III. European policies of criminalization

3. EU list of designated terrorist organisations

Legal action against the EU terror list

Bill Bowring, Birbeck College, University of London

This is a chronological account of the case-law, and focuses on the following cases: *Kadi* and *Al-Barakaat*; the *People's Mujahadeen Of Iran* (PMOI); the Philippine communist leader Professor Sison; the Kurdish organisations PKK and Kongra Gel. This history is one of early set-backs, based on subordination to UN Security Council terrorist listing. The absence of procedural guarantees, that a person or organisation should be able to know the allegations against them, and have an effective means of challenge, led to a number of – at first glance – positive judgments in the Luxembourg courts. Unfortunately, these have been shown to be rather empty.

The starting point is the US Embassy bombings in August 1998. Acting under Chapter VII of the UN Charter, which gives it mandatory powers, the Security Council in UNSC Resolution 1267 (1999) of 15 October 1999 ordered states to:

> "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban… as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available… except as may be authorised by the Committee on a case-by-case basis on the ground of humanitarian need."

In the same resolution, the Security Council established a "Sanctions Committee" of all its members. This Committee, one of whose purposes is to "freeze without delay the funds and other financial assets or economic resources of designated individuals and entities" has established and maintained "The Consolidated List" "with respect to Al-Qaida, Usama bin Laden (sic), and the Taliban and other individuals, groups, undertakings and entities associated with them", which are to be subjected to "asset freezing".

This mechanism, already more than 10 years old, has been incrementally strengthened on many occasions, frequently in response to fresh events.

On 28 September 2001, after "9/11", the Security Council adopted Resolution 1373 (2001) (Terrorism) which continues to be the focus of action by governments around the world "for wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism" including Al-Qaida. This Resolution makes the connection between terrorism and organised crime, drug trafficking, arms trafficking and the illegal movement of weapons of mass destruction.

Some scholars have expressed grave reservations as to whether, in adopting such resolutions under Chapter VII, the UN Security Council is engaging in unwarranted legislation.

The EU acted promptly to put in place mandatory requirements to enforce the Security Council's measures. It adopted "Common Positions" under Article 15 of the Treaty establishing the European Union. If a Common Position calls for Community action implementing some or all of the restrictive measures, the Commission will present to Council a proposal for a Council Regulation in accordance with Articles 60 and 301 of the Treaty establishing the European Community. It should

be recalled that it is the member states acting in the Council that are ultimately responsible for deciding who is included in the EU "terrorist list", acting under the EU's Common Foreign and Security Policy. This is, of course, the context of unjust and arbitrary decision-making.

In 2002 the Council decided to blacklist the PKK, and there were subsequent listing decisions. These were challenged in the CFI by both the 'Kurdistan National Congress' (KNK) - an umbrella group of 30 Kurdish organisations which included the PKK - and Osman Öcalan – the younger brother of Abdullah Öcalan, founder of the PKK, who has been imprisoned by Turkey since 1999. However, on 15 February 2005 the CFI dismissed both applications as inadmissible on procedural grounds – that is, Osman Öcalan could not readily prove that he validly represented the PKK, which the CFI understood was dissolved. Similarly, the Court found that the KNK could not validly represent the PKK, given that the latter group was not a member of the former network anymore. KNK and Öcalan filed an appeal against the CFI's dismissal of their cases with the European Court of Justice (ECJ).

On 21 September 2005 the Court of First Instance (CFI) of the EU's European Court of Justice (ECJ) decided the first two cases on "acts adopted in the fight against terrorism", *Yusuf* and *Kadi*. The judgments established a so-called "rule of paramountcy", derived from Article 103 of the UN Charter:

> "According to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This paramountcy extends to decisions of the Security Council."

2005 was therefore the low point in attempts to challenge Council decisions to place organisations and individuals on the terrorist list.

On 12 December 2006 the CFI ruled in favour of an appeal by the PMOI against asset-freezing as a result of their inclusion in the EU "terrorist list". The Court's ruling represented the first successful legal challenge, but left undisturbed the EU legislation on "terrorist lists". The ruling was limited to the decision to freeze the PMOI's assets, rather than the broader issue of its designation as "terrorist". The Court made a further distinction between organisations proscribed by the EU member states, and organisations proscribed the UN Security Council.

On 18 January 2007, on the appeal of KNK and Öcalan, the ECJ held that certain aspects of Osman Öcalan's appeal were admissible whilst others were inadmissible. Specifically, the Court held that Osman Öcalan was legitimately able to act on behalf of the PKK in this case and that the PKK must have the possibility to dispute the Council's blacklisting decision. In stressing the importance of judicial protection in general, the ECJ stated:

> It is particularly important for that judicial protection to be effective because the restrictive measures … have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.
>
> … [A] person, group or entity can be included in the disputed list only if there is certain reliable information, and the persons, groups or entities covered must be precisely identified. In addition, it is made clear that the name of the persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All these matters must be open to judicial review.

That is, the procedural rights of defence, the obligation to state reasons and the right to effective judicial protection are, according to the ECJ, inseparably interconnected in the context of terrorism blacklists. Furthermore, whilst both Öcalan's challenge against the May 2002 PKK listing decision was dismissed for being out of time and the KNK's appeal was dismissed as unfounded, the Court

referred the challenge against the Council's June 2002 PKK listing decision back to the CFI for proper consideration.

On 11 July 2007 the CFI decided to annul the EU Council Decision to place Professor Sison on the EU list of 'terrorists' for the purposes of asset-freezing. The Court held (para 226):

> In conclusion, the Court finds that no statement of reasons has been given for the contested decision and that the latter was adopted in the course of a procedure during which the applicant's rights of the defence were not observed. What is more, the Court is not, even at this stage of the procedure, in a position to undertake the judicial review of the lawfulness of that decision in light of the other pleas in law, grounds of challenge and substantive arguments invoked in support of the application for annulment.

However, the Court refused his claim for compensation.

On 4 April 2008 the CFI quashed the decisions by the EU Council to include the Kurdish organisations PKK and Kongra Gel on the EU "terrorist list". In Case T-253/04 brought on behalf of Kongra Gel and 10 other individuals, the EU court ruled that the organisation was not in a position "to understand, clearly and unequivocally, the reasoning" that led the member states' governments to include them. It reached the same conclusion in Case T-229/02, bought by Osman Öcalan on behalf of Kurdistan Workers Party (PKK).

This was not such a great victory, however, because the Court also found that the more recent Council decisions keeping both organisations on the terrorist list properly complied with the obligation to provide a statement of reasons. Consequently, the PKK, KADEK and KONGRA-GEL all currently remain on the EU blacklist.

Another apparent victory followed at the end of 2008.

On 3 September 2008 following very strongly worded opinions by the Advocate General, the European Court of Justice (ECJ) astonished all observers by annulling the Council Regulation in both *Kadi* and *Al-Barakaat*, on the ground that

> 'the Community courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council.'

Thus, the ECJ affirmed the jurisdiction of the EU courts to examine the implementation of UN Security Council resolutions and ensure their compliance with human rights law. It held, forthrightly, that rights to due process had been violated.

> '…the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.'

It also condemned the failure of the EC Regulation noted above to include any procedure for "communicating the evidence justifying the inclusion of the names of the persons concerned in the list". This too violated fundamental rights.

Following *Kadi*, on 4 December 2008 the CFI annulled the PMOI's listing - less than 2 months after their decision annulling the earlier Council measures. In this case, the CFI held that the Council had breached PMOI's rights to defence by failing to inform them of new evidence they had purportedly obtained from France to justify the new listing. Whilst this alone was sufficient to annul the Council's decision, the Court went further and specified some of the additional obligations that the Council owed to listed persons or entities to ensure that they have the possibility of an effective judicial remedy.

First, the Council needed to explain why alleged acts by individual members ascribed to a particular group justified the listing of the whole organisation.
Second, a decision by the Council to list an individual or organization must be based on "serious and credible evidence", and in this case the Council's reasoning failed to meet that threshold. Here the CFI found that it was unable properly to review the legality of the listing because it was based on secret information that was kept confidential by the French authorities. Consequently, the Court held that:

> the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.

By failing to disclose such material to the Court, the Council's decision to list PMOI was in clear reach of the fundamental right to effective judicial protection. Consequently, the decision was annulled and, on 26 January 2009, PMOI were officially and finally removed from the EU terrorist list.

On 30 September 2009 the CFI finally delivered their judgment on Professor Sison's case. In short, the Court found that a decision to 'instigat[e] … investigations or prosecut[e]' must primarily aim at the imposition of preventative or punitive measures in relation to that person's involvement in terrorism. In this case, however, the decisions of the *Raad van State* and *Rechtbank* (relied upon by the Council to list Professor Sison) were solely concerned with the legality of the Dutch government's decision to refuse his asylum application. As such, they could not serve as a valid basis for freezing Sison's funds. Accordingly, the CFIt concluded by annulling the June 2007 blacklisting decision, finding that Sison had never been investigated, prosecuted or convicted for any specific act of terrorism.

Finally, on 11 December 2009 – after more than 7 years of continuous legal challenge - the CFI (which by now had been renamed the General Court) removed Professor Sison from the EU terror blacklist and unfroze his assets.

On 29 June 2010, the ECJ delivered their ruling on the correct interpretation of EU law on designating the DHKP-C on the European blacklist. The Court held that all of the EU Council decisions pertaining to the blacklisting of the DHKP-C prior to 29 June 2007 were invalid.

This was because they had not been accompanied by a statement of reasons explaining the actual reasons why the blacklisting of the DHKP-C was considered to be justified. The consequences of this error were twofold: first, it effectively denied the defendants the opportunity to verify whether the inclusion of the DHKP-C on the blacklist (prior to 29 June 2007) was well founded; and second, it prevented the Courts from undertaking an adequate and effective review of the legality of DHKP-C's listing. Accordingly, the ECJ ordered the German court to refrain from applying all Council decisions concerning the DHKP-C adopted prior to June 2007 and declared that such council decisions cannot form the basis of any criminal proceedings against the alleged party members in relation to the period prior to 29 June 2007.

On 28 November 2008, after having provided *Kadi* and *Al Barakaat* with their 'statement of reasons', the Commission renewed their listing on the EU blacklist. A further legal application action was filed with the General Court (formerly, the CFI) on 30 January 2009 against the renewed listing. Whilst the Al Barakaat Foundation was finally de-listed by the UN Security Council and withdrew its EU action for annulment, Mr Kadi remained blacklisted and persisted with his challenge before the General Court.

On 30 September 2010, the General Court's judgment criticized the ECJ's understanding of the relationship between the EU and the UN order. In their view the Court of Justice in scrutinising the UN system engaged in 'judicial review', which is liable to encroach on the Security Council's prerogatives.' (para. 114)

Nevertheless, the General Court followed the ECJ and considered that it must, in principle, ensure a full and rigorous review of the European regulation; it may only decline to do so if sufficient judicial guarantees are already in place at UN level.

Judicial guarantees in the UN system are not sufficient:

> 'In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee ... Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list).' (para. 128)

Sending the applicant a summary of reasons, containing 'general, unsubstantiated, vague and unparticularised allegations,' is not enough. (paras. 177, 157)

The General Court stated that 'The applicant's rights of defence have been "observed" only in the most formal and superficial sense…'(para. 171). The Commission 'failed to take due account of the applicant's comments' and 'did not grant him even the most minimal access to the evidence against him.' (paras. 172 – 173) As a consequence, the right to effective judicial review and the right to property were also infringed.

The Kadi saga, however, does not end with this judgement. An appeal by the Commission is most likely. This means that it might take even more than ten years until Mr Kadi will ever know the evidence against him.