

## **THE JUDICIAL DOCTRINE OF FUNDAMENTAL RIGHTS IN THE LIGHT OF THE KADI CASE**

NADĚŽDA ŠIŠKOVÁ

Jean Monnet Chairholder in EU Law, Faculty of Law, Palacký University in Olomouc, Czech Republic

### **Abstract in original language**

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The contribution deals with the latest significant judgment of Luxembourg Court related to the human rights protection. The author follows the example of two diametric different judgments of the Court of First Instance and European Court of Justice related to the development of the judicial doctrine of fundamental rights at the level of EC/EU.

Taking into the account the arguments in the opinion of General Advocate Póitares Maduro and ratio decidendi of the Court of Justice it is possible to consider that Solange method was used by the Court, which was inspired by the approach of the German Constitutional Court in International Handelsgesellschaft (so called Solange case).

#### **Key words**

European Court of Justice; Court of First Instance; fight against the international terrorism; Resolution of the United Nations Security Council; Sanctions Committee; Judicial doctrine of fundamental rights; procedural safeguards of human rights.

### **1. INTRODUCTORY OUTPOINTS**

The Judgment of the European Court of Justice in the joint cases Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of European Union and Commission of European Communities<sup>1</sup> was declared by Grand Chamber on the 3rd of September 2008 and immediately became the object of the enormous attention from the side of the wide public.

This case is remarkable and outstanding in many respects and can be evaluated from the different points of view and inside various dimensions:

1. concerning the relationship of European and International law in general
2. concerning the acceptance of the authority of the Resolutions of the United Nations Security Council for the another international organization

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<sup>1</sup> Judgment of ECJ in Joined cases C-402/05 and C 415/05 Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, ECR (2008)

3. from the point of view of efficiency of the measures of the international fight against terrorism
4. from the point of view of the European Union's common foreign and security policy (CFSP)

This contribution will deal with another aspect of this case, especially its importance for further development of the Judicial doctrine of fundamental rights and future direction of human rights protection in the European Union area. Despite the fact that at the very beginning of the European integration the ECJ refused to solve cases with human rights dimension and referred them to the national courts of the member states, starting with the Stauder Case (1969)<sup>2</sup>, the court has created a wide and extensive corpus of cases which formulates concrete rights, as well as determines the conditions for their realization. This judicial doctrine gathers from 3 main sources of its inspiration:

1. constitutional traditions of the Member states
2. international treaties in the field of human rights
3. case-law of the European Court of Human Rights<sup>3</sup>.

The Kadi case enriches this list by one more source of inspiration, as will be proved further.

## **2. SOME INFORMATION ABOUT THE BACKGROUND OF THE CASE**

Appellants Yassin Abdullah Kadi (citizen of Saudi Arabia) and Al Barakaat International Foundation (with residence in Sweden) lodged appeals against the judgments of the Court of the First instance of 21st September 2005 in the cases T-315/01 Kadi and case T-306/01 Al Barakaat v. Council and Commission. In both judgments the Court of First Instance dismissed an application for annulment of Council Regulation No 881/2002 of May 27th 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Queda network and the Taliban. The contested regulation reflected 3 resolutions of

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<sup>2</sup> Judgment of ECJ 29/69 Stauder v. Ulm, ECR (1969), 419

<sup>3</sup> Siskova, N.: Actual Issues of the Creation of Constitutionalism in the Field of Human Rights at the EU level and its Prospects in the list of the relevant rights formulated by the Court; Siskova, N.: Dimenze ochrany lidských práv v Evropské unii, second edition, Linde, Prague, 2009, p. 90-93

Siskova, N., ed.: The process of Constitutionalisation of the EU and Related Issues, Europe Law Publishing, Groningen, 2008, p. 8

the United Nations Security Council<sup>4</sup>, which provide, inter alia, that all the States are to take measures to freeze the funds and other financial assets of individuals and entities associated with Bin Laden, the Al-Queda and the Taliban, as designated by a Committee of the Security Council composed of all its members (so called Sanctions Committee). The Sanctions Committee under these Resolutions obtained the competence to issue the list of the persons and entities that were to be subjected to the freezing of funds. The names of appellants were added to the list by the Sanctions Committee on the 17th October and 9th November 2001. The mentioned list including the names of appellants was taken over by the Council and attached to the Regulation 881/2002 in the form of Supplement No 1.

Kadi who was very well situated businessman and Al Barakaat which was a rich legal person, after putting on the mentioned list became without any financial means.

Al Barakaat Foundation before the Court of First Instance put forward three grounds of annulment:

1. alleged that Council was incompetent to adopt the contested regulation
2. alleged infringement of Article 249 and
3. alleged breach of their fundamental rights.

Mr. Kadi put these grounds for annulment inter alia:

1. for infringement of the right to be heard
2. for infringement of the right to respect property and principle of proportionality
3. for infringement of effective judicial review

### **3. RACIONE DECIDENDI OF THE JUDGMENT OF THE ECJ**

Concerning the alleged infringement of the fundamental rights, the Court of First Instance in its judgment decided to examine firstly the relationship between the international legal order represented by the acts of the United Nations in this case and the national legal order, respectively of the Community legal order. In this respect the Court of First Instance declared that the Security Council resolutions adopted under Chapter VII of the UN Charter prevail over the rules of the Community law. The Court essentially found that Community law recognises that Security Council resolutions take precedence over the Treaty.

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<sup>4</sup> Resolutions 1267/1999 (5), 1333(2000) (6) and 1390 (2002) (7) of the United Nations Security Council

Secondly the Court of First Instance declared that it had neither authority nor power to review, even indirectly, the Security Council Resolutions in order to assess their conformity with fundamental rights as protected by Community legal order, in so far as those rights formed part of the principle of *jus cogens*.

On the contrary, the European Court of Justice declared that 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, thus constituting a condition of lawfulness of the Community acts, and measures incompatible with the respect for human rights are not acceptable in the Community.

According to the opinion of Advocate General Poiares Maduro the Court of First Instance made an error when concluded that it has no power to review the Regulation in the light of fundamental rights as the general principle of the Community Law. “The fact that the measures are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law.” “There is no reason for the Court to depart in the present case from its usual interpretation of fundamental rights... The only novel question is whether the concrete needs raised by the prevention of international terrorism justify restrictions on the fundamental rights of the appellant that would otherwise not be acceptable.”

Advocate Maduro underlines the specific features of this case as follows: “The problem facing the appellant is that its financial interests within the Community have been frozen for several years without limit of time and in conditions where there appear to be no measures and without adequate means for appellants to challenge the assertion that it is involved in supporting terrorism. The indefinite freezing of someone’s assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person or entity concern are potentially devastating.”

Later on General Advocate stressed the necessity to have procedural guaranties which require the authorities to justify such measures and demonstrate their proportionality, not merely in the abstract, but in the concrete circumstances of the given case. “The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right to property. However, that doesn’t ipso facto relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person or entity concerned. Procedural safeguards are necessary precisely to ensure that it is indeed in this case. In the absence of those safeguards, the freezing of assets for an indefinite period of time infringes the right to property.”

Other two rights, which are mentioned by the appellants, both the right to be heard and right to effective judicial review constitute fundamental rights that form the part of the general principles of Community law. In the present cases the Community institutions had not afforded any opportunity to the

appellant to make known his views on whether the sanction against him are justified and whether they should be kept in force. The existence of the delisting procedure at the level of the United Nations offers no consolation in this respect, as it creates a matter of purely intergovernmental consultation.

This de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioners in the list. In fact, access to such information is denied regardless of any substantiated claim to the need to protect its confidentiality. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affect on the appellant's right to effective judicial protection.

In Poiares Maduro's opinion, the right to effective judicial protection holds a prominent place in the firmament of fundamental rights and that is why it is unacceptable in a democratic society to impair the very essence of that right. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the community law may be disproportional or even misdirected, and might remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.

Later on, the General Advocate gave one more persuasive argument and the reason for the annulment of the contested Regulation. In particular he pointed out that the decision whether or not to remove a person from the United Nations Sanctions list remains within the full discretion of Sanction Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing Security Council resolutions in question within the Community legal order.

The European Court of Justice shared the opinion of Advocate General Maduro concerning the fact that the contested Regulation infringes the rights of the appellants to be heard, the right to judicial review and the right to property is well founded. So it set aside the judgments of the Court of First Instance and annulled the Council Regulation as so far as it concerns Mr. Kadi and Al Barakaat International Foundation.

#### **4. THE SIGNIFICANCE OF THE JUDGMENT FOR THE DOCTRINE OF FUNDAMENTAL RIGHTS.**

As it was mentioned before, the Kadi case raised a huge wave of reactions on the side of jurisprudence. Although the references were in most cases very positive, some negative responses were also heard.

Especially the famous author in the field of European Law, Grainne de Burca, in her analysis, which was prepared immediately after the declaration of the judgment, pointed out several negative implications. In this respect she states that “the robustly pluralist approach of the ECJ to the relationship between EU law and International law in Kadi represents a sharp departure from the traditional embrace of international law by European Union. It is an approach which carries certain costs for EU and international legal order in the message its sends to the court of the other states and organizations contemplating the authority of the Security Council resolutions. ECJ approach carries the risk of undermining the image the EU as a virtuous international actor which maintains a distinctive commitment to international law and institutions.”<sup>5</sup>

Without prejudice to all these negative implications in the field of international law and policy, it must be stressed the enormous importance of this judgment for further development of the Judicial doctrine of fundamental rights.

The Court in the Kadi case formulated de facto the supremacy principle of fundamental rights over the acts of all international organizations (United Nations included). Moreover, the Court reserved its power to review the legality of the acts of other international organizations concerning their conformity with the level of the human rights protection guaranteed by the Community law. It is quite obvious that the approach of the German Constitutional Court in the International Handelsgesellschaft case was taken into consideration by the ECJ, and it is even possible to suppose that the Solange method<sup>6</sup> was used in the Kadi case.

From this point of view one more source of inspiration for the Court can be indicated: the rationes decidendi of the jurisprudence of the Constitutional Courts of the member states.

#### **Contact – email**

*Nadezda.Siskova@upol.cz*

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<sup>5</sup> De Burea, G.: The EU, the European Court of Justice and the International Legal order after Kadi, Harvard International Law Journal, Vol. 1, No 51, 2009

<sup>6</sup> see Nikolaos Lavranos: Towards a Solange-Method between international courts and tribunals? in Broude, T., Shany, Y.: The Shifting Allocation of Authority in International Law, Hart Publishing, Oxford, 2008