

JUDGMENT OF THE COURT (Second Chamber)

3 December 2009*

In Cases C-399/06 P and C-403/06 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, brought on 20 and 22 September 2006, respectively,

Faraj Hassan, residing in Leicester (United Kingdom), represented by E. Grieves, Barrister, instructed by H. Miller, Solicitor, and subsequently by J. Jones, Barrister, instructed by M. Arani, Solicitor,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by S. Marquardt, M. Bishop and E. Finnegan, acting as Agents,

* Language of the case: English.

European Commission, represented by P. Hetsch and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendants at first instance,

supported by:

French Republic,

United Kingdom of Great Britain and Northern Ireland,

interveners on appeal (C-399/06 P),

Chafiq Ayadi, residing in Dublin (Ireland), represented by S. Cox, Barrister, instructed by H. Miller, Solicitor,

appellant,

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the other parties to the proceedings being:

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

defendant at first instance,

supported by:

French Republic,

intervener on appeal,

United Kingdom of Great Britain and Northern Ireland,

European Commission, represented by P. Hetsch and P. Aalto, acting as Agents, with an address for service in Luxembourg,

interveners at first instance (C-403/06 P),

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans (Rapporteur), K. Schiemann and P. Küris, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 24 September 2009, in Case C-399/06 P,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By their appeals, Mr Hassan (Case C-399/06 P) and Mr Ayadi (Case C-403/06 P) seek to have set aside the judgments of the Court of First Instance of the European Communities of 12 July 2006 in Case T-49/04 *Hassan v Council and Commission* ('*Hassan*') and in Case T-253/02 *Ayadi v Council* [2006] ECR II-2139 ('*Ayadi*') (together, 'the judgments under appeal').

- 2 By the judgments under appeal the Court of First Instance dismissed the actions brought by Mr Hassan and Mr Ayadi for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9, ‘the contested regulation’), in so far as that act concerned them. Mr Hassan’s action was particularly directed against the contested regulation as amended by Commission Regulation (EC) No 2049/2003 (OJ 2003 L 303, p. 20). By its judgment in *Hassan* the Court of First Instance also dismissed Mr Hassan’s claim for compensation.

History of the cases

- 3 The history of the cases was set out in *Hassan*, paragraphs 6 to 34, and in *Ayadi*, paragraphs 11 to 49.
- 4 For the purpose of this judgment, those histories may be briefly summarised as follows.
- 5 On 19 October 2001, the committee established by Resolution 1267 (1999) of the Security Council of the United Nations (‘the Sanctions Committee’) published an addendum to its consolidated list of 8 March 2001 of entities and individuals to be subject to the freezing of funds under Resolutions 1267 (1999) and 1333 (2000) of the Security Council of the United Nations (see press release SC/7180), including inter alia the name of Mr Ayadi, who was identified as being a person associated with Usama bin Laden.

- 6 On the same day, the Commission of the European Communities adopted Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25). By Regulation No 2062/2001 Mr Ayadi's name was added, with others, to the list forming Annex I to Council Regulation No 467/2001 of 6 March 2001 (OJ 2001 L 67, p. 1).

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

- 8 Considering that action by the European Community was necessary in order to implement Resolution 1390 (2002), on 27 May 2002 the Council of the European Union adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of Common Position 2002/402 prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).

- 9 On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.

- 10 According to the fourth recital in the preamble to that regulation, the measures laid down, inter alia, by Resolution 1390 (2002) 'fall [within] the scope of the [EC] Treaty

and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.’

11 Article 1 of the contested regulation defines the concepts of ‘funds’ and ‘freezing of funds’ in terms substantially identical to those in Article 1 of Regulation 467/2001. In addition, it defines what is meant by ‘economic resources’.

12 Article 2 of the contested regulation states:

‘1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.’

13 Annex I to Regulation No 881/2002 contains the list of persons, entities and groups affected by the freezing of funds imposed by Article 2 of that regulation. That list includes, *inter alia*, Mr Ayadi’s name.

- 14 While Mr Ayadi's name remains to this day included in that list, the wording of the entry referring to him has on several occasions been replaced by Commission regulations adopted on the basis of Article 7(1) of the contested regulation and conferring on the Commission the power to amend or add to Annex I to that regulation, most recently by Regulation (EC) No 76/2006 of 17 January 2006 (OJ 2006 L 12, p. 7).
- 15 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999) and 1390 (2002), which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.
- 16 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures were again to be improved after 12 months or earlier if necessary
- 17 Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), the Council adopted Common Position 2003/140/CFSP of 27 February 2003 concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of Common Position 2003/140 provides that, when implementing the measures set out in Article 3 of Common Position 2002/402, the European Community is to provide for the exceptions permitted by that resolution.
- 18 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of Resolution 1452 (2002), to adjust the measures imposed by the Community.

- 19 On 12 November 2003 the Sanctions Committee adopted an addendum to its consolidated list of entities and individuals to be subject to the freezing of funds under Resolutions 1267 (1999), 1333 (2000) and 1390 (2002). That addendum includes, inter alia, the name of Mr Hassan, identified as being a person associated with the Al-Qaeda organisation.
- 20 On 20 November 2003 the Commission adopted Regulation No 2049/2003 amending for the 25th time Regulation No 881/2002. By Regulation No 2049/2003 Mr Hassan's name was added, with others, to the list forming the Annex to the contested regulation.
- 21 On 30 January 2004 the Security Council adopted Resolution 1526 (2004), designed, first, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and, secondly, to strengthen the mandate of the Sanctions Committee. In accordance with Paragraph 3 of Resolution 1526 (2004), those measures were to be further improved in 18 months, or sooner if necessary.
- 22 On 29 July 2005 the Security Council adopted Resolution 1617 (2005). This provides, inter alia, for the continuation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures were to be reviewed within 17 months with a view to their possible further strengthening or sooner if necessary.
- 23 Mr Ayadi remains included in the list forming Annex I to the contested regulation. The entry concerning him has been replaced by Commission Regulation No 1210/2006 of 9 August 2006 (EC) amending for the 67th time Regulation (EC) No 881/2002 (OJ L 219, p. 14).

²⁴ Similarly, while Mr Hassan's name too still appears in that list, the entry concerning him has been replaced by Commission Regulation (EC) No 46/2008 of 18 January 2008 amending for the 90th time Regulation (EC) No 881/2002 (OJ L 16, p. 11.

The actions before the Court of First Instance and the judgments under appeal

²⁵ By application lodged at the Registry of the Court of First Instance on 12 February 2004, Mr Hassan brought an action against the Council and the Commission for annulment of the contested regulation and claimed that the Court of First Instance should:

- principally, annul in whole or in part the contested regulation as amended by Regulation No 2049/2003, or the latter regulation only;

- or, alternatively, declare the contested regulation and Regulation No 2049/2003 inapplicable to him;

- take such further action as it might deem appropriate;

- order the Council to pay the costs and

- order the Council to pay him damages.

26 At the hearing before the Court of First Instance, Mr Hassan stated that his action challenged the contested regulation and Regulation No 2049/2003 only in so far as they were of direct and individual concern to him.

27 By application lodged at the Registry of the Court of First Instance on 26 August 2002, Mr Ayadi brought an action against the Council for annulment of the contested regulation, claiming that the Court of First Instance should:

— annul Article 2 of the contested regulation and, in so far as it refers to Article 2, Article 4 thereof;

— or, alternatively, annul the entry mentioning him in the list forming Annex I to the contested regulation, and

— order the Council to pay the costs.

28 At the hearing before the Court of First Instance, Mr Ayadi stated that his action challenged the contested regulation only in so far as it was of direct and individual concern to him.

29 In the case concerning Mr Ayadi, the United Kingdom of Great Britain and Northern Ireland and the Commission were granted leave to intervene before the Court of First Instance in support of the forms of order sought by the Council.

- 30 In support of his claims, Mr Hassan raised a single plea in law alleging breach of certain of his fundamental rights and of the general principle of proportionality. His complaints related more particularly to the alleged breach of the right to respect for property and of the right to respect for private and family life, on the one hand, and to the alleged breach of the right to be heard and of the right to a fair hearing, on the other.
- 31 Mr Ayadi, for his part, based his claims on three pleas in law, the first alleging that the Council was not competent to adopt Articles 2 and 4 of the contested regulation and a misuse of powers, the second alleging breach of the fundamental principles of subsidiarity, proportionality and respect for his fundamental rights and the third alleging infringement of an essential procedural requirement.
- 32 Because, without prejudice to the claim for compensation in Mr Hassan's appeal, these appeals are confined to the parts of the judgments under appeal relating to the pleas in law alleging breach of the appellants' fundamental rights, only those parts of those judgments will be summarised below.
- 33 With regard to those pleas in law, the Court of First Instance held in *Hassan*, paragraph 91, and *Ayadi*, paragraph 115, that, subject only to a single point of law specific to each of those cases, all the points of law raised by the applicants had already been settled in its judgments of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533 ('*Yusuf* at first instance'), paragraphs 226 to 346, and Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 ('*Kadi* at first instance'), paragraphs 176 to 291 (together, '*Yusuf* and *Kadi* at first instance').

34 In paragraph 92 of *Hassan*, as in paragraph 116 of *Ayadi*, similarly worded, it was noted that, in *Yusuf* and *Kadi* at first instance, the Court of First Instance had in particular ruled as follows:

‘ ...

- from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘the ECHR’),] and, for those that are also members of the Community, their obligations under the EC Treaty (*Yusuf* at first instance, paragraph 231, and *Kadi* at first instance, paragraph 181);

- that primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations (*Yusuf* at first instance, paragraph 234, and *Kadi* at first instance, paragraph 184);

- although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it (*Yusuf* at first instance, paragraph 243, and *Kadi* at first instance, paragraph 193);

- first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, in the exercise of its powers it is bound, by the very Treaty by which it was

established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (*Yusuf* at first instance, paragraph 254, and *Kadi* at first instance, paragraph 204);

- as a result, the arguments challenging the contested regulations and based, on the one hand, on the autonomy of the Community legal order vis-à-vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected (*Yusuf* at first instance, paragraph 258, and *Kadi* at first instance, paragraph 208);

- [the contested] regulation ..., adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations (*Yusuf* at first instance, paragraph 264, and *Kadi* at first instance, paragraph 213);

- in that situation, the Community institutions acted under circumscribed powers, with the result that they had no autonomous discretion (*Yusuf* at first instance, paragraph 265, and *Kadi* at first instance, paragraph 214);

- in light of the considerations set out above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law (*Yusuf* at first instance, paragraph 272, and *Kadi* at first instance, paragraph 221);

- the resolutions of the Security Council at issue therefore fall, in principle, outside the ambit of the Court’s judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law; on the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations (*Yusuf* at first instance, paragraph 276, and *Kadi* at first instance, paragraph 225);

- none the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible (*Yusuf* at first instance, paragraph 277, and *Kadi* at first instance, paragraph 226);

- the freezing of funds provided for by [the contested r]egulation ... infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by jus cogens (*Yusuf* at first instance, paragraphs 288 and 289, and *Kadi* at first instance, paragraphs 237 and 238);

- since the Security Council resolutions concerned do not provide a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list in question and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, the arguments alleging breach of such a right must be rejected (*Yusuf* at first instance, paragraphs 306, 307 and 321, and *Kadi* at first instance, paragraphs 261 and 268);

- in these circumstances in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence

adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (*Yusuf* at first instance, paragraph 320, and *Kadi* at first instance, paragraph 274);

- nor were the Community institutions obliged to hear the persons concerned before [the contested r]egulation ... was adopted (*Yusuf* at first instance, paragraph 329) or in the context of the adoption and implementation of that act (*Kadi* at first instance, paragraph 259);

- in dealing with an action for annulment such as the present action, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions; the Court also reviews the lawfulness of the contested regulations having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether those regulations are proportionate to the resolutions; the Court reviews the lawfulness of the contested regulations and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of jus cogens, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person (*Yusuf* at first instance, paragraphs 334, 335 and 337, and *Kadi* at first instance, paragraphs 279, 280 and 282);

- on the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order; nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 337 above, to check indirectly the appropriateness and proportionality of those measures (*Yusuf* at first instance, paragraphs 338 and 339, and *Kadi* at first instance, paragraphs 283 and 284);

- to that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee (*Yusuf* at first instance, paragraph 340, and *Kadi* at first instance, paragraph 285);

- the lacuna thus found to exist in the previous indent in the judicial protection available to the persons involved is not in itself contrary to jus cogens, for (a) the right of access to the courts is not absolute; (b) the limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right; (c) such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued, and (d) in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving the governments concerned, constitute another reasonable method of affording adequate protection of the fundamental rights of the persons concerned as recognised by jus cogens (*Yusuf* [at first instance], paragraphs 341 to 345, and *Kadi* [at first instance], paragraphs 286 to 290);

- the arguments relied on to challenge the contested regulations alleging breach of the right to an effective judicial remedy must consequently be rejected (*Yusuf* [at first instance], paragraph 346, and *Kadi* [at first instance], paragraph 291).³⁵

³⁵ In paragraphs 95 to 124 of *Hassan*, the Court of First Instance added a number of points in response to the arguments more specifically propounded by Mr Hassan at the hearing concerning, on the one hand, the allegedly excessive strictness of the measure freezing all his funds and economic resources and, on the other, the alleged invalidity, in the circumstances, of the conclusions reached by the Court of First Instance in *Yusuf*

and *Kadi* at first instance concerning the compatibility with jus cogens of the lacuna found in those judgments to exist in the judicial protection of the persons concerned.

36 Similarly, in paragraphs 117 to 154 of *Ayadi*, the Court of First Instance added a number of points to those set out in paragraph 34 above in response to the arguments more specifically propounded by Mr Ayadi concerning, on the one hand, the alleged ineffectiveness of the exemptions to and derogations from the freezing of funds provided for by Regulation No 561/2003, especially as regards carrying on a trade or business and, on the other, the alleged invalidity, in the circumstances, of the conclusions reached by the Court in *Yusuf* and *Kadi* at first instance concerning the compatibility with jus cogens of the lacuna found to exist in the judicial protection of the persons concerned.

37 The Court of First Instance examined those arguments, concluding that they could not call in question the assessment it had made of the points of law raised in *Yusuf* and *Kadi* at first instance.

38 In paragraphs 126 to 128 of *Hassan*, the Court of First Instance went on to examine Mr Hassan's complaints relating to a breach of his right to respect for private and family life and an attack on his reputation, and rejected them for the essential reason that, according to the standard of jus cogens, it must be held that that applicant had not suffered any arbitrary interference with the exercise of those rights.

39 Similarly, in paragraph 156 of *Ayadi*, the Court of First Instance rejected the argument, not yet examined in *Yusuf* and *Kadi* at first instance, that the Member States of the United Nations are not bound to apply as they stand the measures that the Security Council 'calls upon' them to adopt.

40 The Court of First Instance therefore dismissed the appellants' claims for annulment as unfounded.

41 Lastly, the Court of First Instance declared inadmissible Mr Hassan's claim for compensation because it lacked all detail, adding that with regard to the other evidence he had produced the claim was on any view unfounded.

42 In consequence, the Court of First Instance dismissed the two actions in their entirety.

Procedure before the Court

43 By order of the President of the Court of 5 November 2008, the French Republic and the United Kingdom were given leave to intervene in support of the form of order sought by the Council and the Commission in Case C-399/06 P. By order of the President of the Court of 30 March 2009, the French Republic was given leave to intervene in support of the form of order sought by the Council in Case C-403/06 P.

44 By application lodged at the Court Registry on 7 January 2009, Mr Ayadi applied for the legal aid provided for by Article 76 of the Court's Rules of Procedure.

45 By order of 2 September 2008 the Court granted his application.

46 The parties and the Advocate General having been heard on this point, these cases must, on account of the connection between them, be joined for the purposes of the judgment, in accordance with Article 43 of the Court's Rules of Procedure.

Forms of order sought by the parties to the appeals

47 By his appeal, Mr Hassan claims that the Court should:

- set aside the judgment in *Hassan*;

- annul the contested regulation and/or Regulation No 2049/2003 in their entirety or in respect of the measures directed against him;

- or, alternatively, declare those regulations inapplicable to him;

- take such further action as the Court may deem appropriate;

- order the Council to pay the costs and

— order the Council to pay him damages.

48 By his appeal, Mr Ayadi claims that the Court should:

— set aside the judgment in *Ayadi* in its entirety;

— declare null and void Articles 2 and 4 of and Annex I to the contested regulation in so far as they are of direct and individual concern to him and

— order the Council to pay the costs of the proceedings before the Court and the Court of First Instance.

49 In the two cases the Council and the Commission contend that the Court should dismiss the appeals, with the exception of the grounds similar to those held to be well founded by the Court in its judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351 (*Kadi* on appeal) and order the appellants to pay so much of the costs as the Court may deem appropriate.

The grounds put forward in support of the appeals

50 In his first ground of appeal Mr Hassan argues that the Court of First Instance erred in law in its examination of the pleas he raised before it with regard to the breach of certain of his fundamental rights, in that it did not determine directly whether the Security Council offered protection equivalent to that offered by the ECHR, more particularly by

Articles 6, 8 and 13 thereof and by Article 1 of Protocol 1 of the ECHR, but rather examined indirectly the actions of the Security Council by virtue of the principle of jus cogens.

51 In his second ground of appeal Mr Hassan maintains that the Court of First Instance erred in law in considering that restriction of the use of property was not relevant with regard to the actual substance of the right to property.

52 It is clear from Mr Ayadi's reply that, in the light of *Kadi* on appeal, he now means to submit only two grounds of appeal, the first of which is that the Court of First Instance erred in law in finding that the Community judiciary may evaluate the lawfulness of a Community measure giving effect to a resolution of the Security Council only with regard to jus cogens and in not holding that it could annul such a measure in order to guarantee the protection of the fundamental rights recognised by the legal order of the United Nations, and the second of which is that the Court of First Instance erred in law in not holding that the parts of the contested regulation which are under challenge constitute a breach of Mr Ayadi's fundamental rights.

Concerning the appeals

The effect of Regulation (EC) No 954/2009 on whether it is necessary to adjudicate

53 By Regulation (EC) No 954/2009 of 13 October 2009 amending for the 114th time Regulation No 881/2002 (OJ L 269, p. 20), the decisions to include Mr Hassan and Mr Ayadi in the list forming Annex I to the contested regulation were replaced by fresh decisions confirming and amending their inclusion.

- 54 According to the preamble to Regulation No 954/2009, the Commission adopted that regulation, having regard to the case-law of the Court of Justice, in particular to *Kadi* on appeal, after apprising Mr Hassan and Mr Ayadi of the grounds for their inclusion in the list, as provided by the Sanctions Committee and after examining the comments made by the appellants concerning those grounds.
- 55 In that preamble it is also stated that, after careful examination of those comments, the Commission considered, given the preventive nature of freezing of funds and economic resources, that the inclusion of the two appellants in the list in question was justified by reason of their association with the Al-Qaeda network.
- 56 In accordance with Article 2 of Regulation No 954/2009, the latter entered into force on the day following its publication in the *Official Journal of the European Union*, that is to say, 15 October 2009, and has applied as from 30 May 2002 as regards Mr Ayadi and from 21 November 2003 as regards Mr Hassan.
- 57 The question therefore arises whether, in the light of the withdrawal of the contested regulation and its retroactive replacement by Regulation No 954/2009 with effect from those dates with regard to the appellants, it is still necessary to adjudicate on these cases.
- 58 It is to be borne in mind that the Court may, of its own motion, raise the objection that a party has no interest in bringing or in maintaining an appeal because an event occurring after the judgment of the Court of First Instance removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason (see, in particular, Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051, paragraph 24, and the case-law cited).

59 In the present case, Article 2 of Regulation No 954/2009 provides that the latter is to apply from the original inclusion of Mr Ayadi and Mr Hassan in the list forming Annex I to the contested regulation, that is to say, since 30 May 2002 and 21 November 2003 respectively.

60 Mr Ayadi and Mr Hassan have been included in that list for a period of seven and six years respectively and have, therefore, been subject to the restrictive measures provided by the contested regulation which the Court has held to have a considerable impact on the rights and freedoms of the persons concerned (see *Kadi* on appeal, paragraph 375), while they have maintained, first before the Court of First Instance and then before the Court of Justice in proceedings covering nearly the whole of those periods, that the inclusion of their names in that list was unlawful, for it failed, in particular, to have regard to their fundamental rights, which is not now denied by either the Council or the Commission, in the light of *Kadi* on appeal.

61 Regulation No 954/2009 has kept the names of Mr Ayadi and Mr Hassan in that list with retroactive force, so that the resulting restrictive measures continued to apply to them for the period for which the contested regulation, as referred to in their actions, was applicable, although the purpose of their actions is to have their names removed from that list.

62 The adoption of Regulation No 954/2009 cannot, therefore, be considered to constitute a fact occurring after the judgments under appeal and capable of rendering the appeals devoid of purpose.

63 Furthermore, Regulation No 954/2009 is not yet definitive, inasmuch as it may be the object of an action for annulment. It is therefore not inconceivable that, supposing that that measure were annulled as a result of such proceedings, the contested regulation might come back into force so far as the appellants are concerned.

64 Those matters supply confirmation that the adoption of Regulation No 954/2009 cannot be regarded as equivalent to annulment pure and simple of the contested regulation in so far as it concerns the appellants by which they have obtained the only result that their actions could have secured for them and that there is accordingly no longer any need for the Court to adjudicate. In that regard the contested regulation differs from the measure at issue in the order of 8 March 1993 in Case C-123/92 *Lezzi Pietro v Commission* [1993] ECR I-809.

65 In these particular circumstances, the appeals have not become devoid of purpose and it is necessary for the Court to adjudicate on them in that regard.

Substance

66 A preliminary point to be noted is, in the first place, that at the hearing before the Court of Justice Mr Hassan expressly withdrew his ground of appeal relating to the claim for compensation. There is, therefore, no longer any need to consider that ground in this appeal.

67 In the second place, as regards the subject-matter of the grounds of appeal, it must be observed that that must be understood to concern, in so far as it relates to each of the appellants respectively, the contested regulation as amended, in connection with Mr Ayadi's case, by Regulation No 1210/2006 and, in Mr Hassan's, by Regulation No 46/2008.

The appellants' grounds of appeal relating to the contested regulation's failure to observe their fundamental rights

- 68 It is necessary to consider the grounds advanced by the appellants in support of their appeals, in which they object that the Court of First Instance dismissed their pleas in law alleging that the contested regulation failed to observe their fundamental rights.
- 69 In the judgments under appeal, and relying on its judgments in *Yusuf* and *Kadi*, the Court of First Instance essentially held that it follows from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, because it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, may not be the subject of judicial review of its internal lawfulness save with regard to its compatibility with the norms of *jus cogens* and therefore enjoys, subject to that reservation, immunity from jurisdiction (*Hassan*, paragraph 92, and *Ayadi*, paragraph 116).
- 70 Again relying on its judgments in *Yusuf* and *Kadi*, the Court of First Instance held, therefore, that it is with regard to *jus cogens*, understood as a public international order binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible, that the lawfulness of the contested regulation may be examined, in relation also to the appellants' pleas alleging breach of their fundamental rights (*Hassan*, paragraph 92, and *Ayadi*, paragraph 116).
- 71 It is apparent from paragraphs 326 and 327 of *Kadi* on appeal that that reasoning amounts to an error of law. The Community judicature must, in accordance with the powers conferred on it by the 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 contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

- 72 The Court concluded, in paragraph 328 of *Kadi* on appeal, that the grounds of appeal put forward by the persons concerned being well founded on that point, it was necessary to set aside *Yusuf* and *Kadi* at first instance in that respect.
- 73 In addition, the Court held, in paragraph 330 of *Kadi* on appeal, that because in the latter parts of *Yusuf* and *Kadi* at first instance, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance had confined itself to examining the lawfulness of the contested regulation in the light of the rules of *jus cogens* alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter parts of those judgments also had to be set aside.
- 74 It follows that, given that the legal grounds of the judgments under appeal are, as pointed out in paragraphs 69 and 70 above, the same as those relied on in *Yusuf* and *Kadi* at first instance, the judgments under appeal are marred by the same error in law and must, therefore, for the same reasons, be set aside in so far as they contain the Court of First Instance's response to the appellants' arguments alleging breach of certain of their fundamental rights.
- 75 That conclusion is not called in question by the addition, in paragraphs 95 to 125 of *Hassan* and in paragraphs 117 to 155 of *Ayadi*, of a number of points in response to the arguments more specifically propounded by the appellants, given that the Court of First Instance concluded that those points demonstrate the correctness of the legal grounds of *Yusuf* and *Kadi* at first instance and, in consequence, of the judgments under appeal.
- 76 Lastly, it is to be noted that at the hearing before the Court Mr Hassan acknowledged that the head of claim raised before the Court of First Instance and dismissed by the latter, relating to the alleged breach of his right to respect for private and family life, guaranteed by Article 8 of the ECHR, had not been included in his appeal. In the circumstances, there is no need to examine it.

77 The grounds of appeal put forward by the appellants are therefore well founded with the result that the judgments under appeal must be set aside.

Concerning the actions before the Court of First Instance

78 As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits

79 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.

80 It is appropriate to examine, in the first place, the claims made by the appellants with regard to the breach of the rights of defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.

81 In this regard it has to be found that it is not disputed that the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation are identical to those in which the names of the parties concerned in the cases giving rise to *Kadi* on appeal had been entered in that list.

82 In the light of those circumstances, the Court held in paragraph 334 of *Kadi* on appeal that the rights of defence, in particular the right to be heard, and the right to effective judicial review of observance of those rights, had patently not been respected.

83 In paragraph 348 of that judgment the Court likewise held that, because the Council had neither communicated to the persons concerned 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, those persons had not had the opportunity to make their point of view in that respect known to advantage. The Court concluded in that paragraph that their rights of defence, in particular the right to be heard, had not been respected.

84 That conclusion must be reached in the instant cases, and for the same reasons, so that it must be found that the appellants' rights of defence have not been respected.

85 Moreover, the Court ruled in paragraph 349 of *Kadi* on appeal that, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 of that judgment, between the rights of defence and the right to an effective legal remedy, the parties concerned had also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy had also been infringed.

86 The same conclusion must be reached in the instant cases with regard to the appellants' right to an effective legal remedy, so that it must be found that, in the circumstances, that fundamental right of Mr Hassan and Mr Ayadi has not been respected.

- 87 It must, furthermore, be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the Community judicature, the Council has adduced no evidence to that effect (see, by analogy, *Kadi* on appeal, paragraph 350). What is more, although the Council took formal note in these appeals of the guidance given in *Kadi* on appeal, it must be found that it has produced no information concerning the evidence adduced against the appellants.
- 88 The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed (see, by analogy, *Kadi* on appeal, paragraph 351).
- 89 It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the evidence adduced against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed (see, by analogy, *Kadi* on appeal, paragraph 352).
- 90 It follows from all the foregoing considerations that the pleas in law raised by Mr Hassan and Mr Ayadi in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded (see, by analogy, *Kadi* on appeal, paragraph 353).
- 91 In the second place, so far as the heads of claim relating to a breach of the right to respect for property caused by the fund-freezing measures imposed by the contested

regulation are concerned, the Court held, in paragraph 366 of *Kadi* on appeal, that the restrictive measures imposed by that regulation constituted restrictions of the right to property which might, in principle, be justified.

- 92 It is, however, established that the contested regulation, in so far as it concerns Mr Hassan and Mr Ayadi, was adopted without furnishing any guarantee enabling them to put their case to the competent authorities, in a situation in which the restriction of their property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting them (see, by analogy, *Kadi* on appeal, paragraph 369).
- 93 It must therefore be held that, in the circumstances of these cases, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Hassan and Mr Ayadi, by including them in the list contained in Annex I to that regulation, constitutes an unjustified restriction of their right to property (see, by analogy, *Kadi* on appeal, paragraph 370).
- 94 The appellants' claims that their fundamental right to respect for property has been infringed are therefore well founded.
- 95 In the circumstances, it is no longer necessary to examine Mr Hassan's heads of claim concerning the alleged breach of his right to respect for his private and family life, guaranteed by Article 8 of the ECHR.
- 96 It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled, account being taken of the clarification in paragraph 67 above as to the version of that regulation concerned by the appellants' respective appeals.

Costs

- 97 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first paragraph of Article 69(4) provides that the Member States which have intervened in the proceedings are to bear their own costs.
- 98 Because Mr Hassan and Mr Ayadi's appeals must be upheld and because the contested regulation must be annulled in so far as it concerns the appellants and within the limits described in paragraph 67 above, the Council must be ordered to pay, in addition to its own costs, those incurred by Mr Hassan and Mr Ayadi, both at first instance and on appeal in accordance with the forms of order sought by the appellants.
- 99 The United Kingdom is to bear its own costs both at first instance and in the appeals.
- 100 The French Republic is to bear its own costs relating to the appeals.
- 101 The Commission is to bear its own costs at first instance and in the appeal in the case concerning Mr Hassan. In the case concerning Mr Ayadi, the Commission is to bear its own costs, in respect both of its intervention before the Court of First Instance and of the proceedings before the Court.

On those grounds, the Court (Second Chamber) hereby:

- 1. Sets aside the judgments of the Court of First Instance of the European Communities of 12 July 2006 in Case T-49/04 *Hassan v Council and Commission* and in Case T-253/02 *Ayadi v Council*;**

- 2. Annuls Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, as amended by Commission Regulation (EC) No 46/2008 of 18 January 2008, in so far as it concerns Mr Hassan;**

- 3. Annuls Regulation No 881/2002, as amended by Commission Regulation (EC) No 1210/2006 of 9 August 2006, in so far as it concerns Mr Ayadi;**

- 4. Orders the Council of the European Union to pay, in addition to its own costs, the costs incurred by Mr Hassan and Mr Ayadi both at first instance and in these appeals;**

- 5. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs, both at first instance in the case concerning Mr Ayadi and in these appeals;**

- 6. Orders the French Republic to bear its own costs;**

- 7. Orders the European Commission to bear its own costs both at first instance and in the appeal in the case concerning Mr Hassan. Orders the European Commission, in the case concerning Mr Ayadi, to bear its own costs, in respect both of its intervention before the Court of First Instance of the European Communities and of the proceedings before the Court of Justice of the European Union.**

[Signatures]