Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

9 June 2021 *

(Common foreign and security policy – Restrictive measures taken against Iran with the aim of preventing nuclear proliferation – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Retention of the applicant's name on the list – Error of assessment – Article 266 TFEU)

In Case T-580/19,

**Sayed Shamsuddin Borborudi**, residing in Tehran (Iran), represented by L. Vidal, lawyer,

applicant,

v

**Council of the European Union**, represented by V. Piessevaux and D. Mykolaitis, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Council Implementing Regulation (EU) 2019/855 of 27 May 2019 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2019 L 140, p. 1) in so far as it retains the name of the applicant on the list set out in Annex IX to Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1),

THE GENERAL COURT (Fourth Chamber),

composed of S. Gervasoni, President, L. Madise and J. Martín y Pérez de Nanclares (Rapporteur), Judges,

Registrar: E. Artemiou, Administrator,

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

gives the following

* Language of the case: English.

## Judgment [1]

### I. Background to the dispute

…

### *B. The inclusion of the applicant's name on the lists at issue*

5 By Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413 (OJ 2011 L 319, p. 71), the Council amended the latter decision in order to apply those restrictive measures to other persons and entities, whose names were added to the list in Annex II to the latter decision. The name of the applicant, Sayed Shamsuddin Borborudi, together with the date of inclusion of his name on that list, 1 December 2011, were added to Annex II to Decision 2010/413, with reference being made to the following grounds:

'Deputy Head of [the United Nations] designated Atomic Energy Organisation of Iran, where he is subordinate to [the United Nations] designated Feridun Abbasi Davani. Has been involved in the Iranian nuclear programme since at least 2002, including as the former head of procurement and logistics at [the] AMAD [Plan], where he was responsible for using front companies such as Kimia Madan to procure equipment and material for Iran's nuclear weapons programme.'

…

### *C. Retention of the applicant's name on the lists at issue*

…

11 By letter of 15 April 2014, the applicant sent the Council a new petition for removal from the lists at issue ('the letter of 15 April 2014'). The content of that new petition was, in essence, the same as that of the letter of 31 January 2013 referred to in paragraph 9 above. In that regard, in addition to the content of that latter letter, the letter of 15 April 2014 included a reference to the Joint Plan of Action concluded in Geneva (Switzerland) on 24 November 2013. The applicant claimed that, in the light of that plan, the AEOI expected the Council to reconsider its decision to impose restrictive measures on persons and entities involved in the Iranian nuclear programme. The applicant also claimed that he had no cooperation, whether as a consultant or administrator, with the companies or organisations under sanctions or entities related to the Iranian nuclear industry.

12 No exchange between the Council and the applicant took place after the letter of 15 April 2014 was sent until 27 May 2019, the date on which the Council adopted Decision (CFSP) 2019/870 amending Decision 2010/413 (OJ 2019 L 140, p. 90), following an annual review of the list of persons and entities set out in Annex II to Decision 2010/413, as provided for in Article 26(3) of that latter decision. Pursuant to Article 1 of Decision 2019/870, Annex II to Decision 2010/413 was amended as set out in the Annex to Decision 2019/870. The entry concerning the applicant in that annex was amended so as to add, in the column relating to the identifying information, the applicant's date of birth, namely 21 September 1969.

13 On 27 May 2019, the Council also adopted Implementing Regulation (EU) 2019/855 implementing Regulation No 267/2012 (OJ 2019 L 140, p. 1, 'the contested measure'). Under Article 1 of the contested measure, Annex IX to Regulation No 267/2012 was amended to take account of the

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

amendments made to Annex II to Decision 2010/413 by Decision 2019/870. In particular, the applicant's name appears in line 25 of Table A of Annex IX to Regulation No 267/2012 in respect of persons and entities involved in the nuclear or ballistic missile programme and persons and entities providing support to the Government of Iran.

## II. Procedure and forms of order sought

14 By application lodged at the Registry of the General Court on 20 August 2019, the applicant brought the present action.

15 By decision adopted on 17 October 2019, pursuant to Article 27(3) of the Rules of Procedure of the General Court, the President of the General Court reallocated the case to a new Judge-Rapporteur attached to the Fourth Chamber.

16 On 22 November 2019, the Council lodged its defence at the Registry of the Court.

17 The reply and rejoinder were lodged, respectively, by the applicant on 14 February 2020 and by the Council on 23 April 2020.

18 The oral part of the procedure was closed on 23 April 2020.

19 In the context of the measures of organisation of procedure provided for in Article 89(3)(a) of the Rules of Procedure, on 6 October 2020 the Court requested the parties to reply to a series of questions which they answered within the prescribed period.

20 The parties presented oral argument and replied to the questions put by the Court at the hearing on 3 December 2020.

21 The applicant claims that the Court should:

– annul the contested measure, in so far as it concerns him;

– order the Council to remove his name from Annex IX to Regulation No 267/2012;

– order the Council to pay all the costs.

22 The Council contends that the General Court should:

– reject the application as unfounded;

– order the applicant to pay the costs.

## III. Law

### *A. The first head of claim*

23 It should be noted that the applicant has not sought the annulment of Decision 2019/870, which was adopted at the same time as Implementing Regulation 2019/855.

24 According to Article 29 TEU, on the basis of which Decision 2010/413 was adopted, 'the Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions'.

25 Article 215(1) TFEU provides that 'where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union [in which Article 29 TEU appears], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof'. Article 215(2) TFEU provides that, 'where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities'.

26 It is apparent from the case-law that decisions adopted on the basis of Article 29 TEU and regulations adopted on the basis of Article 215 TFEU are two types of act, the first declaring the Union's position with respect to the restrictive measures to be adopted and the second constituting the instrument giving effect to those measures at Union level (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 90).

27 In addition, the Court has held that a prerequisite for the validity of a regulation adopted on the basis of Article 215 TFEU is the prior adoption of a valid decision in accordance with the provisions relating to the common foreign and security policy (CFSP) (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 55). In other words, the adoption of a regulation on the basis of Article 215 TFEU is subject to the adoption of a decision under Article 29 TEU.

28 Despite the close connection between those two types of acts, the fact remains that they are two distinct and independent acts, so that there is nothing to prevent an applicant from challenging only an implementing regulation.

29 Thus, in the present case, the fact that the subject matter of the action is limited to an application for annulment of the contested measure in so far as it concerns the applicant and does not also relate to Decision 2019/870 does not preclude its examination, without prejudice to the consequences which possible annulment of the contested measure might have for that decision (see paragraph 91 et seq. below).

…

### *C. Substance*

…

#### *3. The applicant's capacity as Deputy Head of the AEOI*

52 In the first place, it must be borne in mind that the applicant states that he ceased to work for the AEOI in August 2013 and that he no longer has any relationship with that organisation. In order to substantiate that assertion, the applicant produces, first, a certificate signed by the Director-General of the AEOI, dated 5 May 2019, according to which the applicant worked as the 'Vice Chairperson of the [AEOI] in Executive Affairs and Administrative and Financial Deputy of the Organisation' from 23 April 2011 to 31 August 2013. In response to the Council's criticisms expressed in the defence, relating to the fact that the abovementioned certificate is of poor technical quality and is not certified,

the applicant provided, when lodging the reply, a new certificate from the AEOI's Director-General for Human Resources Development and Welfare of 22 January 2020. On that certificate, the content of which is the same as that of the certificate of 5 May 2019, it is stated that, after 31 August 2013, the applicant did not hold a position, employment or working relationship with the AEOI. Secondly, the applicant argues that his alleged position as Deputy Head of the AEOI is contradicted by a press release from the Foreign Office of the United Kingdom of 23 June 2019, according to which the Minister for the Middle East had had meetings with, inter alia, the Deputy Head of the AEOI, A. Thirdly, in the reply, the applicant notes that his name is not mentioned in any report of the IAEA. According to the applicant, however, the various reports of that organisation regularly mention the names of the legal representatives of the AEOI, in particular that of its Head. Fourthly and lastly, the applicant observes that since the signing of the JCPOA, the Iranian nuclear programme has been under the close supervision of the IAEA and the European Union. Consequently, according to the applicant, if he actually was still linked with the AEOI, the Council would have had evidence to prove this.

53 Despite the Council's criticism of the certificate signed by the Director-General of the AEOI of 5 May 2019, produced by the applicant, and despite the Council's challenging some of the arguments raised by the applicant, it should be noted that, in the present proceedings, the Council does not in fact dispute the fact that the applicant ceased to work for the AEOI in August 2013.

54 On the other hand, the Council contends that, in view of certain circumstances, it was not unreasonable for it to believe, on the date of adoption of the contested measure, that the applicant continued to be a Deputy Head of the AEOI. That resulted, in essence, first, from the fact that the applicant had not produced evidence in support of the claims contained in his letter of 15 April 2014, secondly, from the ambiguous content of that letter suggesting that the applicant had written it in his capacity as Deputy Head of the AEOI, thirdly, from the fact that the applicant had not communicated to the Council his address or contact details other than those of the AEOI, fourthly, from the fact that the applicant had not contacted the Council since that letter and, fifthly, that neither the AEOI's website nor any other publicly available sources provided any information as to who held managerial positions within the AEOI, so that the only information on which it could rely in this situation was documentary evidence from the applicant.

55 In that regard, it should be noted that the Council cannot criticise the applicant, without reversing the burden of proof, for not having established that he had ceased all activity within the AEOI by requiring him to inform it of that fact and, still less, to submit evidence to the Council (see, to that effect, judgment of 3 July 2014, *Alchaar* v *Council*, T-203/12, not published, EU:T:2014:602, paragraph 152 and the case-law cited). On the contrary, it is for the Council, in the context of the annual review of restrictive measures provided for in Article 26(3) of Decision 2010/413 and Article 46(7) of Regulation No 267/2012, to examine carefully the evidence substantiating the inclusion of the applicant's name on the lists at issue. That does not prevent the applicant from submitting, at any time, observations or new evidence, in accordance with Article 24(4) of Decision 2010/413 and Article 46(5) of Regulation No 267/2012. However, this is a power vested in the applicant which cannot relieve the Council from the burden of proof incumbent on it.

…

62 On the other hand, it should be noted that, in any event, the non-confidential extract of the listing proposal contains only one paragraph, the wording of which coincides with that contained in the grounds for inclusion on the lists at issue. It is not accompanied by any evidence to substantiate the ground that the applicant is a Deputy Head of the AEOI.

…

*5. The past nature of the applicant's activities set out in the grounds for listing*

…

80 By claiming that the retention of the applicant's name on the lists at issue is justified by his past activities, the Council replaces the grounds on which the contested measure is based, which the Court cannot accept (see, to that effect, judgment of 26 October 2012, *Oil Turbo Compressor* v *Council*, T-63/12, EU:T:2012:579, paragraph 29 and the case-law cited).

81 In any event, it should be borne in mind that, according to the case-law, the criterion for inclusion on the lists in question, relating to the provision of support for Iran's proliferation-sensitive nuclear activities, implies that the existence of a direct or indirect link is established between the activities of the person or entity concerned and nuclear proliferation (judgment of 25 March 2015, *Central Bank of Iran* v *Council*, T-563/12, EU:T:2015:187, paragraph 66).

82 Furthermore, it has been held that the various provisions of Decision 2010/413 and Regulation No 267/2012 providing for funds to be frozen are worded in general terms ('are engaged in, directly associated with, or providing support') and make no reference to conduct prior to a decision to freeze funds (judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 85).

83 In addition, it must be borne in mind that the restrictive measures against Iran are aimed at preventing the development of nuclear proliferation by applying pressure on the Islamic Republic of Iran to end its proliferation-sensitive nuclear activities. It is apparent from both the scheme and the general purpose of Decision 2010/413, Regulation No 961/2010 and Regulation No 267/2012 that their objective is to prevent proliferation-sensitive nuclear activities in that state and that the fund-freezing measures imposed on the basis of them are intended to be preventive (see, to that effect, judgment of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 44).

84 It follows that the adoption of restrictive measures against a person does not presuppose that that person has actually previously acted reprehensibly; the risk that that person may do so in the future may be sufficient (see, to that effect, judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 84).

85 Thus, while actual involvement in Iran's nuclear programme prior to the adoption of the restrictive measures cannot be required, the existence of a direct or indirect link between a person's activities and nuclear proliferation is a condition for the inclusion of that person's name on the lists in question (see, to that effect, judgment of 7 March 2017, *Neka Novin* v *Council*, T-436/14, not published, EU:T:2017:142, paragraph 30).

86 In the present case, taken in isolation, the applicant's previous employment with the AEOI and, assuming it is proved, his former involvement in Iran's nuclear programme, cannot justify the inclusion of his name on the lists at issue. If the Council wished to rely on the applicant's previous employment and on his former involvement in Iran's nuclear programme, and on the risk that, in the light of his knowledge and skills, the applicant might provide support for Iran's proliferation-sensitive nuclear activities, it was for the Council to put forward sound and consistent evidence from which it might reasonably be inferred that the applicant maintained links with the AEOI and with Iran's nuclear programme, or, more generally, with proliferation-sensitive nuclear activities, on the date of adoption of the contested measure, justifying the inclusion of his name on the lists at issue, after the termination of his employment with that organisation and after the end of his involvement in Iran's nuclear programme (judgment of 18 February 2016, *Jannatian* v *Council*, T-328/14, not published, EU:T:2016:86, paragraph 40).

…

### *D. The consequences of the present judgment for Decision 2019/870*

91 In response to a question put by the Court, the applicant submits, in essence, that if the Court annuls the contested measure, the Council should withdraw Decision 2019/870.

92 In response to that same question, the Council observes that the applicant sought annulment of the contested measure only in so far as it concerns him. In addition, it indicated that, if the Court were to annul that measure, the annulment would apply only to the latter. It also contended that the General Court was bound by the form of order sought by the applicant and that it could not rule beyond it. Lastly, the Council stated that Decision 2019/870 had been replaced by Decision (CFSP) 2020/849 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2020 L 196, p. 8).

93 It should be noted that the present judgment seeks only the annulment of the contested measure, namely Implementing Regulation 2019/855. It cannot therefore automatically lead to the annulment of Decision 2019/870.

94 However, Decision 2019/870's remaining applicable even if the contested measure is annulled is liable seriously to jeopardise legal certainty, since those two acts impose on the applicant measures which are identical (judgment of 17 April 2013, *TCMFG* v *Council*, T-404/11, not published, EU:T:2013:194, paragraph 43).

95 Furthermore, in order to comply with the present judgment and to implement it fully, the Council is required to have regard not only to the operative part of that judgment but also to the grounds constituting its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the grounds for including the applicant's name on the lists at issue held to be illegal in so far as they are vitiated by errors of assessment and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the Council must take into account (see, to that effect, judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 60 and the case-law cited).

96 However, although a finding of illegality emerging from the grounds of a judgment annulling a measure primarily requires the institution which adopted the measure to eliminate that illegality in the measure intended to replace the annulled measure, it may also, in so far as it relates to a provision with specific scope in a given area, give rise to other consequences for that institution (see judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 61 and the case-law cited).

97 In cases such as this, concerning the annulment of an implementing regulation amending the list in Annex IX to Regulation No 267/2012 – a list which must be reviewed at regular intervals pursuant to Article 46(7) of Regulation No 267/2012 – the institution which adopted the measure is first of all under an obligation to ensure that subsequent fund-freezing measures adopted after the annulling judgment and governing periods subsequent to that judgment are not vitiated by the same illegalities (see, to that effect, judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 62 and the case-law cited).

98 It is in addition to be acknowledged that, by virtue of the retroactive effect of annulling judgments, the finding of unlawfulness takes effect from the date on which the annulled measure entered into force (see judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 64 and the case-law cited). It follows that in the present case the Council may also be under an obligation pursuant to Article 266 TFEU to eliminate from the provisions already adopted when the annulling judgment was delivered the grounds for including the applicant's name with the same effect as the grounds held to be unlawful, if those grounds are substantiated by the same evidence as that examined by the General Court in the present judgment (see, by analogy,

judgment of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 30). That therefore applies to provisions subsequent to the adoption of the contested measure containing grounds for listing which are identical to those held to be unlawful in the present annulment judgment and which are based on the same evidence (see, by analogy, judgment of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 31), as in the case of Decision 2019/870, whose date of entry into force is the same as that of the contested measure, provided that it contains grounds identical to those held to be unlawful in the present judgment for annulment and that it is based on the same evidence.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Implementing Regulation (EU) 2019/855 of the Council of the European Union of 27 May 2019 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran in so far as it concerns Mr Sayed Shamsuddin Borborudi;**

2. **Orders the Council to pay the costs.**

Gervasoni Madise Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 9 June 2021.

[Signatures]