



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

14 July 2021*

(Common foreign and security policy – Restrictive measures taken with regard to the situation in Venezuela – Freezing of funds – Lists of persons, entities and bodies covered by the freezing of funds and economic resources – Inclusion of the applicant’s name on the lists – Retention of the applicant’s name on the lists – Obligation to state reasons – Rights of the defence – Principle of sound administration – Right to effective judicial protection – Error of assessment – Freedom of expression)

In Case T-248/18,

Diosdado Cabello Rondón, residing in Caracas (Venezuela), represented by L. Giuliano and F. Di Gianni, lawyers,

applicant,

v

Council of the European Union, represented by S. Kyriakopoulou, P. Mahnič, V. Piessevaux and A. Antoniadis, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking annulment, first, of Council Decision (CFSP) 2018/90 of 22 January 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 14) and of Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10) and, second, of Council Implementing Regulation (EU) 2018/88 of 22 January 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 16 I, p. 6), and of Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1), in so far as those acts concern the applicant,

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos, President, I. Reine (Rapporteur) and L. Truchot, Judges,

Registrar: B. Lefebvre, Administrator,

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

gives the following

* Language of the case: English.

Judgment¹

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Law

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The third plea in law, alleging a breach of the freedom of expression

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100 It should be recalled that respect for fundamental rights is required of all actions of the European Union, including those in the area of CFSP as is apparent from the combined provisions of Articles 21 and 23 TEU (see judgment of 27 September 2018, *Ezz and Others v Council*, T-288/15, EU:C:2018:619, paragraph 58 and the case-law cited). Given that the freedom of expression and to information is guaranteed by Article 11 of the Charter and, under the following conditions, by Article 10 ECHR, it is necessary to verify whether the contested acts comply with that right.

101 As regards Article 10 ECHR, it must be observed that, admittedly, that convention is not, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law. Consequently, the examination of the validity of an act of EU secondary legislation must be carried out solely in the light of the fundamental rights guaranteed by the Charter. However, it should be recalled, on the one hand, that, under Article 6(3) TEU, fundamental rights recognised by the ECHR constitute general principles of EU law and, on the other hand, that it follows from Article 52(3) of the Charter that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. According to the explanations relating to that provision, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it, the meaning and scope of the guaranteed rights are determined not only by the text of the ECHR but also, in particular, by the case-law of the ECtHR. It is also apparent from those explanations that Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. Moreover, it must be pointed out that that equivalence between the freedoms guaranteed by the Charter and those guaranteed by the ECHR has been formally expressed in relation to freedom of expression (see judgment of 31 May 2018, *Korwin-Mikke v Parliament*, T-770/16, EU:T:2018:320, paragraph 38 and the case-law cited).

102 The text itself of Article 11(1) of the Charter and of Article 10(1) ECHR provides that ‘everyone has the right to freedom of expression’. The ECtHR has already held that the freedom of expression constitutes one of the essential foundations of a democratic society and that no distinction is made in that convention according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (ECtHR, 28 September 1999, *Öztürk v. Turkey*, CE:ECHR:1999:0928JUD002247993, § 49).

103 It should be borne in mind that the ECtHR places particular weight on the role played by journalists as ‘watchdogs’ of society in general and democracy in particular. It recommends ‘the greatest care’ when it is necessary to assess the validity of restrictions on their freedom of expression (see, to that effect, ECtHR, 24 June 2014, *Roşiiianu v. Romania*, CE:ECHR:2014:0624JUD002732906, § 61). It also stresses

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

that audiovisual media, such as radio and television, have a particularly important role to play in that regard. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print. The function of television and radio as familiar sources of entertainment in the intimacy of the listener or viewer's home further reinforces their impact (ECtHR, 17 September 2009, *Manole and Others v. Moldova*, CE:ECHR:2009:0917JUD001393602, § 97).

- 104 Nevertheless, the ECtHR considers that the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism. Article 10(2) ECHR, underlines that freedom of expression carries with it 'duties and responsibilities', which also apply to the media even with respect to matters of serious public concern (see, ECtHR, 17 December 2004, *Pedersen and Baadsgaard v. Denmark*, CE:ECHR:2004:1217JUD004901799, § 78 and the case-law cited). It follows from the case-law of the ECtHR that the fact that audiovisual media have effects that are often more immediate and powerful than print media is a factor to be taken into consideration when assessing the 'duties and responsibilities' referred to above (see, to that effect, ECtHR, 16 June 2015, *Delfi AS v. Estonia*, CE:ECHR:2015:0616JUD006456909, § 134).
- 105 Furthermore, the ECtHR has held that there is little scope under Article 10(2) ECHR for restrictions on political expression or on debate on questions of public interest. Expression on matters of public interest is in principle entitled to strong protection, by contrast with that which promotes or justifies violence, hatred, xenophobia or other forms of intolerance, which is normally not protected. It is in the nature of political speech to be controversial and often virulent, but that does not diminish its public interest, provided that it does not cross the line and turn into a call for violence, hatred or intolerance (ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, §§ 197, 230 and 231; see also, to that effect, ECtHR, 8 July 1999, *Süreç v. Turkey (N° 1)*, CE:ECHR:1999:0708JUD002668295, §§ 61 and 62). According to the ECtHR, in order to determine whether the statements as a whole could be regarded as incitement to violence, it was necessary to have regard to the words used and the context within which they were broadcast (see, to that effect, ECtHR, 6 July 2010, *Gözel and Özer v. Turkey*, CE:ECHR:2010:0706JUD004345304, § 52). In particular, if those statements were made against a tense political or social background, that court has generally accepted that some form of interference with such statements may be justified under Article 10(2) ECHR (see, to that effect, ECtHR, 15 October 2015, *Perinçek v. Suisse*, CE:ECHR:2015:1015JUD002751008, § 205).
- 106 For the application of those principles to this case, it is necessary to have regard to the context of the present case, which has specific characteristics distinguishing it from those that allowed the ECtHR to develop its case-law (see, to that effect, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 93).
- 107 It must be emphasised that the principles set out in the case-law of the ECtHR were established in view of situations in which a state, which had acceded to the ECHR, imposed restrictive measures, often of a penal nature, on a person who had made statements or undertaken actions considered unacceptable to that state, and that person invoked the freedom of expression as a defence against that state (judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 94).
- 108 By contrast, in the present case, the applicant is a Venezuelan citizen, resident in Venezuela, who exercises political functions in his own country and has considerable access to the audiovisual media in that country.

- 109 That is the context in which the applicant invokes the right to freedom of expression. Thus, he does not rely on that right in order to defend himself against the Venezuelan State, but rather to protect himself against restrictive measures, of a precautionary, rather than penal, nature, which the Council adopted in reaction to the prevailing situation in Venezuela (see, to that effect and by analogy, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 97).
- 110 It is in the light of all of those principles and all of those considerations that the present plea must be examined.
- 111 It must be emphasised that the applicant was included and retained on the lists at issue in his capacity as a leading Venezuelan political figure, for having publicly attacked and threatened the political opposition, media and civil society. That ground allowed the Council to apply the criterion laid down in Article 6(1)(b) of Decision 2017/2074, for including the names of natural persons whose actions, policies or activities otherwise undermine democracy or the rule of law in Venezuela.
- 112 It must be observed that the media interventions made by the applicant on which the Council relied in order to justify the contested acts disclose, inter alia, his political acts and statements during demonstrations, before the press and at press conferences.
- 113 It follows that the applicant was made the subject of the restrictive measures at issue in his capacity as a political figure who undermined democracy and the rule of law by making public and targeted threats against the political opposition, media and civil society.
- 114 As regards the applicant's argument that he may rely on his status of commentator, journalist and entrepreneur in the entertainment industry, it should be observed that his weekly television programme, the sole evidence moreover of the status of journalist upon which he relies for his benefit, appears to be an extension of his political activities. In fact, as is clear from paragraphs 81 to 83 above, the applicant has used his programme to attack his political opponents and to give instructions as to actions against the opposition. Furthermore, as stated in paragraph 112 above, the applicant's actions considered by the Council do not concern his television programme alone. In any event, it follows from the case-law of the ECtHR that the principles relating to journalists' good faith and ethical duties that they are required to respect in order to be able to rely on greater protection from interference in their freedom of expression (see paragraph 104 above) apply equally to other persons who engage in public debate (see, to that effect, ECtHR, 15 February 2005, *Steel and Morris v. United Kingdom*, CE:ECHR:2005:0215JUD006841601, § 90, and 29 November 2005, *Urbino Rodrigues v. Portugal*, CE:ECHR:2005:1129JUD007508801, § 25). Thus, those principles are relevant as regards the applicant's situation, who undoubtedly engaged in the public debate taking place in Venezuela.
- 115 It is clear from an examination of the case file that, without taking on the 'duties and responsibilities' referred to in the ECtHR case-law, the applicant freely made use of the media in order to publicly threaten and intimidate the political opposition, other media and civil society.
- 116 In particular, the applicant accused journalists of complicity in a bomb attack on the National Guard. In addition, he has not denied having engaged in intimidation on his website with regard to movements denouncing human rights violations in Venezuela, or having used, in his television programme, information derived from the unlawful recording of private conversations in order to attack political opponents. Nor did he dispute the information that he incited brutal repression through incendiary rhetoric, gave instructions to deploy combat corps against the demonstrations by the opposition, publicly threatened opposition leaders by declaring 'we know where you live', publicly exhibited a 'manual for revolutionary fighters' that contained personal information about opposition leaders, including in particular their place of residence, in order to intimidate the opposition. The applicant has furthermore not disputed information that appeared in the OAS report of 14 March 2017 according to which he was involved in acts of torture.

- 117 Therefore, it must be held that the acts of the applicant examined by the Council in its file constitute an incitement to violence, hatred and intolerance, within the meaning of the case-law referred to in paragraph 105 above, such that those acts cannot benefit from the enhanced freedom of expression which protects, in principle, statements made in the political context. Those acts are, in fact, genuine attacks that undermine democracy and the rule of law in Venezuela.
- 118 Consequently, the applicant's arguments based on his role as journalist relating to the freedom of expression enjoyed by journalists must be rejected.
- 119 Moreover, it is true that, as noted in paragraph 102 above, 'everyone' enjoys freedom of expression. In addition, in the present case, the restrictive measures imposed on the applicant may lead to restrictions on the applicant's freedom of expression since they were decided upon by the Council on account, inter alia, of some of his comments and may therefore deter him from expressing his views in similar terms. However, it must be observed that the freedom of expression does not constitute an unfettered prerogative and may be limited, under the conditions laid down in Article 52(1) of the Charter.
- 120 In order to comply with EU law, a limitation on the freedom of expression must satisfy three conditions. First, the limitation must be 'provided for by law'. In other words, the EU institution adopting measures liable to restrict a person's freedom of expression must have a legal basis for its actions. Secondly, the limitation in question must be intended to achieve an objective of general interest, recognised as such by the European Union. Thirdly, the limitation in question must not be excessive (see judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 69 and the case-law cited).
- 121 As regards the first condition, it should be noted that, in the present case, the limitation is 'provided for by law', in view of the fact that it is set out in acts which are, inter alia, of general application and have clear legal bases in EU law, namely Article 29 TEU and Article 215 TFEU (see, to that effect, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 72).
- 122 As regards the second condition, it should be noted that, as is apparent from the examination of the second plea in law, the contested acts comply, as regards the applicant, with the objective referred to in Article 21(2)(b) TEU of consolidating and supporting democracy and the rule of law in so far as they form part of a policy designed to promote democracy in Venezuela.
- 123 As regards the third condition, it must be noted that it has two aspects: first, the limitations on freedom of expression liable to result from the restrictive measures at issue must be necessary and proportionate to the aim pursued and, second, the essence of that freedom must not be impaired (see, by analogy, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 84). As regards the first aspect, it must be recalled that the principle of proportionality, as one of the general principles of EU law, requires that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question. Consequently, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 87).
- 124 In that respect, the case-law makes clear that, with regard to judicial review of compliance with the principle of proportionality, the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 88).

- 125 In the present case, as regards whether the restrictive measures, such as those imposed on the applicant, are appropriate in the light of an objective of general interest as fundamental to the international community as the protection of democracy and the rule of law, it appears that the freezing of funds, financial assets and other economic resources of persons identified as being involved in the undermining of democracy in Venezuela cannot, as such, be regarded as inappropriate. (see, to that effect, judgment of 12 February 2020, *Boshab v Council*, T-171/18, not published, EU:T:2020:55, paragraph 134 and the case-law cited). As has been pointed out in paragraph 117 above, by his incitements to violence, hatred and intolerance, the applicant is the cause of such harm.
- 126 As regards the necessity of the limitations at issue, it should be noted that alternative and less restrictive measures, such as a system of prior authorisation or an obligation to justify, a posteriori, how the funds transferred were used, are not as effective in achieving the objectives pursued, namely bringing pressure to bear on Venezuelan decision-makers responsible for the situation in Venezuela, particularly given the possibility of circumventing the restrictions imposed (see, to that effect, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 85).
- 127 Furthermore, it should be recalled that Article 7(4) of Decision 2017/2074 and Article 9(1) of Regulation 2017/2063 provide for the possibility of authorising the release of certain frozen funds or economic resources in order for the persons concerned to meet basic needs or commitments.
- 128 Since the limitations on the applicant's freedom of expression that the restrictive measures at issue are liable to entail are necessary and proportionate to the objective pursued, it is appropriate next to examine whether they impair the essence of that freedom.
- 129 It must be borne in mind that the restrictive measures at issue provide that, first, Member States are to take the necessary measures to prevent the entry into, or transit through, their territories and, second, all of his funds and economic resources in the European Union are to be frozen.
- 130 The applicant is a national of a third country to the European Union, Venezuela, and resides in that state, where he pursues his professional activity as a politician also active in the media of that country. Accordingly, the restrictive measures at issue do not undermine the essence of the applicant's right to exercise his freedom of expression, in particular in the context of his professional activity in the media sector, in the country in which he resides and works (see, by analogy, judgment of 15 June 2017, *Kiselev v Council*, T-262/15, EU:T:2017:392, paragraph 123).
- 131 In addition, those measures are by nature temporary and reversible. It follows from Article 13 of Decision 2017/2074 that that decision is kept under constant review (see paragraph 7 above).
- 132 Therefore, the restrictive measures to which the applicant is subject do not infringe his freedom of expression.
- 133 Having regard to all of the foregoing, the third plea in law must be dismissed.

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On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr Diosdado Cabello Rondón to pay the costs.

da Silva Passos

Reine

Truchot

Delivered in open court in Luxembourg on 14 July 2021.

[Signatures]