JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

11 June 2009 *

In Case T-318/01,

Omar Mohammed Othman, residing in London (United Kingdom), represented initially by J. Walsh, Barrister, and F. Lindsley and S. Woodhouse, Solicitors, and subsequently by S. Cox, Barrister, and H. Miller, Solicitor,

applicant,

v

Council of the European Union, represented initially by M. Vitsentzatos and M. Bishop, and subsequently by M. Bishop and E. Finnegan, acting as Agents,

and

* Language of the case: English.

Commission of the European Communities, represented initially by A. van Solinge and C. Brown, and subsequently by E. Paasivirta and P. Aalto, acting as Agents,

defendants,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by J. Collins, subsequently by C. Gibbs, and then by E. O'Neill, and lastly by I. Rao, acting as Agents, assisted initially by S. Moore, and subsequently by M. Hoskins, Barristers,

intervener,

APPLICATION, originally, for annulment of, first, Council Regulation (EC) No 467/2001 of 6 March 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, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1) and, second, Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25) and, subsequently, for annulment of 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-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9), in so far as those acts concern the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Seventh Chamber),

composed of N.J. Forwood (Rapporteur), President, D. Šváby and E. Moavero Milanesi, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2009,

gives the following

Judgment

Legal context and background to the dispute

1 For a summary of the legal context applicable to this case, reference is made to paragraphs 3 to 10 of the judgment of the Court of Justice of 3 September 2008 in 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 ('*Kadi* on appeal').

2 For a summary of the background to this case, covering the period from 15 October 1999 to 8 March 2001 and encompassing, in particular, the adoption of Council Regulation (EC) No 467/2001 of 6 March 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, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1), reference is made to paragraphs 13 to 30 of *Kadi* on appeal.

3 On 19 October 2001 the Sanctions Committee established by Resolution 1267 (1999) of the Security Council of the United Nations ('the Security Council') published an addendum to its consolidated list of 8 March 2001 of the entities which and persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000) (see Press Release SC/7180), which included inter alia the name of the applicant, identified as a person associated with Usama bin Laden.

4 By Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25), the applicant's name was added, with others, to Annex I to that regulation.

5 On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other associated individuals, groups, undertakings and entities. Paragraphs 1 and 2 of that resolution provide, in essence, that the measures, including the freezing of funds, imposed by paragraph 4(b) of Resolution 1267 (1999) and by paragraph 8(c) of Resolution 1333 (2000) are to be maintained.

6 Considering that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that common position prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and

entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).

7 On 27 May 2002, on the basis of Articles 60 EC, 301 EC and 308 EC, the Council adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9).

8 Article 1 of Regulation No 881/2002 defines 'funds' and 'freezing of funds' in terms essentially identical to those used in Article 1 of Regulation No 467/2001. It also defines what is meant by 'economic resources'.

9 Annex I to Regulation No 881/2002 contains the list of persons, entities and groups affected by the freezing of funds imposed by Article 2. That list includes the applicant's name.

10 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counterterrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its approval.

11 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures were again to be improved after 12 months or earlier if necessary.

12 Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), on 27 February 2003 the Council adopted common position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402 (OJ 2003 L 53, p. 62). Article 1 of that common position provides that, when implementing the measures set out in Article 3 of Common Position 2002/402, the European Community is to provide for the exceptions permitted by Security Council Resolution 1452 (2002).

13 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation No 881/2002 (OJ 2003 L 82, p. 1). In recital 4 in the preamble to that regulation, the Council states that it is necessary, in view of Resolution 1452 (2002), to adjust the measures imposed by the Community.

14 On 30 January 2004 the Security Council adopted Resolution 1526 (2004) which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary.

15 On 29 July 2005 the Security Council adopted Resolution 1617 (2005). That resolution provides, inter alia, for the maintenance of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures are to be reviewed with a view to their possible further strengthening in 17 months, or sooner if necessary.

16 On 22 December 2006 the Security Council adopted Resolution 1735 (2006). That resolution provides, inter alia, for the maintenance of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 33 of Resolution 1735 (2006), those measures are to be reviewed with a view to their possible further strengthening in 18 months, or sooner if necessary.

17 By Commission Regulation (EC) No 374/2008 of 24 April 2008 amending for the 94th time Regulation No 881/2002 (OJ 2008 L 113, p. 15), the entry of the applicant's name in Annex I to Regulation No 881/2002 was amended in response to a corresponding modification made by the Sanctions Committee to its list of the entities which and persons who must be subjected to the freezing of funds pursuant to the relevant Security Council resolutions.

18 On 30 June 2008 the Security Council adopted Resolution 1822 (2008). That resolution provides, inter alia, for the maintenance of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 40 of Resolution 1822 (2008), those measures are to be reviewed with a view to their possible further strengthening in 18 months, or sooner if necessary.

Procedure and forms of order sought

19 By application lodged at the Registry of the Court of First Instance on 17 December 2001, Mr Omar Mohammed Othman, the applicant, brought an action under Article 230 EC against the Council and the Commission in which he claimed that the Court should annul Regulations Nos 467/2001 and 2062/2001.

20 In their defences, lodged at the Registry on 15 March 2002, the Council and the Commission contended that the Court should dismiss the application and order the applicant to pay the costs.

21 By document lodged at the Registry on 1 May 2002, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in these proceedings in support of the forms of order sought by the Council and the Commission.

22 By document lodged at the Registry on 27 May 2002, the applicant made an application for legal aid.

23 By order of the President of the First Chamber of the Court of First Instance of 31 May 2002, the written procedure was suspended, at the applicant's request and without objection from the other parties, pending final judgment in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission*.

24 The composition of the Chambers of the Court of First Instance having been altered, the Judge-Rapporteur was attached to the Second Chamber to which this case was, in consequence, assigned.

25 The written procedure was resumed on 21 September 2005.

26 By letter from the Registry of 3 October 2005, the applicant was requested to express his views in his reply on the new matters of law and fact that had arisen since the proceedings were brought and that might have some bearing on the outcome of the present dispute. He was requested in particular:

— to submit his observations on the appropriate conclusions to be drawn, for the continuing conduct of the case, from the repeal of Regulation No 467/2001 and its replacement by Regulation No 881/2002;

— to reconsider the form of order sought, pleas in law and arguments in his action, in the light of the two judgments of the Court of First Instance of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533 ('*Yusuf* at first instance') and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649 ('*Kadi* at first instance').

27 In the same letter from the Registry, the applicant was invited to submit an updated application for legal aid.

28 In his reply, lodged at the Registry on 14 November 2005, the applicant stated that he was amending his application in order to seek annulment of Regulation No 881/2002 ('the contested regulation') in so far as it concerned him.

29 By order of 2 December 2005, the President of the Second Chamber of the Court of First Instance granted the United Kingdom leave to intervene in support of the forms of order sought by the defendants. The intervener lodged its statement in intervention within the prescribed period.

30 In its rejoinder, lodged at the Registry on 21 December 2005, the Council reiterated the form of order sought in its defence.

31 The Commission contended in its rejoinder, lodged at the Registry on 13 January 2006, that the Court of First Instance should:

— dismiss the application as inadmissible in so far as it is directed against the Commission;

— dismiss the application as unfounded;

— order the applicant to pay the costs.

32 In its statement in intervention, lodged at the Registry on 1 March 2006, the United Kingdom supported the forms of order sought by the Council and the Commission.

33 By letter also lodged at the Registry on 1 March 2006, the United Kingdom requested that information contained in the annexes to the statement in intervention should not be made public.

34 The written procedure was closed on 3 April 2006.

35 By document lodged at the Registry on 25 April 2006, the applicant submitted an updated application for legal aid.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

37 Although the date of the hearing before the Second Chamber of the Court of First Instance had been fixed at 17 October 2006, on 22 September 2006 the applicant lodged a further request that the proceedings should be stayed pending judgment in *Kadi* on appeal. Accordingly, the Court of First Instance (Second Chamber) revoked its decision to open the oral procedure and, by order of the President of the Second Chamber of 9 November 2006, proceedings were stayed, without objection by the other parties, pending judgment in *Kadi* on appeal.

38 By order of the President of the Second Chamber of the Court of First Instance of 27 October 2006, the applicant was granted legal aid.

39 The composition of the Chambers of the Court of First Instance having once again been changed, the Judge-Rapporteur was attached to the Seventh Chamber, to which this case was consequently reassigned.

40 Proceedings were resumed on 3 September 2008.

41 By letter from the Registry of 16 October 2008, the parties were requested:

— to state what conclusions should in their view be drawn, for the purposes of the present action, from *Kadi* on appeal;

— to inform the Court of changes in the applicant's factual and legal situation, in so far as they considered them relevant for the purposes of this action.

42 The parties complied with that request by letters lodged at the Registry on 30 October 2008 by the Council and the Commission and on 31 October 2008 by the applicant and the United Kingdom, respectively.

43 Upon hearing the further report of the Judge-Rapporteur, the Court of First Instance (Seventh Chamber) decided to open the oral procedure.

44 The parties presented oral arguments and answered the questions put to them by the Court at the hearing on 21 January 2009.

45 At the hearing, the applicant added to the forms of order he sought by requesting that the Council should be ordered to pay the costs.

Facts

46 Mr Othman is a Jordanian citizen who has lived since 1993 in the United Kingdom, where he was granted temporary political asylum in 1994. His application for indefinite leave to remain was still under consideration when the present action was brought. He has a dependent wife and five dependent children.

47 In February 2001, the applicant was arrested and held for questioning in an investigation under the Prevention of Terrorism (Temporary Provisions) Act 1989. During a search of his home, the police found and seized a substantial amount of money in cash in a number of different currencies (pounds sterling, German marks, Spanish pesetas and US dollars), the exchange value of which came to about GBP 180 000. The applicant gave no explanation of the origin of those funds. The applicant's two bank accounts, which had a credit balance of approximately GBP 1 900, were furthermore frozen in implementation of measures determined by the Sanctions Committee.

48 It is also apparent from the documents before the Court that, in December 2001, the applicant went into hiding from fear of arrest and indefinite detention under the Anti-Terrorism, Crime and Security Act 2001, which was about to be adopted by the United Kingdom Parliament. He was arrested by the police and held in Belmarsh Prison (United Kingdom) from 23 October 2002 to 13 March 2005, when he was released, under strict surveillance, following a judgment of the House of Lords holding that the United Kingdom scheme of 'detention without trial', to which he was subject, was unlawful. The applicant was once more arrested on 11 August 2005 and held in Long Lartin Prison (United Kingdom), under the new anti-terrorist measures adopted by the United Kingdom Government. That government's decision to deport the applicant to

Jordan and to hold him pending deportation, which was served on the applicant on 11 August 2005, has been the subject of an unsuccessful appeal before the competent national courts. That government has, nevertheless, agreed not to give effect to that decision pending the outcome of the action brought by the applicant before the European Court of Human Rights. In the meantime, the applicant was released on bail on 17 June 2008. Bail was revoked on 2 December 2008 by the Special Immigration Appeals Commission. The applicant has since then remained in detention.

Law

The procedural consequences of the adoption of the contested regulation

Arguments of the parties

49 In his reply, the applicant maintains that he is entitled to amend his heads of claim, so as to seek annulment of the contested regulation in so far as it concerns him. In support of this, he cites paragraph 55 of *Kadi* at first instance.

50 In their rejoinders, the Council and the Commission agree that, in accordance with *Yusuf* and *Kadi* at first instance, the applicant must be allowed to amend his application so as to challenge the contested regulation, in so far as it concerns him.

51 The Commission adds that, as a result of the new legislative situation, the action is no longer admissible in so far as it is directed against the Commission. However, it requests that, for reasons of procedural economy and of the proper administration of justice, its claims, grounds of defence and arguments should be taken into account, without the necessity of formally readmitting it as an intervener. The Commission refers, in support of this, to *Yusuf* and *Kadi* at first instance (in paragraphs 76 and 57, respectively).

Findings of the Court

52 The main parties to the proceedings are at one in acknowledging that the applicant is entitled to alter his claims and pleas in law so as to seek annulment of the contested regulation that repeals and replaces Regulation No 467/2001, as amended by Regulation No 2062/2001. In his reply, the applicant in fact stated that his original claims and pleas in law were altered to that effect.

53 On this point, it must be borne in mind that when, during the proceedings, one decision is replaced by another having the same subject-matter, this must be considered a new factor allowing the applicant to adapt its pleas in law and claims for relief. It would indeed be contrary to the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application. Moreover, it would be inequitable if the defendant institution were able, in order to counter criticisms of a decision contained in an application made to the Community judicature, to amend the contested decision or to substitute another for it and to rely in the

proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision (Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 *Fabrique de fer de Charleroi and Dillinger Huttenwerke* v *Commission* [1987] ECR 3639, paragraph 11; Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988]
ECR 4131, paragraphs 11 and 12; and Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 33.

54 That case-law may be applied to a situation in which a regulation of direct and individual concern to a person is replaced, during the proceedings, by another regulation having the same subject-matter.

55 That hypothesis corresponding on all points to that at issue in this case, the applicant's request that his action should seek annulment of the contested regulation, in so far as it concerns him, must be allowed, and the parties must be permitted to redraft their claims for relief, pleas in law and arguments in the light of that new factor.

56 In those circumstances, it must be held that the applicant's original application for annulment in part of Regulation No 467/2001 has become devoid of purpose on account of the repeal of that measure by the contested regulation. There is, therefore, no longer any need to give a decision on that application or on the application for annulment in part of Regulation No 2062/2001, now devoid of purpose also.

57 It follows from the foregoing that there are no longer any grounds for ruling on the action in so far as it is directed against the Commission. In the circumstances of the case, however, the principle of proper administration of justice and the requirements of procedural economy on which the decisions cited in paragraph 53 above are based provide justification for account to be taken also of the Commission's claims, pleas in law and arguments, redrafted as mentioned in paragraph 55 above, but without it being necessary formally to readmit that institution to the proceedings under Articles 115(1) and 116(6) of the Rules of Procedure of the Court of First Instance, as intervening in support of the forms of order sought by the Council.

58 Having regard to the foregoing, this action must be regarded as being directed henceforth against the Council alone, supported by the Commission and the United Kingdom, and its sole object must be considered to be a claim for annulment of the contested regulation, in so far as it concerns the applicant.

Substance

Arguments of the parties

59 In his application, the applicant put forward, in essence, three pleas in law in support of his claim for annulment of Regulations Nos 467/2001 and 2062/2001, the first alleging infringement of Articles 60 EC and 301 EC and misuse of powers; the second alleging breach of fundamental rights as guaranteed in particular by Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), and of the principles of proportionality and subsidiarity; and the third alleging infringement of the obligation to state reasons.

60 In his observations lodged at the Registry on 31 October 2008, the applicant stated, however, that in the light of *Kadi* on appeal he did not wish to pursue the first and third pleas.

61 The Council and the Commission, in their defences, and the United Kingdom, in its statement in intervention, challenged the applicant's second plea for annulment with arguments which were essentially the same as those they put forward in response to similar pleas for annulment relied on by the applicants in the cases giving rise to the judgments in *Yusuf* and *Kadi* at first instance and in Case T-253/02 *Ayadi* v *Council* [2006] ECR II-2139 and Case T-49/04 *Hassan* v *Council and Commission* (not published in the ECR).

62 In his reply, the applicant developed fresh arguments in connection with the plea alleging breach of his fundamental rights.

63 The applicant accepted that Article 2a of the contested regulation, as inserted by Regulation No 561/2003, now permits the persons concerned to be provided with funds and economic resources necessary for subsistence and other most basic needs. He maintained, however, that that provision is extremely narrowly drawn and interferes extremely seriously with those persons' dignity.

64 First, the provision in question makes it impossible for the applicant to have the means of enjoying the normal aspects of civilised existence.

65 Secondly, that provision prohibits the applicant from engaging in any paid employment, occupation or profession.

66 Thirdly, unlike Resolution 1333 (2000), given effect by Regulation No 467/2001, Resolution 1390 (2002), given effect by the contested regulation, is indefinite in time. The contested regulation thus permits the permanent exclusion of the applicant from almost all aspects of social life.

67 Fourthly and lastly, the applicant is deprived of any judicial challenge to the restrictive measures imposed on him. The decision to include him in the list annexed to the contested regulation is an entirely political decision of the Security Council, taken in a wholly non-judicial manner without any regard to the rules of evidence or of fairness. There is no remedy, even of a quasi-judicial kind, that might be invoked against the Security Council's decision.

68 The Council and the Commission, in their respective rejoinders, and the United Kingdom, in its statement in intervention, contested those new arguments, referring, in particular, to *Yusuf* and *Kadi* at first instance.

69 In his observations, lodged at the Registry on 31 October 2008, the applicant maintained that he found himself in the same situation as the applicants in the cases giving rise to *Kadi* on appeal. None of them has ever received from the Council the slightest indication of the evidence used against them to justify the adoption of the restrictive measures imposed by that regulation.

70 According to the applicant, the Court of First Instance must recognise, in the light of *Kadi* on appeal (paragraphs 336, 348, 349 and 370), that the contested regulation

infringes his rights of defence, his right to an effective legal remedy and his right to property, and that that measure must therefore be annulled in so far as it concerns him.

71 In its observations, lodged at the Registry on 30 October 2008, the Council acknowledged that, following *Kadi* on appeal, it was necessary to provide the applicant with a statement of reasons, to allow him an opportunity to comment on it and to take those comments into consideration before adopting a new decision to freeze funds affecting him.

72 The necessary steps are under way in order to obtain the information required for that statement of reasons, but the Council has not been able to say when it will be possible to communicate that statement of reasons to the applicant. The Council has undertaken to act as swiftly as possible in order to observe the applicant's rights of defence and to keep the Court informed of further developments.

73 In its observations, lodged at the Registry on 30 October 2008, the Commission also recognised that the applicant's situation was the same as that of the applicants in the cases giving rise to *Kadi* on appeal, in that his funds were frozen, first pursuant to Regulation No 467/2001 and then pursuant to Regulation No 881/2002, without the reasons for that measure being communicated to him. It is therefore necessary to review his situation with regard to the latter regulation, after first providing him with a summary of the grounds and giving him an opportunity to make observations on them. According to the Commission, steps to that end were already under way vis-à-vis the Sanctions Committee, but could take several weeks.

74 The Commission none the less drew the attention of the Court to the fact that the second plea in law in the present case, unlike the claims in the cases giving rise to *Kadi*

on appeal, does not dispute the applicant's inclusion in the list as such, but only its consequences on his livelihood, including the suspension of social security benefits.

75 In its observations, lodged at the Registry on 31 October 2008, the United Kingdom endorsed the observations lodged by the Council in response to the Court's request.

76 At the hearing, the Council and the Commission admitted, in the light of *Kadi* on appeal, that the contested regulation had been adopted under a procedure in the course of which the applicant's rights of defence had not been observed.

77 Those institutions further explained that the steps taken, in particular those vis-à-vis the Sanctions Committee, in order to make the Community fund-freezing procedures consistent with the principles laid down by the Court of Justice in *Kadi* on appeal (see paragraphs 71 and 72 above), had not as yet yielded any result in the applicant's case.

78 The Council and the interveners accordingly requested the Court of First Instance, if it should annul the contested regulation in so far as it concerned the applicant, to maintain its effects for a brief period, as the Court of Justice did, pursuant to Article 231 EC, in *Kadi* on appeal.

79 In this regard, the United Kingdom argued more particularly, referring to paragraph 373 of that judgment, that such annulment with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by that regulation and which the Community is required to implement,

because in the interval preceding its replacement by a new regulation the applicant might take steps seeking to prevent measures freezing funds from being applied to him again.

80 Furthermore, inasmuch as the annulling judgment to be given would be founded on the same essentially procedural considerations as those on which *Kadi* on appeal is founded, the United Kingdom noted that, in paragraph 374 of that judgment, the Court of Justice took care to observe that it could not be excluded that, on the merits of the case, the imposition of those measures on the persons concerned might nevertheless prove to be justified. That is particularly the case in this instance, as borne out by several decisions concerning the applicant taken by the courts of the United Kingdom with jurisdiction in the field of terrorism.

81 The applicant opposed that request made by the Council and the interveners.

Findings of the Court

82 It is established that, both in respect of the procedure leading to the adoption of the contested regulation and in respect of the extent, effects and justification, if any, of the restriction of the use of his right to property arising from the restrictive measures laid down by that regulation, the applicant finds himself in a factual and legal situation in every way comparable to that of the appellants in the cases giving rise to *Kadi* on appeal.

83 With regard, first, to the procedure leading to the adoption of the contested regulation, it must be pointed out that the Council at no time informed the applicant of the

evidence adduced against him that allegedly justified his inclusion for the first time in Annex I to that regulation and, consequently, the imposition of the restrictive measures laid down by the latter.

84 It is not indeed denied that no information was supplied in that connection to the applicant, whether in Regulation No 467/2001 as amended by Regulation No 2062/2001, mentioning his name for the first time in a list of persons, entities or bodies to whom and to which a measure freezing funds applies, in the contested regulation or at some later stage.

85 Because the Council neither communicated to the applicant the evidence used against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, the applicant was not in a position to make his point of view in that respect known to advantage. Therefore, the applicant's rights of defence, in particular the right to be heard, were not respected (see, to that effect, *Kadi* on appeal, paragraph 348).

86 In addition, given the failure to inform him of the evidence adduced against him and having regard to the relationship, referred to by the Court of Justice in paragraphs 336 and 337 of *Kadi* on appeal, between rights of defence and the right to an effective legal remedy, the applicant was also unable to defend his rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that his right to an effective legal remedy has also been infringed (see, to that effect, *Kadi* on appeal, paragraph 349).

87 Lastly, it must be stated that that infringement has not been remedied in the course of this action, the Council having adduced no evidence for that purpose (see, to that effect, *Kadi* on appeal, paragraph 350).

88 The Court of First Instance cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the applicant, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which he enjoys has not, in the circumstances, been observed (see, to that effect, *Kadi* on appeal, paragraph 351).

89 It must, therefore, be held that the contested regulation, in so far as it concerns the applicant, was adopted without any guarantee being given as to the communication of the inculpatory evidence against him or as to his being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the applicant's rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed (see, to that effect, *Kadi* on appeal, paragraph 352).

90 It follows from all the foregoing considerations that the grounds of challenge put forward by the applicant in his reply (see paragraph 67 above) and in his observations lodged at the Registry on 31 October 2008 (see paragraph 69 above), in support of his claim for annulment of the contested regulation and alleging breach of his rights of defence, especially the rules of evidence, and of the right to effective judicial review, are well founded (see, to that effect, *Kadi* on appeal, paragraph 353).

91 With regard, secondly, to the extent, effects and justification, if any, of the restriction of the use of his right to property arising from the restrictive measures laid down by the contested regulation, it must be added that that regulation, in so far as it concerns the applicant, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him (see, to that effect, *Kadi* on appeal, paragraph 369).

92 It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of the applicant, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property (see, to that effect, *Kadi* on appeal, paragraph 370).

93 Therefore, in so far as certain challenges made by the applicant in his reply (see paragraphs 63 to 66 above), in support of his claim for annulment of the contested regulation, may be understood to allege breach of the fundamental right to property, they too are well founded (see, to that effect, *Kadi* on appeal, paragraph 371).

94 It follows from all the foregoing that the contested regulation, in so far as it concerns the applicant, must be annulled.

95 In the circumstances of the case, there are no grounds for allowing the request made at the hearing by the Council and the interveners seeking to have the effects of the contested regulation maintained for a short period pursuant to Article 231 EC.

96 The period already elapsed since the delivery of the judgment in *Kadi* on appeal, on 3 September 2008, far exceeds the maximum period of three months from the date of delivery of that judgment considered reasonable by the Court of Justice in order to allow the Council to remedy the infringements found in that case, while taking account of the considerable impact of the restrictive measures concerned on the rights and freedoms of the persons concerned (see, to that effect, *Kadi* on appeal, paragraphs 375 and 376).

97 Although that period was determined by reference only to the case of the two persons involved in the cases giving rise to *Kadi* on appeal, namely, Mr Kadi and the Al Barakaat International Foundation, the fact remains that the Council could not have been unaware that the applicant's situation, which is in all respects comparable (see paragraph 82 above), necessarily called for the same response on its part. Furthermore, the institutions that are parties to these proceedings have stated that they have taken steps, in particular by approaching the Sanctions Committee, immediately after the delivery of that judgment, for the purpose of making the Community fund-freezing procedures consistent with the principles laid down in that judgment (see paragraphs 72 and 73 above).

98 What is more, in accordance with the second paragraph of Article 60 of the Statute of the Court of Justice, which none of the parties, questioned on this point at the hearing, denied was applicable to the circumstances of the case, by way of derogation from Article 244 EC, decisions of the Court of First Instance declaring a regulation to be void take effect only from the date of expiry of the period referred to in the first paragraph of Article 56 of the Statute or, if an appeal has been brought within that period, as from the date of dismissal of the appeal. In addition to the time elapsed since the delivery of *Kadi* on appeal, the Council in any event has available to it a period of at least two months, and in addition the extension of the time-limit on account of distance by 10 days, running from the date of notification of this judgment, in order to remedy the infringements found by adopting, if appropriate, a new restrictive measure to be imposed on the applicant. This fact distinguishes the instant case from that giving rise to the judgment in *Kadi* on appeal, which was enforceable *ipso jure*, in accordance with Article 244 EC.

99 Accordingly, the danger of serious and irreversible prejudice to the effectiveness of the restrictive measures imposed by the contested regulation and which the Community is required to implement, invoked by the Court of Justice in *Kadi* on appeal (paragraph 373), does not appear to be sufficiently great in the present case, having regard to the considerable impact of the restrictive measures concerned on the applicant's rights and freedoms, to justify the maintenance of the effects of that regulation for a period exceeding that laid down in Article 60 of the Statute of the Court of Justice.

Costs

100 Under Article 87(2) 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. Under the first subparagraph of Article 87(4) of those rules, the Member States and institutions which intervened in the proceedings are to bear their own costs. Under Article 87(6), where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance

101 In the instant case, the Council has been unsuccessful inasmuch as Regulation No 881/2002 must be annulled in so far as it concerns the applicant, in accordance with the form of order sought by him, whereas there is no longer any need to rule on the original application for annulment of Regulation No 467/2001, as amended by Regulation No 2062/2001, in so far as it was directed against the Commission.

102 In his written pleadings before the Court of First Instance, the applicant did not claim that the Council should be ordered to pay the costs. None the less, he indicated at the hearing that he sought an order for costs against the Council.

103 In this regard, it is apparent from settled case-law that the fact that the successful party did not ask for costs until the hearing does not prevent his application from being allowed (see Joined Cases T-225/06, T-255/06, T-257/06 and T-309/06 *Budějovický Budvar* v *OHIM — Anheuser-Busch (BUD)* [2008] ECR II-3555, paragraph 206, and the case-law there cited).

104 In those circumstances, and having regard to the alteration of the subject-matter of the case and of the Commission's status in the proceedings (see paragraphs 56 to 58 above), the provisions mentioned above will be given proper application by deciding that the Council is to pay, in addition to its own costs, those of the applicant, while the United Kingdom and the Commission are to bear their own costs.

105 In accordance with Article 97(3) of the Rules of Procedure, the applicant having been granted legal aid and the Court of First Instance having ordered the Council to pay the costs incurred by the applicant, the Council will be required to refund to the Court cashier the sums advanced by way of legal aid.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

1. **Declares that there is no longer any need to adjudicate on the claims for annulment of Council Regulation (EC) No 467/2001 of 6 March 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, and repealing Regulation (EC) No 337/2000, and of Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001;**

2. **Annuls 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-Qaeda network and the Taliban, and repealing Regulation No 467/2001, in so far as it concerns Mr Omar Mohammed Othman;**

3. **Orders the Council of the European Union to pay, in addition to its own costs, those incurred by Mr Othman, and the sums advanced by way of legal aid by the cashier of the Court of First Instance;**

4. **Orders the Commission of the European Communities and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Forwood Šváby Moavero Milanesi

Delivered in open court in Luxembourg on 11 June 2009.

[Signatures]