

# PROTECTION OF HUMAN RIGHTS OF ALLEGED INTERNATIONAL TERRORISTS BY THE ECHR AND THE CJEU IN A COMPARATIVE VIEW<sup>1</sup>

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## Abstract in original language

Tento příspěvek se zabývá problematikou Sankčního režimu Al-Kajdy a Talibanu, konkrétně pak případy souvisejícími s daným režimem a rozhodovanými Soudním dvorem EU a Evropským soudem pro lidská práva. Úvod je zaměřen na základní fakta o sankčním režimu. Druhá část se zabývá případem Kadi, který byl, a opět je, projednáván před SDEU. Třetí část analyzuje rozsudek ESLP ve věci Nada. Závěrečná část je věnována srovnání předmětných dvou judikátů. Cílem příspěvku je nalézt případné podobnosti ve zmiňovaných rozsudcích.

## Key words in original language

Sankční režim Al-Kajdy a Talibanu; SDEU; Kadi; ESLP; Nada

## Abstract

This paper deals with an issue of Al-Qaida and the Taliban Sanctions Regime, in particular with cases related to that sanctions regime and decided by the two main European judicial instances, by the Court of Justice of the EU and by the European Court of Human Rights. An introduction is focused on basic facts about the sanctions regime. The second part deals with Kadi case before the CJEU. In the third the Nada case before the ECHR is analyzed and the final part is dedicated to a comparison of the two given judgments. The aim of the article is to find similarities in the judgments.

## Key words

Al-Qaida and the Taliban Sanctions Regime; CJEU; Kadi; ECHR; Nada

## 1. INTRODUCTION

In 1999 Al-Qaida and the Taliban Sanctions Regime<sup>2</sup> with its sanctions measures directed against Al-Qaida and the Taliban

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<sup>2</sup> Al-Qaida and the Taliban Sanctions Regime was established by the UNSC resolution 1267. After that there were many other UNSC resolutions that had changed this sanctions regime usually in respect of the right to a fair trial of listed persons. More in NECHVÁTALOVÁ, L. *Činnost ombudsmana*

terrorists was established. According to the relevant UNSC resolutions the states were responsible for implementation of it in their national legal systems. The problems with its application have become when the listed persons<sup>3</sup> started to challenge listing before national and even international courts. These courts found out in some cases that a procedure of listing and delisting<sup>4</sup> does not respond to the guarantees for a fair trial.

This paper deals with the above mentioned matter before the Court of Justice of the European Union, concretely with the Kadi case in the first part and in the second part it discusses the sanctions regime before the European Court of Human Rights, in particular the Nada case. The third part is focused on a comparison of the two given judgments. The aim of the paper is to analyse two given cases, to compare them and find similar features of them.

## **2. AL-QAIDA AND THE TALIBAN SANCTIONS REGIME BEFORE THE CJEU**

There were more than one case before the Court of Justice of the EU related to Al-Qaida and the Taliban Sanctions Regime. One of the most famous is the so called Kadi case. Anyway, before we will elaborate on the Kadi case, we should be focused on a reason why is the Court of Justice of the EU or the European Union involved in the matter of Al-Qaida and the Taliban Sanctions Regime.

### **2.1 LEGAL REGULATION OF THE EU**

When the UN Security Council adopted resolution 1267 (1999) and ensuing resolutions concerning Al-Qaida and the Taliban Sanctions Regime, the European Community decided to implement them firstly by the common positions adopted under the Common Foreign and Security Policy (CFSP) and afterwards by adopting Council Regulation (EC) No. 467/2001 and then by 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, Al-Qaida network and the Taliban, and repealing

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*(zřízeného na základě rezoluce RB OSN 1904(2009)) v souvislosti se zápisem (údajných) teroristů na seznam Sankčního výboru RB OSN 1267/1989, 1091 - 1101 p. In ŽATECKÁ, E., KOVÁČOVÁ, L., NECHVÁTALOVÁ, L., VOMÁČKA, V. COFOLA 2012 The Conference Proceedings. 1. vyd. Brno: Masarykova univerzita, 2012, 1724 p., ISBN 978-80-210-5929-0.*

<sup>3</sup> Listed persons means alleged Al-Qaida and the Taliban terrorists listed on the so called Consolidated List established by UNSC resolution 1333 (2000) and administered by the Al-Qaida and the Taliban Sanctions Committee which deliberates about listing or not and about delisting or not of the mentioned terrorists.

<sup>4</sup> Both procedures are based on (political) decisions of Al-Qaida and the Taliban Sanctions Committee that consists of all UNSC member states.

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 ("Regulation"). As it is stated in par. 4 of the Regulation's Preamble: *"These measures [stated in the UNSC resolutions relating to Al-Qaida and the Taliban Sanctions Regime] fall under the scope of the 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."* The EC (and subsequently the EU) has decided by this provision that it is its duty (in accordance with its powers) to implement the measures into EU law because the implementation could affect a competition within the territory of the EU member states. There were implemented sanctions measures in the Regulation and the Consolidated List was implemented in an Annex of this Regulation (updated by decisions of the EU Commission).

## **2.2 THE CASE OF KADI**

### **2.2.1 THE CASE BEFORE THE COURT OF THE FIRST INSTANCE**

The process of the case of Mr. Kadi before the EU courts is quite complicated. It began on 18 December 2001 when Mr. Kadi lodged an application to the Court of the First Instance ("CFI")<sup>5</sup>. He claimed to annul the Regulation in so far as it concerned him because according to his opinion the measures imposed on him under this Regulation violated his right to be heard and his right to an effective judicial protection (he was never asked about his relations to Al-Qaida or the Taliban by the EC bodies but he was restricted in his rights by the EC Regulation); simply he wanted his name to be deleted from the Annex to the Regulation (from the implemented Consolidated List). CFI held that it is not allowed to review in a full range the EC acts that "only" implement the sanctions stipulated by the UNSC resolutions adopted under the Chapter VII of the UN Charter because the EC has no margin of appreciation in this area. CFI further stated that there could be only a "limited" judicial review of the act, in particular the court is allowed to decide only if the EU act is in compliance with ius cogens of international law.

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<sup>5</sup> Judgment of the Court of First Instance (Second Chamber) of 21 September 2005, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, case T-315/01.

### **2.2.2 THE CASE BEFORE THE EUROPEAN COURT OF JUSTICE**

Because CFI dismissed the application of Mr. Kadi, Mr. Kadi decided to appeal to the European Court of Justice ("ECJ")<sup>6</sup> because he did not agree with legal qualification of the CFI. ECJ had deviated from the CFI's opinion. It decided that EC courts have to perform a full review of the lawfulness of all EC acts.<sup>7</sup> It further ruled that legal system of the EC is completely autonomous legal system. And even if the EC adhere to the international law in general if there are EC acts implementing the obligations from the international law, those acts have to be in compliance with fundamental rights that are integral parts of general principles of the EC (EU). Subsequently it decided to delete Mr. Kadi because his fundamental rights (the right of the defence and the right to an effective judicial review) were violated by listing him in the Annex without giving him a chance to defend himself.

### **2.2.3 THE CASE BEFORE THE GENERAL COURT OF THE EUROPEAN UNION**

In the last stage Mr. Kadi had to lodge an application again, now to the General Court of the European Union (previously the Court of the First Instance)<sup>8</sup> because the European Commission did not delete him from the Annex. The reason for not deleting him was that the EU Commission revealed the reasons for listing to Mr. Kadi thus Commission gave him a chance to defend himself. In fact the EU Commission just revealed him general reasoning of the Al-Qaida and the Taliban Sanctions Committee and Mr. Kadi had no chance to oppose it. The General Court upheld the decision of the ECJ and it decided that there is no judicial immunity of the EC/EU acts implementing sanctions stated in the UNSC resolutions adopted under the Chapter VII of the UN Charter and that there must be a full judicial review of EC/EU acts freezing assets of the individual for an indefinite time. Further it held that the EU Commission adhered to the right of defence of Mr. Kadi in the "most formal and superficial sense". The General Court of the EU concluded that the Regulation have to be annulled so far as it concerns Mr. Kadi.

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<sup>6</sup> Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P.

<sup>7</sup> For an analysis of full judicial review of the sanctions measures by the EU courts see CIAMPI, A. *Security Council Targeted Sanctions and Human Rights*, p. 119. In FASSBENDER, B. *Securing Human Rights? Achievements and Challenges of the UN Security Council*. New York: Oxford University Press, 2011, 219 p., ISBN 978-0-19-964149-9.

<sup>8</sup> Judgment of the General Court (Seventh Chamber) of 30 September 2010, *Yassin Abdullah Kadi v European Commission*, T-85/09.

Nowadays the case is already again before the Court of Justice of the EU. The EU Commission (and many EU Member States) has appealed because it does not agree with the legal opinion of the General Court of the EU.

### **3. AL-QAIDA AND THE TALIBAN SANCTIONS REGIME BEFORE THE ECHR**

#### **3.1 THE FACTS OF THE CASE**

The first case that had to be decided by the European Court of Human Rights<sup>9</sup> is related to the Italian and Egyptian citizen, Mr. Nada, living in the Italian enclave Campione d'Italia surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by the Swiss lake Lugano.<sup>10</sup> Mr. Nada was listed in November 2001 onto the UN Consolidated List and subsequently in the Annex of the Taliban Ordinance (the national act implementing sanctions measures stated in UNSC resolutions related to Al-Qaida and the Taliban Sanctions Regime). Thus he was not allowed to travel through the territory of Switzerland what actually meant in his extraordinary situation that he was forced to stay in the enclave and he was not allowed even to travel to Italy of which was a citizen.

On the basis of this situation Mr. Nada complained to Swiss administrative bodies. He did not receive any reasoning of his listing and therefore he wanted to be deleted from the Annex to the Taliban Ordinance to be enabled (among others) to travel freely to Italy. The Swiss authorities did not acknowledge his objections with reasoning that they were just implementing the UNSC resolutions adopted under the Chapter VII of the UN Charter so they have no margin of appreciation in the area of who would be listed and who would not. Because Mr. Nada was not satisfied with their attitude he submitted an application to the European Court of Human Rights.

#### **3.2 THE LEGAL ASSESSMENT**

##### **3.2.1 PRELIMINARY OBJECTIONS**

On 12 September 2012 the ECHR decided on Mr. Nada's case. There were two preliminary objections within the case. The first objection was focused on the responsibility for implementation of the measures. The Swiss government alleged that the sanctions measures or more precisely obligations arising from UNSC resolutions adopted under the Chapter VII of the UN Charter "*were binding and prevailed over any other international agreement*".<sup>11</sup> And because the measures were

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<sup>9</sup> Judgment of the European Court of Human Rights of 12 September 2012, *Nada v. Switzerland*, application No. 10593/08.

<sup>10</sup> Par. 11 of the Judgment in the case *Nada v. Switzerland*.

<sup>11</sup> Par. 102 *ibid*.

adopted by the UN Security Council, this issue *"fell outside the scope of the Court's review"*.<sup>12</sup>

The ECHR dismissed these objections. The reasons for this were following: *"the relevant Security Council resolutions required States to act in their own names and to implement them at national level...The acts [the Swiss Taliban Ordinance and its Annex] therefore relate to the national implementation of UN Security Council resolutions...The alleged violations of the Conventions are thus attributable to Switzerland"*.<sup>13</sup>

### **3.2.2 ALLEGED VIOLATIONS OF ART. 8 AND 13 OF THE CONVENTION**

Mr. Nada alleged that his right for the protection of his private and family life was breached by Switzerland. The main problem was that he was not allowed to travel from the Italian enclave through the Swiss territory to Italy (of which was a citizen). Mr. Nada's family and friends were in Italy. Moreover Mr. Nada was seriously ill and he was not allowed to travel even to the doctor abroad.

The Court found out that Switzerland did not even attempt to harmonise two different obligations arising from the international law (from the UNSC resolutions adopted under the Chapter VII and from the Convention). Further it stated that there was not a fair balance between the restrictions on free movement of Mr. Nada and the legitimate aim of the protection Swiss nation against terrorism and *"the interference with his right to respect for private and family life was not proportional and therefore not necessary in a democratic society"*.<sup>14</sup> The Art. 8 of the Convention was breached by Switzerland.

In the case of alleged violation of Art. 13 Mr. Nada complained that there was no effective remedy before the Swiss authorities to make a complaint about a violation of the rights guaranteed by the Convention. The core of this complaint was that Mr. Nada was allowed to submit an application for delisting to the Swiss authorities but they did not decide his applications on the merits with reference to the binding character of the UNSC resolutions under the Chapter VII of the UN Charter. The ECHR ruled that there was nothing in international law (UNSC resolutions) *"to prevent the Swiss authorities from introducing mechanism to verify the measures taken at the national level pursuant to those resolutions"*.<sup>15</sup> It can be concluded

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<sup>12</sup> Par. 103 *ibid.*

<sup>13</sup> Par. 120 and 121 of the Judgment in the case *Nada v. Switzerland* .

<sup>14</sup> Par. 198 *ibid.*

<sup>15</sup> Par. 212 *ibid.*

that the Swiss authorities should have been more active in the matter of delisting Mr. Nada.

#### **4. COMPARATIVE VIEW**

If we compare the two above mentioned cases then we would come to the following conclusions. In the both cases the international courts decided on the matter of Al-Qaida and the Taliban Sanctions Regime having held that this issue can be decided on the merit. Thus they did not admit objections that implementation of the UNSC resolutions adopted under the chapter VII of the UN Charter do fall outside the scope of the courts' review.

The second common feature of the two cases is that courts admitted violation of the right to an effective judicial review or effective remedy against listing. The courts ruled that there is nothing in the international law what would forbid the Switzerland or the EU to review the listing of given individuals.

#### **5. CONCLUSION**

Regarding to the above mentioned information we can conclude that the two highest European courts have some similarities in their judgments on the matter of Al-Qaida and the Taliban Sanctions Regime. The courts actually invite the given subjects not to adhere to Al-Qaida and the Taliban Sanctions Regime automatically (only with reference to the binding character of the UN legal system) and without considering if the fundamental or human rights of listed individuals can be violated. The question that can arise is if the regime can be effective in the situation when every state has a margin of appreciation who to list and who not. The stated preventive nature of the sanctions regime can lead us to the conclusion that at least UNSC considers that with that system it could be difficult to be effective.

What is indisputable is the fact that the preventive nature of the sanctions regime without possibility to challenge the listing before the independent and impartial body is indefensible. The UNSC is therefore pushed to change the nowadays sanctions system relating to Al-Qaida and the Taliban or to reconcile with the fact that European states will probably change their attitude to the preventive and binding nature of the sanctions measures and sanctions regime.

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## JUDGMENTS

### *International cases*

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