ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
7 June 2004 *

In Case T-338/02,

Segi,

Araitz Zubimendi Izaga, residing in Hernani (Spain),

Aritza Galarraga, residing in Saint-Pée-sur-Nivelle (France),

represented by D. Rouget, lawyer,

applicants,

v

Council of the European Union, represented by M. Vitsentzatos and M. Bauer, acting as Agents,

defendant,

* Language of the case: French.

supported by

Kingdom of Spain, represented by its agent, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by P. Ormond, and subsequently by C. Jackson, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for compensation for the damage allegedly sustained by the applicants due to the inclusion of Segi on the list of persons, groups or entities referred to in Article 1 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), of Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75), and Council Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32),

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

composed of J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,
Registrar: H. Jung,

makes the following

Order

Background to the dispute

1 It is apparent from the documents before the Court that Segi is an organisation which has the aim of supporting the claims of Basque youth, and of Basque identity, culture and language. According to the applicants, this organisation was created on 16 June 2001 and is established in Bayonne (France) and in Donostia (Spain). Ms Araitz Zubimendi Izaga and Mr Aritza Galarraga have been appointed spokespersons. No official documentation has been provided in this respect.

2 On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), by which, in particular, it decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

3 On 27 December 2001, considering that action by the Community was necessary in order to implement Resolution 1373 (2001) of the United Nations Security Council, the Council adopted Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). That common

position was adopted on the basis of Article 15 EU, which comes under Title V of the EU Treaty entitled 'Provisions on a common foreign and security policy' (CFSP), and Article 34 EU, which comes under Title VI of the EU Treaty entitled 'Provisions on police and judicial cooperation in criminal matters' (commonly known as justice and home affairs) (JHA).

4 Articles 1 and 4 of Common Position 2001/931 provide:

'Article 1

1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.'

'Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they

shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.'

5 The annex to Common Position 2001/931 indicates in point 2 entitled 'Groups and entities':

'* — Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (E.T.A.)

(The following organisations are part of the terrorist group E.T.A.: K.a.s., Xaki; Ekin, Jarrai-Haika-Segi, Gestoras pro-amnistía.)'

6 The note at the bottom of this annex states that '[p]ersons marked with an * shall be the subject of Article 4 only'.

7 On 27 December 2001, the Council also adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). None of those texts mentions the applicants.

8 According to the Council declaration annexed to the minutes at the time of the adoption of Common Position 2001/931 and Regulation No 2580/2001 ('the Council declaration concerning the right to compensation'):

'The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.'

9 By orders of 5 February and 11 March 2002, the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), respectively declared Segi's activities illegal and ordered the imprisonment of certain of Segi's presumed leaders, on the ground that that organisation was an integral part of the Basque separatist organisation ETA.

10 By decision of 23 May 2002, the European Court of Human Rights dismissed as inadmissible the action brought by the applicants against the 15 Member States, concerning Common Position 2001/931, on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

11 On 2 May and 17 June 2002, the Council adopted, on the basis of Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP and 2002/462/CFSP updating Common Position 2001/931 (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32). The annexes to these two common positions contain the name 'Segi', which appears in the same way as it does in Common Position 2001/931.

Procedure and forms of order sought by the parties

12 By application lodged at the Registry of the Court of First Instance on 13 November 2002, the applicants brought the present action.

13 By separate document lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, on which the applicants submitted their observations.

14 By order of 5 June 2003, the President of the Second Chamber of the Court of First Instance granted the requests of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for leave to intervene in support of the forms of order sought by the Council. The United Kingdom did not submit observations on the objection of inadmissibility. The Kingdom of Spain submitted its observations on the objection of inadmissibility within the prescribed time-limits.

15 In its objection of inadmissibility, the Council, supported by the Kingdom of Spain, concludes that the Court should:

— dismiss the action as clearly inadmissible;

— order the 'applicant' to pay the costs.

16 In their observations on that objection, the applicants claim that the Court should:

— declare the action for damages admissible;

— alternatively, find that the Council infringed general principles of Community law;

— in any event, order the Council to pay the costs.

Law

Arguments of the parties

17 The Council and the Kingdom of Spain submit, first, that Segi does not have the capacity to bring legal proceedings. They add that Ms Zubimendi Izaga and Mr Galarraga do not have the power to represent Segi nor, according to the Kingdom of Spain, locus standi before the Court of First Instance.

18 Second, the Council and the Kingdom of Spain submit that the damage referred to in the second paragraph of Article 288 EC must follow from a Community act (Case 99/74 *Société des grands moulins des Antilles* v *Commission* [1975] ECR 1531, paragraph 17). As the Council acted on the basis of its powers in the area of the CFSP and JHA, there is no such Community act.

19 Third, the Council and the Kingdom of Spain submit that the non-contractual responsibility of the Community requires evidence of the illegal behaviour alleged against the institution. However, the Court of First Instance does not have jurisdiction, under Articles 35 EU and 46 EU, to assess the legality of an act which comes within the scope of the CFSP or JHA.

20 As a preliminary point, the applicants argue that it is particularly shocking that the Council denies the existence and the capacity to bring legal proceedings of the applicant association with the sole aim of preventing it from challenging its inclusion in the annex to Common Position 2001/931 and of obtaining compensation. This constitutes an infringement of the general principles of Community law as set out, in particular, in Article 1, Article 6(1) and Article 13 of the ECHR.

21 Concerning the applicant association, the applicants submit that the laws of the Member States, Community law and the case-law of the European Court of Human Rights provide that a de facto association has the capacity to bring legal proceedings, in particular when it acts to defend its rights (Case 18/74 *Syndicat général du personnel des organismes européens* v *Commission* [1974] ECR 933; Case 135/81 *Groupement des agences de voyages* v *Commission* [1982] ECR 3799, paragraph 11; and Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 34). By the Council declaration concerning the right to compensation, the Council recognised the capacity to seek compensation of the 'groups' and 'entities' referred to in that common position. Moreover, by including it on the list in question, the Council treated the applicant association as an independent legal entity.

22 Concerning the two natural persons included within the applicants, they submit that they are legitimately acting in a dual capacity, as individual applicants and as representatives of the association.

23 They submit that, in a Community of law, in which fundamental laws are applied, in particular those of the ECHR, an effective judicial remedy must be available to them in order that the damage they sustained can be established and compensation obtained. Otherwise, they would find themselves in the presence of a denial of justice, which would mean that the institutions, when acting in the context of the Union, act in a completely arbitrary manner.

24 The applicants take the view that the Council fraudulently chose the legal basis for the measure in question in order to avoid all democratic control, by the courts or otherwise. This abuse of process was clearly condemned by the European Parliament, in particular in its Resolution P5 TA(2002)0055 of 7 February 2002. The choice of different legal bases for the texts concerning terrorism adopted by the Council on 27 December 2001 had the aim of depriving certain categories of persons, in particular those referred to in Article 4 of Common Position 2001/931, of the right to an effective judicial remedy, unlike those referred to in Regulation No 2580/2001. The Court of First Instance is competent to sanction such an abuse of process in the context of an action for damages.

25 Concerning the Council declaration concerning the right to compensation, it is for the Court of First Instance to interpret this declaration and define its legal effect. The Member States' responsibility is indivisible in this respect, first, because it is a Council act which is at issue, second, because the national courts do not have jurisdiction over damage caused by the Council and, third, because it would be unreasonable if the injured party had to bring an action before the 15 Member States. The said declaration gives the Court of First Instance jurisdiction to give a ruling concerning the category of persons referred to in Article 4 of Common

Position 2001/931, in the same way as it may give a ruling in respect of persons referred to in Regulation No 2580/2001 and Article 3 of that common position, who may invoke a Community act. The error mentioned in that declaration amounts to a fault and such a fault is constituted, in the present case, by errors of fact, legal characterisation and law, and by misuse of powers.

26 If the Court of First Instance ruled that it had no jurisdiction over the present action, the applicants consider that it would have to be held that the Council had infringed the general principles of Community law, as set out in particular in Article 1, Article 6(1), and Article 13 of the ECHR.

27 With regard to costs, the applicants submit that it would be inequitable if they had to be borne by them, since they are trying, in a complex and difficult legal context, to obtain compensation for the alleged damage.

Findings of the Court

28 Under Article 114(1) of the Rules of Procedure, where a party so requests, the Court of First Instance may decide on inadmissibility without going into the substance of the case. Under Article 114(3) of those rules, the remainder of the proceedings are to be oral unless the Court of First Instance decides otherwise.

29 Under Article 111 of the Rules of Procedure, where an action is manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

30 The Court takes the view that, in the present case, it has sufficient information available to it from the documents in the file and that there is no need to open the oral procedure.

31 It must first be noted that, by their action, the applicants seek compensation for the damage sustained on account of the inclusion of Segi on the list annexed to Common Position 2001/931, updated by Common Positions 2002/340 and 2002/462.

32 It should further be noted that the measures from which, it is claimed, the damage allegedly sustained arose are common positions adopted on the basis of Articles 15 EU, which comes within Title V of the EU Treaty on the CFSP, and 34 EU, which comes within Title VI of the EU Treaty on JHA.

33 It should finally be noted that the applicants are only affected by Article 4 of Common Position 2001/931, as expressly stated in the note at the bottom of the annex to that common position. That article states that the Member States shall afford each other the widest possible assistance through police and judicial cooperation within the framework of Title VI of the EU Treaty and does not entail any measure falling within the scope of the CFSP. Therefore, Article 34 EU is the only relevant legal basis of the measures from which the damage allegedly arose.

34 No judicial remedy for compensation is available in the context of Title VI of the EU Treaty.

35 Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU. As regards the provisions relevant to the present case, which were not amended by the Treaty of Nice, this article provides:

'The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

...

(b) provisions of Title VI, under the conditions provided for by Article 35 [EU];

...

(d) Article 6(2) [EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;

...'

36 It follows from Article 46 EU that, in the context of Title VI of the EU Treaty, the only judicial remedies envisaged are contained in Article 35(1), (6) and (7) EU, and comprise the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States.

37 It should further be noted that the guarantee of respect for fundamental rights referred to in Article 6(2) EU is not relevant to the present case, as Article 46(d) EU gives the Court of Justice no further competence.

38 Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts. Contrary to the Council's submissions, it would not be of any use for the applicants to seek to establish the individual liability of each Member State for the national measures enacted pursuant to Common Position 2001/931, as a means to try to obtain compensation for the damage allegedly sustained on account of the inclusion of Segi in the annex to that common position. With regard to seeking to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of the common positions in question, such an action is likely to be of little effect. Moreover, it is not possible to challenge the legality of the inclusion of Segi in that annex, in particular through a reference for a preliminary ruling on validity, because of the choice of a common position and not, for example, a decision pursuant to Article 34 EU. However, the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 44 and 45).

39 The applicants further invoke the Council declaration concerning the right to compensation, which provides that 'in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress'. According to settled case-law, declarations recorded in minutes are of limited value, since they cannot be used for the purposes of interpreting a provision of Community law where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance (Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and Case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23). The declaration in question does not specify either the judicial remedies or, a fortiori, the conditions for the opening of proceedings. In any event, it cannot refer to an action before the Community Courts, as it would then be inconsistent with the judicial system established by the EU Treaty. Therefore, as no jurisdiction has been conferred on the Court of First Instance by the said Treaty, such a declaration cannot lead it to examine the present action.

40 It follows from the above that the Court of First Instance clearly has no jurisdiction over the present action for damages in so far as it seeks compensation for any damage which may have been caused by the inclusion of Segi on the list annexed to Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

41 By contrast, the Court of First Instance does have jurisdiction over the present action for damages in so far as the applicants allege failure to observe the powers of the Community. The Community Courts have jurisdiction to review the content of an act adopted in the context of the EU Treaty in order to ascertain whether that act affects the powers of the Community (see, by analogy, Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25, and Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, paragraph 17).

42 In so far as the applicants allege misuse of procedure by the Council operating in the field of JHA consisting in an encroachment on the powers of the Community leading to their being completely deprived of judicial protection, the present action comes within the jurisdiction of the Community Courts pursuant to Article 235 EC and the second paragraph of Article 288 EC.

43 The Court considers it expedient to rule first on the substance of the present action, solely to the extent indicated in paragraph 42 above.

44 According to settled case-law, the Communities can be held liable only if a number of conditions are satisfied as regards the illegality of the alleged conduct, the genuineness of the damage suffered and the existence of a causal link between the conduct of the institution and the damage alleged.

45 In the present case, there is clearly no unlawful conduct. As is apparent from paragraph 42 above, the alleged unlawful conduct could only consist of failure to adopt a measure based on a provision of the EC Treaty the adoption of which was obligatory, alternatively to or accompanying Common Position 2001/931. As stated in paragraph 33 above, the applicants are only affected by Article 4 of Common Position 2001/931, as confirmed by Common Positions 2002/340 and 2002/462. That provision requires the Member States to fully exploit the acts adopted by the European Union and other existing international agreements, arrangements and conventions with respect to enquiries and proceedings in respect of the persons, groups and entities listed, and to afford each other, in the context of cooperation under Title VI of the EU Treaty, the widest possible assistance. The content of this provision therefore falls within the scope of Title VI of the EU Treaty and the relevant legal basis for its adoption is Article 34 EU.

46 The applicants have failed to cite a legal basis in the EC Treaty which was not applied. However, in so far as they recall in that respect the fact that the Council adopted, on 27 December 2001, various types of act to combat terrorism and, in particular, Regulation No 2580/2001 based on Articles 60 EC, 301 EC and 308 EC, the view cannot be taken that the police and judicial cooperation between Member States referred to in Article 4 of Common Position 2001/931 infringes these provisions of the EC Treaty. In fact, these provisions are clearly intended to implement, where necessary, acts adopted in the field of the CFSP and do not concern acts adopted in the area of JHA. With regard to Article 308 EC, this provision allows, admittedly, the adoption of appropriate Community measures when action appears necessary to attain one of the objectives of the Community and the EC Treaty has not provided the necessary powers. While Article 61(e) EC provides for the adoption of measures in the field of police and judicial cooperation in criminal matters, it explicitly states that the Council shall adopt these measures in accordance with the provisions of the EU Treaty. Under these circumstances, and leaving aside the question whether, where appropriate, measures of that kind could be based on Article 308 EC, the adoption of Article 4 of Common Position 2001/931 on the basis of Article 34 EU alone is not incompatible with the system of Community competences laid down by the EC Treaty. With regard to the Parliament resolution of 7 February 2002, in which it criticises the choice of a legal basis coming within the field of JHA for the establishment of the list of terrorist organisations, it must be noted that that criticism concerns a political choice and does not call into question, as such, the lawfulness of the legal basis chosen or concern the question of failure to observe Community competences. Therefore, while it follows from inclusion on the list of persons, groups or entities involved in acts of terrorism in a common position that the persons mentioned have no judicial remedy before the Community judicature, this fact does not constitute, as such, failure to observe the Community competences.

47 In so far as the action is based on a failure to observe Community competences by the Council operating in the area of JHA, it must therefore be dismissed as clearly unfounded, without it being necessary to rule in this respect on the objection of inadmissibility raised by the Council (Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52).

48 The applicants' alternative claim requesting a declaration that, despite the dismissal of their action, the Council has infringed the general principles of Community law must also be dismissed. In proceedings before the Community judicature, there is no remedy whereby the Court can adopt a position by means of a general declaration on a matter which exceeds the scope of the main proceedings. Therefore, the Court clearly has no jurisdiction over this claim either.

Costs

49 Under Article 87(3) of the Rules of Procedure, where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs. In the present case, it should be noted that the applicants have requested that the Council bear the whole costs, even if their action is dismissed. In that respect, it is relevant that the Council declaration on the right to compensation could have misled the applicants and that it was legitimate for them to seek a court competent to hear their claims. Under those circumstances, each party must be ordered to bear its own costs.

50 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The interveners must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. The application is dismissed.

2. Each party shall bear its own costs.

Luxembourg, 7 June 2004.

H. Jung

Registrar

J. Pirrung

President