean that the restrictive measures retained against him by those acts are obsolete. Clearly, in so far as the Council decided to refer, in the grounds for retaining the applicant's name on the lists at issue, to specific situations involving the Bolivarian National Guard which he commanded, there could be no question of anything other than past conduct. Such a reference cannot therefore be considered to be of no relevance solely because the conduct in question dates from the more or less remote past (see, to that effect, judgment of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 83 and the case-law cited).

49 That interpretation is borne out by the second paragraph of Article 13 of Decision 2017/2074, as amended by Decision 2018/1656, contested in the present case, pursuant to which Decision 2017/2074 is to be kept under constant review and is to be renewed, or amended as appropriate, if the Council deems that its objectives have not been met. Such a provision allows the Council to retain persons' names on the lists at issue for the same reasons that gave rise to their initial inclusion, without the persons in question having committed any further human rights violations during the

period preceding the review, if that retention is still justified in the light of all the relevant circumstances and, in particular, of the fact that the objectives pursued by the restrictive measures have not been achieved (see, by analogy, judgment of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 84 and the case-law cited).

50 In that connection, it must be borne in mind that restrictive measures are of a precautionary and, by definition, provisional nature, the validity of which always depends on whether the factual and legal circumstances which led to their adoption continue to apply and on the need to persist with them in order to achieve their objective. It is thus for the Council, in the course of its periodic review of those restrictive measures, to conduct an updated assessment of the situation and to appraise the impact of such measures, in order to determine whether they have made it possible to attain the objectives pursued by the initial inclusion of the names of the persons and entities concerned on the list at issue or whether the same conclusion in respect of those persons and entities can still be drawn (judgment of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraphs 58 and 59).

51 It must therefore first be examined whether, at the time when the contested acts were adopted, the Council carried out an updated assessment of the legal and factual circumstances which led to restrictive measures being imposed on the applicant, justifying the retention of those measures having regard to the attainment of the objective they were pursuing.

52 In that regard, the reason given by the Council for the adoption of the restrictive measures at issue was the continuing deterioration of democracy, the rule of law and human rights in Venezuela; it expressed, inter alia, its concern at the numerous reports of human rights violations and excessive use of force, and called on the Venezuelan authorities to respect the Venezuelan Constitution and the rule of law and to ensure that fundamental rights and freedoms, including the right to peaceful demonstration, are guaranteed (see, in that regard, recitals 1 to 6 of Decision 2017/2074). To that end, the restrictive measures were intended to put pressure on persons held to be responsible for serious human rights violations or abuses or the repression of civil society and democratic opposition and persons, entities and bodies whose actions, policies or activities undermine democracy or the rule of law in Venezuela, as well as on persons, entities and bodies associated with them (see, in that regard, recital 7 of Decision 2017/2074).

53 It is in that context that the applicant's name was included in the lists at issue, by Decision 2018/90 and Implementing Regulation 2018/88, on the grounds that he held the position of Chief of the Capital District Government and had held the position of General Commander of the Bolivarian National Guard until 21 June 2017 and he was involved in the repression of Venezuelan civil society and democratic opposition, that he was responsible for serious human rights violations committed under his command by the Bolivarian National Guard, and that his actions and policies as General of the Bolivarian National Guard, in particular where it played a leading role in the maintenance of the order during civil demonstrations and when he publicly advocated the jurisdiction of military courts over civilians, undermined the rule of law in Venezuela.

54 In today's judgment, *Benavides Torres* v *Council* (T-245/18, not published), the Court observed that the Council was fully entitled to consider that, under the applicant's command, the Bolivarian National Guard made use, in practice, of excessive force in the maintenance of the order during civil demonstrations and, having regard to the general context of the situation in Venezuela, the applicant had been involved in the repression of Venezuelan civil society and democratic opposition and that he was responsible for serious human rights violations committed under his command by the Bolivarian National Guard.

55 The applicant does not dispute that the positions of Chief of the Capital District Government and General Commander of the Bolivarian National Guard are very high-ranking positions in Venezuela and, by holding those positions, the applicant could be regarded as holding positions of responsibility within the institutional system of Venezuela and was therefore, in carrying out those duties, fully connected, inter alia, with the Venezuelan regime.

56 In addition, it is common ground that, at the time when the contested acts were adopted, there had been no change in the regime in power in Venezuela.

57 However, it is clear that, at the time when the contested acts were adopted on 6 November 2018, the applicant had no longer held the position of General Commander of the Bolivarian National Guard for approximately one and a half years, that is to say, since 21 June 2017. In addition, as stated by the applicant, without being challenged by the Council, he had also ceased to serve as Chief of the Capital District Government since 4 January 2018, that is to say, approximately 10 months before the adoption of the contested acts in the present case.

58 In those circumstances, given that no change in the regime in power in Venezuela had taken place at the time when the contested acts were adopted, it was relevant for the Council to examine, at that date, the connections between the applicant and the government in power, in order to assess whether the legal and factual circumstances which led to restrictive measures being imposed on the applicant, justifying the retention of those measures having regard to the attainment of the objective they pursue, recalled in paragraph 52 above, continued to apply.

59 However, it is apparent that the retention of the applicant's name on the lists at issue was justified by the same evidence relied on in support of the initial inclusion of his name (see paragraph 13 above). At the hearing, the Council confirmed that, during the review which led to the adoption of the contested acts, it had not taken into consideration any evidence subsequent to the acts initially including the applicant's name on the lists at issue.

60 Admittedly, it must be stated that a considerable period of time, exceeding 10 months, passed between the applicant's ceasing to hold his position of Chief of the Capital District Government and the adoption of the contested acts. In that regard, it should be noted that, in the context of the updated assessment it was required to carry out when reviewing the restrictive measures at issue, the Council did not establish or even claim that it was impossible for it to obtain the information relating to the applicant's ceasing to hold his position of Chief of the Capital District Government.

61 Nevertheless, it should be borne in mind that the mechanism for reviewing the restrictive measures laid down in Decision 2017/2074 provides that the persons subject to those restrictive measures are invited to act by requesting the review of that decision within a certain period. In that regard, it is apparent from Article 8 of that decision that the Council gives the person concerned by the restrictive measures the opportunity of submitting observations and will review its decision if observations are submitted or substantial new evidence is presented. Thus, the person on whom the restrictive measures are imposed is in the best position to inform the Council of any change in his or her specific situation.

62 Regarding the applicant, the Council had specifically invited his representative, by email of 3 April 2018, to submit observations in the context of the annual review of the restrictive measures at issue by 1 September 2018 (see paragraph 15 above). However, it is apparent that the applicant informed the Council of the change in his situation only on 30 October 2018, that is, a few days before the contested acts were adopted, as stated in paragraph 17 above, whereas he must be deemed to have known that the Council had to take a decision on whether the restrictive measures at issue were to be maintained by 14 November 2018 at the latest (see paragraph 11 above).

63 In addition, it must be stated that there was no change in the regime in power in Venezuela between the time when the applicant was General Commander of the Bolivarian National Guard and Chief of the Capital District Government and the time when he no longer held those positions. However, it is not apparent from the case file, nor does the applicant – who was questioned specifically on this point at the hearing – claim that he took the decision to cease holding his various public roles in response to the undermining of the rule of law and democracy in Venezuela, in order to distance himself from such actions (see, by analogy, judgments of 26 March 2019, *Boshab and Others* v *Council*, T-582/17, not published, EU:T:2019:193, paragraph 152, and of 12 February 2020, *Kande Mupompa* v *Council*, T-170/18, EU:T:2020:60, paragraph 131 (not published)).

64 In those circumstances, in the absence of evidence to the contrary, the Council was entitled to consider that, on the date when the contested acts were adopted, the applicant remained connected to the regime in power in Venezuela, which had not changed in relation to the time when, in the context of his position as General Commander of the Bolivarian National Guard, he had undermined democracy and the rule of law in Venezuela.

65 The foregoing considerations cannot be regarded as meaning that a presumption or reversal of the burden of proof to the applicant's detriment has been established, contrary to the applicant's claims. Their significance is simply that the reference, in the grounds of the contested acts, to posts formerly occupied by the applicant, discloses that the Council considered that, for that reason, he remained connected to the regime in power in Venezuela and that the Council was not aware of anything to call into question that proposition (see, by analogy, judgment of 22 April 2015, *Tomana and Others* v *Council and Commission*, T-190/12, EU:T:2015:222, paragraph 167).

66 As a result, the single plea must be rejected and the action must be dismissed in its entirety.

Costs

67 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to bear his own costs and to pay those incurred by the Council, in accordance with the form of order sought by the Council.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr Antonio José Benavides Torres to pay the costs.

da Silva Passos Reine Truchot

Delivered in open court in Luxembourg on 14 July 2021.

[Signatures]