

Joined Cases C-402/05 P and C-415/05 P

Yassin Abdullah Kadi and Al Barakaat International Foundation

v

**Council of the European Union
and
Commission of the European Communities**

(Common foreign and security policy (CFSP) — Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — United Nations — Security Council — Resolutions adopted under Chapter VII of the Charter of the United Nations — Implementation in the Community — Common Position 2002/402/CFSP — Regulation (EC) No 881/2002 — Measures against persons and entities included in a list drawn up by a body of the United Nations — Freezing of funds and economic resources — Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) — Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 — Actions for annulment — Competence of the Community — Joint legal basis of Articles 60 EC, 301 EC and 308 EC — Fundamental rights — Right to respect for property, right to be heard and right to effective judicial review)

Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 . . . I - 6363
Opinion of Advocate General Poiares Maduro, delivered on 23 January 2008 . . . I - 6387
Judgment of the Court (Grand Chamber) 3 September 2008 I - 6411

Summary of the Judgment

1. *Acts of the institutions — Choice of legal basis — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
(Arts 57(2) EC, 60 EC, 133 EC and 301 EC; Council Regulation No 881/2002)
2. *Acts of the institutions — Choice of legal basis — Community measures concerning objectives under the EU Treaty in the sphere of external relations — Article 308 EC — Not permissible*
(Arts 60 EC, 301 EC and 308 EC; Art. 3 EU)
3. *Acts of the institutions — Choice of legal basis — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
(Arts 60 EC, 301 EC and 308 EC; Council Regulation No 881/2002)
4. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Community measure giving effect to resolutions of the United Nations Security Council — Indirect review of the lawfulness of decisions of the Security Council — Unacceptable*
(Art. 220 EC; Council Regulation No 881/2002)
5. *Community law — Principles — Fundamental rights — Taking into consideration the European Convention on Human Rights*
(Arts 220 EC, 307 EC; Art. 6(1) EU)
6. *Public international law — Charter of the United Nations — Resolutions of the Security Council adopted under the Charter of the United Nations*
7. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
8. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*

9. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban*
10. *Actions for annulment — Judgment annulling a measure — Effects — Limitation by the Court — Regulation imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (Art. 231 EC)*

1. To accept the interpretation of Articles 60 EC and 301 EC that it is enough for the restrictive measures laid down by Resolution 1390 (2002) of the United Nations Security Council and given effect by Regulation 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 to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.

of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

Interpreting Article 301 EC as building a procedural bridge between the Community and the European Union, so that it must be construed as broadly as the relevant Community competences, including those relating to the common commercial policy and the free movement of capital, threatens to reduce the ambit and, therefore, the practical effect

Having regard to the purpose and subject-matter of that regulation, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade, and it could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy. A Community measure falls within the

competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. Nor can that regulation be regarded as falling within the ambit of the provisions of the EC Treaty on free movement of capital and payments, in so far as it prohibits the transfer of economic resources to individuals in third countries. With regard, first of all, to Article 57(2) EC, the restrictive measures at issue do not fall within one of the categories of measures listed in that provision. Next, so far as Article 60(1) EC is concerned, that provision cannot furnish the basis for the regulation in question either, for its ambit is determined by that of Article 301 EC. As regards, finally, Article 60(2) EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.

(see paras 168, 176-178, 183, 185, 187-191, 193)

2. The view that Article 308 EC allows, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the common foreign and security policy (the CFSP), runs counter to the very wording of Article 308 EC.

While it is correct to consider that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC

Recourse to Article 308 EC demands that the action envisaged should, on the one hand, relate to the 'operation of the common market' and, on the other, be intended to attain 'one of the objectives of the Community'. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.

The coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, constitute considerations of an institutional kind militating against any extension of that bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.

Likewise, Article 3 EU, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community.

3. Article 308 EC is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

Regulation 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, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC. Since those articles do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom that regulation applies, that lack of power, attributable to the limited ambit *ratione personae* of those provisions, may be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject have been satisfied.

The objective pursued by the contested regulation being to prevent persons

(see paras 197-204)

associated with Usama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities, it may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the common foreign and security policy, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

Implementing such measures through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because by their very nature they offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC. If economic and financial measures such as those imposed by the regulation were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market.

(see paras 211, 213, 216, 222, 225-227, 229, 230)

4. The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation 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, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

(see paras 281, 282, 286-288)

5. Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation 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 in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. If Article 300(7) EC,

providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, 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 regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

(see paras 283-285, 299, 303, 304, 306-308, 326)

6. The Community must respect international law in the exercise of its powers

and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII, since they are to be given effect in accordance with the procedure applicable in

that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

before their names were included for the first time in the list set out in Annex I to that regulation. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

(see paras 291, 293, 294, 298)

7. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by Regulation 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, the Community authorities cannot be required to communicate, before the name of a person or entity is included for the first time in the list of persons or entities concerned by those measures, the grounds on which that inclusion is based. Such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation. Nor, for reasons also connected to the objective pursued by that regulation and to the effectiveness of the measures provided by the latter, were the Community authorities bound to hear the appellants

Nevertheless, the rights of the defence, in particular the right to be heard, were patently not respected, for neither the regulation at issue nor Common Position 2002/402 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, to which that regulation refers, provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later and, furthermore, the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to

be informed of that evidence within a reasonable period after those measures were enacted.

knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

(see paras 334, 338, 339, 341, 342, 345, 348)

8. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation 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 is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full

(see paras 335-337, 349, 351)

9. The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial

nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation 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 constitute restrictions of the right to property which may, in principle, be justified.

The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of

putting his or its case to the competent authorities, as required by Article 1 of Protocol No 1 to the European Convention on Human Rights.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex I, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it.

(see paras 361, 363, 366, 368-370)

10. In so far as a regulation such as Regulation 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 must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.

Annulment of that regulation with immediate effect would thus be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive

measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation the appellants might take steps seeking to prevent measures freezing funds from being applied to them again. In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.

(see paras 373, 374, 376)