

Due Process, Judicial Protection and the Kadi Saga

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A COMMENTARY ON the dissenting judgment of Mr Justice Fennelly in *Equality Authority v Portmarnock Golf Club and Others*¹ refers to it as ‘a plainly clever judgment that is unconcerned with protesting its cleverness’.² Indeed it is. For example:

It is, moreover, a matter of simple common sense that the principal purpose of Portmarnock Golf Club is the playing of golf. When the far-seeing founding members of Portmarnock came together in 1894 and led to the establishment of what is now the first and greatest of Irish golf clubs, what was their purpose if it was not the establishment of a golf club? Clearly, the answer is ‘none’. Any other answer would be preposterous.³

When he was one of the Advocates General of the European Court of Justice Nial Fennelly delivered many plainly clever opinions that were unconcerned with protesting their cleverness. They were straightforward, easy to read and, at least as far as I was concerned, always (or almost always) right.

Sadly, as an Advocate General from one of the ‘small’ Member States, his term of office was limited to six years, but Luxembourg’s loss was Ireland’s gain. His judgments in the Supreme Court carry the same imprint of a precise judicial mind concerned to identify the real issue in a case and to find an acceptable solution, consistent with common sense. In particular, they are constantly imbued with a concern for due process and procedural fairness, as in the *Portmarnock* case:

Another issue raised by the Club and canvassed at the hearing of the appeal was the position of the Masonic Order under the legislation. I find it objectionable that the interests of a body which is not before the Court and not represented should

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¹ *Equality Authority v Portmarnock Golf Club* [2009] IESC 73.

² D O’Connell, ‘No “ladies” need apply – Equality Authority v Portmarnock Golf Club,’ *Village Magazine*, December 2009.

³ N 1, para 58.

be debated at all. In any event, whether that or any other club or body is treated correctly under the legislation is, to my mind, also utterly irrelevant to the legal issue before the Court.⁴

In the common-law countries, due process and procedural fairness have been the recurring theme in the historic proclamations of fundamental rights from Magna Carta onwards: the right to be heard; the right to trial within a reasonable time; the right of the accused to be confronted with accusers and witnesses; protection against arbitrary search and seizure, and so on. The underlying principles have been developed over centuries by the case-law of the courts, and Jean-Pierre Warner, the first Advocate General from a common-law country, brought them firmly into EU law with his Opinion in *Transocean Marine Paint*.⁵

Due process and procedural fairness were at the core of what Advocate General Bot called ‘the saga of the *Kadi* cases’. But the *ultimate ratio decidendi* (if there be such a thing⁶) is not very easy to identify and analysis is complicated by nuances of difference between the French and English texts.

What, at the end of the day, was the outcome of the saga? In particular, what do the principles of due process and procedural fairness require in cases that raise security concerns about full disclosure to those, like Mr Kadi, who are alleged to have been involved in terrorism? How far can the principle of judicial protection compensate for what may be lacking? These highly topical questions have been overshadowed in discussion of wider questions raised by the *Kadi* saga, such as the relationship between EU law and international law.

Using nomenclature which seems to have become conventional, the cases will be referred to as *Kadi I* (the judgment of the Court of First Instance in 2005);⁷ *Kadi II* (the judgment of the Court of Justice in 2008 setting aside the judgment in *Kadi I*);⁸ *Kadi III* (the judgment of the General Court in 2010);⁹ and *Kadi IV* (the judgment of the Court of Justice in July 2013 in the appeal from *Kadi III*).¹⁰

I. KADI I – THE FACTS

The underlying facts can be stated fairly shortly. Beginning in 1999, the Security Council of the United Nations adopted a series of measures designed to stop Afghanistan being used as a safe haven for terrorism, and established a Sanctions Committee to ensure that the measures were implemented. The measures to be taken by States included the freezing of ‘funds and other financial assets of

⁴ N 1, para 75.

⁵ Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063 at pp 1088 ff.

⁶ ‘With the possible exception of the legal term “malice”, ... the most misleading expression in English law’ *per* AL Goodhart, ‘Determining the *Ratio Decidendi* of a Case’ (1930) *XL Yale Law Journal* 161, 162.

⁷ Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

⁸ Joined Cases C-402 and 415/05 P *Kadi and Al Bakaraat v Council and Commission* [2008] ECR I-6351.

⁹ Case T-85/09 *Kadi v Commission* [2010] ECR II-5177.

¹⁰ Joined Cases C-584, 593 and 595/10 P *Commission v Kadi*, judgment of 18 July 2013.

Usama Bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee]’.

The Council of the European Union adopted a Regulation providing that ‘[a]ll funds and other financial assets belonging to any natural or legal person, entity or body designated by the ... Sanctions Committee and listed in Annex I shall be frozen.’¹¹

Annex I contained the list of those affected by the freezing of funds, and the Commission was empowered to amend the list on the basis of determinations made by the Security Council or the Sanctions Committee.

On 21 October 2001, the Sanctions Committee added the name of Mr Kadi to its list, and on the same day the Commission added his name to the list in Annex I, with the result that his assets were frozen.¹² The Security Council subsequently adopted resolutions providing for relaxation of the freezing regime in limited circumstances, including the possibility of individuals making representations through their national authorities to the Sanctions Committee (‘de-listing procedure’). The Council of the EU adopted a further Regulation for that purpose.¹³

II. *KADI I* – THE GENERAL COURT

In *Kadi I*, Mr Kadi sought annulment of the Council and Commission Regulations which had the effect of freezing his assets, principally on the ground that he had been arbitrarily deprived of rights of property without a fair, or indeed any, hearing and with no right to judicial review. This, he said, constituted a breach of his fundamental rights. The Council and Commission did not dispute that Mr Kadi had not been allowed any hearing, contending that they had no discretion in the matter since they were bound, under the Charter of the United Nations,¹⁴ to comply with the Resolutions of the Security Council.

The Court of First Instance (now General Court) comprehensively rejected Mr Kadi’s arguments. It held that the EU was bound by Community law (quite apart from international law) to implement the resolutions of the Security Council; that there had, in any event, been no arbitrary deprivation of a right of property nor any breach of the right to be heard since there was provision

¹¹ Council Regulation (EC) No 467/2001 of 6 March 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, and repealing Regulation (EC) No 337/2000 [2001] OJ L67/1, Art 2.

¹² Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, 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 and repealing Regulation (EC) No 337/2000, [2001] OJ L277/25.

¹³ Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2003] OJ L82/1.

¹⁴ Arts 24(1), 25, 48(2) and 103.

for resort (albeit indirect) to the Sanctions Committee; and, as regards the availability of judicial protection, that it was not open to the Community courts to review decisions of the Security Council or the Sanctions Committee.

III. *KADI II* – THE ADVOCATE GENERAL

In *Kadi II*, Advocate General Poiares Maduro affirmed the right and obligation of the Court, notwithstanding the terms of the UN Charter, to uphold fundamental rights within the Community legal order in relation to the Community act freezing Mr Kadi's assets. As he said, '[t]he 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'.¹⁵

As to the right of property, he said that '[c]learly, the indefinite freezing of someone's assets constitutes a far-reaching interference with the peaceful enjoyment of property'.¹⁶

He then dealt fairly briefly with the right to be heard,¹⁷ and concentrated his fire on the lack of effective judicial protection:

The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant him an opportunity to dispute the grounds for his continued inclusion on the list. They have, in effect, levelled extremely serious allegations against him and have, on that basis, subjected him to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless 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.

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.¹⁸

IV. *KADI II* – THE COURT OF JUSTICE

In its judgment in *Kadi II*, the Court of Justice drew an important distinction between judicial review of the acts of the institutions of the UN and review of those of the EU, and emphasised that

¹⁵ Para 46.

¹⁶ Para 47.

¹⁷ Para 51.

¹⁸ Paras 53 and 54.

in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.¹⁹

Thus the Court did not, as it might have done, rest its decision on the supremacy, in international law, of the fundamental rights enshrined in the Universal Declaration of Human Rights even as against acts of the UN institutions.

In 2006 (after the judgment in *Kadi I* but before the judgment in *Kadi II*), the Security Council had put in place a ‘re-examination procedure’ before the Sanctions Committee. The Court held in *Kadi II* that this was not an adequate substitute for judicial review because (i) the procedure was in essence diplomatic and intergovernmental; (ii) the applicant had no right to be heard; (iii) the applicant had no right of access, even restricted access, to the evidence justifying his appearance on the list; and (iv) if the Committee rejected the application, it was not bound to give reasons.

The Court therefore concluded:

It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, *in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the 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.²⁰

The words italicised in the quotation (‘in principle the full review’) have given rise to substantial confusion and misunderstanding discussed below.

On the facts of the case, the Court held that ‘the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected’.²¹

There then follows a passage where ‘the rights of defence, in particular the right to be heard’ and ‘effective judicial protection’ appear to be treated as two sides of the same coin. Thus:

[t]he effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds (*motifs*) on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions²² and to decide, with full knowledge of the relevant facts,

¹⁹ Para 286.

²⁰ Paras 322–326 (emphasis added).

²¹ Para 334.

²² It is not clear whether the French ‘*dans les meilleurs conditions possibles*’ should be understood to mean ‘in the best possible conditions in any circumstances’ or ‘in the best conditions possible in the particular circumstances of the case’. The difference may be important.

whether there is any point in their applying to the Community judicature ..., and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.²³

However, it becomes clear that the two concepts (rights of defence and judicial protection), although related, are not two sides of the same coin.

On the one hand, the Court held that there was no right to be told in advance before one's name was entered on the list, nor to be heard before that measure was taken, since 'such measures must, by their very nature, take advantage of a surprise effect'. Moreover,

with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.²⁴

On the other hand,

that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.

In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal v. United Kingdom*²⁵).²⁶

The reference to available 'techniques' becomes clearer if one refers to the judgment of the ECtHR in *Chahal*, which held that the form of judicial review available in England was inadequate:

Because the Secretary of State invoked national security considerations as grounds for his decisions to deport Mr Chahal and to detain him pending deportation, the English courts' powers of review were limited. They could not themselves consider the evidence on which the Secretary of State had based his decision that the applicant constituted a danger to national security or undertake any evaluation of the Article 3 (art. 3) risks. Instead, they had to confine themselves to examining whether the evidence showed that the Secretary of State had carried out the balancing exercise required by the domestic law.²⁷

The 'technique' suggested to overcome this objection was one adopted in Canada:

²³ N 8, paras 336 and 337.

²⁴ N 8, paras 338–342.

²⁵ *Chahal v United Kingdom*, ECtHR, 15 November 2006, Reports of Judgments and Decisions 1996-V, para 131.

²⁶ *Kadi II* n 8, paras 343–344.

²⁷ *Chahal*, n 25, para 143.

Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.²⁸

Thus, it appears that, while the rights of defence (or at any rate the normal due process rights of the individual) may have to give way before 'legitimate security concerns', the individuals affected can nevertheless be given a 'sufficient measure of procedural justice' through 'effective judicial protection'. Such protection may be afforded by allowing the judge to see (and to assess) what the affected individual may not see. A similar line of thought recurs in *Kadi IV*, where the Court refers to 'the task of the Court of the European Union before whom the secrecy or confidentiality of that information or evidence is no valid objection'.²⁹

Having raised the possibility of overcoming security objections by special techniques, the Court reverted to infringement of the rights of defence in *Kadi's* case. The Court held that:

Because the Council neither communicated to the appellants the evidence used against them [*les éléments retenus à leur charge*] to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence [*prendre connaissance desdits éléments*] within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected.³⁰

The Court then brought together rights of defence and judicial protection in this way:

In addition, given the failure to inform them of the evidence adduced against them [*les éléments retenus à leur charge*] and having regard to the relationship ... between the rights of the defence and the right to an effective legal remedy [*recours juridictionnel effectif*], the appellants were also unable to defend their rights with regard to that evidence [*au regard desdits éléments*] in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.

Last, it must 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 [*vérification*] by the Community judicature, the Council has adduced no evidence to that effect.

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

²⁸ N 8, para 144.

²⁹ *Kadi IV*, n 11, para 125.

³⁰ *Kadi II*, n 9, para 348.

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.³¹

This passage implies that judicial protection is cognate to, but conceptually different from, rights of defence. The point being made is that judicial review can operate only if there is something susceptible of review, so judicial protection can be given only if the individual affected has a means of bringing the matter before a judicial authority (a legal remedy). It may be that the outcome will be a decision that there has been no infringement of the rights of defence: judicial protection is concerned with the right to have that matter considered and determined by a court.

The Court then considered the claim of infringement of Mr Kadi's rights of property and concluded that:

The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.³²

V. TWO LINGUISTIC PROBLEMS

Before moving on to *Kadi III*, it is necessary to deal in more detail with two linguistic problems raised by the judgment in *Kadi II*. They concern two phrases in the English text: first, 'the review, in principle the full review, of lawfulness'; and, second, 'the evidence adduced against them', used together with the word 'investigate'. It has to be borne in mind that, while the judgment was almost certainly drafted in French, the authentic languages of the case were English and Swedish.

(1) As regards the first problem, the use of expressions such as 'full review', 'marginal review' and 'restricted review' suggests that they refer to well-defined and well-understood (and presumably mutually exclusive) legal categories. But experience shows that the nature and scope of judicial review does not lend itself to easy categorisation.

In the French text of *Kadi II*, the expression used is '*un contrôle, en principe complet, de la légalité*'. The Swedish text refers to '*en i princip fullständig kontroll*' ['complete review']. The German text is even more emphatic: '*eine grundsätzlich umfassende Kontrolle der Rechtmäßigkeit*' ['in principle, an all-embracing review'].

The Italian text refers to '*un controllo, in linea di principio completo, della legittimità*'. This is inconsistent with an argument later advanced by the Advocate General in *Kadi IV* that a distinction should be drawn between '*en principe*' (in principle) and '*par principe*' (as a matter of principle). The Italian

³¹ N 9, paras 349–351.

³² N 9, para 369.

phrase ‘*in linea di principio*’ clearly means the latter rather than the former. In any event, while it may be true that the judgment in *Kadi II* was drafted and deliberated in French, the authentic languages of the case were English and Swedish, so logic-chopping about French prepositions is, with respect, both technically and legally inept.

Comparing the different language texts, it is difficult to imagine that any rational reader of the judgment in *Kadi II* could suppose that the words ‘full review’ were intended to mean other than what they say.

(2) The second linguistic problem concerns the distinction between the English ‘evidence adduced against someone’ and the French ‘*éléments retenus à charge*’.

In English, particularly in the context of the common-law system, the word ‘evidence’ has very specific connotations. Evidence may be written or oral, coming from an identifiable source, and it will be tested for relevance, admissibility, credibility and reliability. Where it is said, in the English text of the judgment, that the individual has ‘the right to be informed of that evidence’ and, later, that the evidence ‘may be the subject of investigation’, this would be taken by a common lawyer to mean that the individual has the right to be informed, not simply of the allegation against him, but that he or she is entitled to an independent investigation of the underlying evidential basis for that allegation.

The French expression ‘*éléments retenus à charge*’ does not have the same connotation. In the German text, the expression is rendered ‘*welche Umstände ihnen zur Last gelegt werden*’ [what circumstances are charged against him]. Almost exactly the same phraseology as in the German is found in the archaic English of the King James Bible: ‘They laid to my charge things that I knew not’.³³ Comparison of these texts suggests that the Court, in referring to ‘*éléments retenus à charge*’, intended to refer only to the allegations made against Mr Kadi and not to their evidential basis.

A requirement that a judicial authority should be able to ‘verify’ or ‘check’ [*vérifier, überprüfen*] the allegations against someone in order to justify listing is rather different from a requirement (implied by the English text) that the authority should be able to ‘investigate’ and then (presumably) assess the reliability of their evidential basis.

This linguistic confusion helps to explain the difference of approach between the General Court in *Kadi III* and the Court of Justice in *Kadi IV*.

VI. EVENTS FOLLOWING *KADI II*

Shortly before the Court’s decision in *Kadi II* (3 September 2008), the Security Council had, on 30 June 2008, adopted Resolution 1822 (2008) which took note of the challenges to the listing procedure and made some modifications to that procedure. In particular, it provided for the release to the person affected of a ‘statement of reasons’ for listing. This was followed by Resolution 1904 (2009)

³³ *Psalm* 35.11. See also *Romans* 8.33 : ‘Who shall lay anything to the charge of God’s elect?’.

which provided that the Sanctions Committee was to be assisted by an ‘Office of the Ombudsperson’ who would carry out investigations and report to the Committee on requests for delisting. (The powers of the Ombudsperson were later increased.)

On 8 September 2008, the Sanctions Committee was asked, as a matter of urgency, to make available the summary of reasons for Mr Kadi’s listing. This was provided on 21 October 2008 and communicated to Mr Kadi the following day. Mr Kadi was given rather less than three weeks to submit observations.

The reasons given for Mr Kadi’s listing were in brief:³⁴

- that he was the founding trustee and directed the activities of a Foundation which operated under the umbrella of an organisation that was the predecessor of, and was subsequently absorbed into, Al-Qaeda;
- that he appointed to manage the Foundation a person with close links to Usama bin Laden, notably in the training of Tunisian mujahidin;
- that the Foundation provided logistical and financial support to a mujahidin battalion in Bosnia and Herzegovina;
- that Mr Kadi was a major shareholder in a Bosnian bank where planning sessions for an attack against a US facility in Saudi Arabia may [sic] have taken place; and
- that he owned several firms in Albania through which money was funneled to extremists and in some cases received working capital from Usama bin Laden.

On 10 November 2008, Mr Kadi submitted his observations in which, as summarised by the General Court, he:

- requested the Commission to disclose the evidence supporting the assertions and allegations made in the summary of reasons and also the relevant documents in the Commission’s file;
- requested a further opportunity to make representations on that evidence, once he had received it; and
- attempted to refute, providing evidence in support of his refutation, the allegations made in the summary of reasons, in so far as he was able to respond to general allegations.³⁵

In particular Mr Kadi pointed out that criminal proceedings against him in Switzerland, Turkey and Albania had been dropped.

On 28 November 2008, without further communication with Mr Kadi, the Commission adopted a new Regulation³⁶ renewing his inclusion in Annex 1 of the Council Regulation giving effect to the Security Council listing. The preamble stated:

After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and

³⁴ Following the summary in the judgment of the Court of Justice in *Kadi IV*, n 11, paras 141–148.

³⁵ *Kadi III*, para 55.

³⁶ Regulation (EC) No 1190/2008, [2008] OJ L 322/25.

economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaeda network.

On 8 December 2008, the Commission replied to Mr Kadi. The text of the Commission's letter is not quoted anywhere in full. The clearest summary of its contents is in the Advocate General's Opinion in *Kadi IV*:³⁷

- in providing him with the summary of reasons and inviting him to comment on them, the Commission had complied with the judgment of the Court of Justice in *Kadi II*;
- the judgment of the Court of Justice in *Kadi II* did not require that the Commission disclose the further evidence requested;
- as the relevant Security Council resolutions required 'preventative' asset freezing, the freezing must be supported, with respect to the requisite evidentiary standard, by 'reasonable grounds, or a reasonable basis, to suspect or believe that the individual or entity designated is a terrorist, one who finances terrorism or a terrorist organisation';
- the letter from Mr Kadi confirmed his participation in the decisions and activities of the Muwafaq Foundation and his links with Mr Ayadi, who was part of a contact network with Usama bin Laden; and
- the dropping of the criminal proceedings in Switzerland, Turkey and Albania had no bearing on the relevance of his inclusion on the list drawn up by the Sanctions Committee, which may be based on information from other United Nations Member States. In addition, those decisions to drop proceedings were taken within the framework of criminal proceedings, which have different standards of evidence from those applicable to Sanctions Committee decisions, which are preventative in nature.

The Commission concluded that the listing of Mr Kadi was justified by his association with the Al-Qaeda network. It enclosed a statement of reasons identical to the summary of reasons previously sent, together with the text of the Regulation adopted on 28 November, drawing attention to the possibility for him to challenge that regulation before the General Court and to submit at any time a request to the Sanctions Committee to have his name removed from the list.

Against that background, by an action raised on 26 February 2009, Mr Kadi sought annulment of the Regulation adopted on 28 November 2008.

In the interim, the General Court had issued three judgments involving the People's Mojahedin Organization of Iran (PMOI) in which it dealt with the appropriate level of judicial review in such cases.³⁸ In the last of them, the Court said that:

the judicial review of the lawfulness of a decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence

³⁷ N 11, para 27.

³⁸ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, 'OMPI', paras 154, 155 and 159; Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019, 'PMOI I', paras 141 to 143; and Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3487, 'PMOI II', paras 74 and 75.

and information on which that assessment is based ... The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in order to justify disregarding those rights, are well founded.³⁹

VII. *KADI III* – THE GENERAL COURT

Before the General Court, Mr Kadi called for an ‘intensive and anxious’ standard of judicial review, basing his arguments on the judgment of the Court of Justice and the Opinion of the Advocate General in *Kadi II* and the Judgments of the General Court in the PMOI cases. The Commission, the Council and the intervening Member States sought, in effect, to revisit the judgment in *Kadi II*, protesting that ‘full review’ would be unworkable and inconsistent with the UN listing system.

In its judgment, the General Court considered these submissions in some detail, and concluded that

once there is acceptance of the premiss, laid down by the judgment of the Court of Justice in *Kadi*, that freezing measures such as those at issue in this instance enjoy no immunity from jurisdiction merely because they are intended to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.⁴⁰

The Court then dealt shortly and severely with the situation in which Mr Kadi had been placed. The essence of the Court’s reasoning is in these paragraphs:

In the context of a judicial review which is ‘in principle the full review’ of the lawfulness of the contested regulation in the light of the fundamental rights (judgment of the Court of Justice in *Kadi*, paragraph 326) and in the absence of any ‘immunity from jurisdiction’ for that regulation (*Kadi*, paragraph 327), the arguments and explanations advanced by the Commission and the Council – particularly in their preliminary observations on the appropriate standard of judicial review in the present case – quite clearly reveal that the applicant’s rights of defence have been ‘observed’ only in the most formal and superficial sense, as the Commission in actual fact considered itself strictly bound by the Sanctions Committee’s findings and therefore at no time envisaged calling those findings into question in the light of the applicant’s observations.

By the same token, the Commission, notwithstanding its statements at recitals 4 to 6 in the preamble to the contested regulation, failed to take due account of the applicant’s comments and as a result he was not in a position to make his point of view known to advantage.

Furthermore, the procedure followed by the Commission, in response to the applicant’s request, did not grant him even the most minimal access to the evidence

³⁹ *PMOI II*, n 38, para 74.

⁴⁰ *Kadi III*, para 151.

against him. In actual fact, the applicant was refused such access despite his express request, whilst no balance was struck between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other (see, in that regard, the judgment of the Court of Justice in *Kadi*, paragraphs 342 to 344).

In those circumstances, the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned.

That is the case, taking as a particularly telling but in no way unique example, of the allegation, not otherwise substantiated and thus irrefutable, that the applicant was a shareholder in a Bosnian bank in which planning sessions against a United States facility in Saudi Arabia ‘may have’ taken place.⁴¹

The Court went on to hold that

The General Court cannot, therefore, do other than find that it is not able to undertake a review of the lawfulness of the contested regulation, with the result that it must be held that, for that reason too, the applicant’s fundamental right to effective judicial review has not, in the circumstances, been observed (see, to that effect, the judgment of the Court of Justice in *Kadi*, paragraph 351).

Consequently, it must be held that the contested regulation was adopted without any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his actually being properly heard in that regard, and it must therefore be concluded that the regulation was adopted according to a procedure in which the rights of the defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed (see, to that effect, the judgment of the Court of Justice in *Kadi*, paragraph 352).⁴²

For these and other reasons, the General Court annulled the Commission’s Regulation of 28 November 2008.

VIII. *KADI IV* – THE ADVOCATE GENERAL

The judgment of the General Court was delivered on 30 September 2010, and appeals were lodged by the Council, the Commission and the United Kingdom on 10 December 2010. On 5 October 2012, the Sanctions Committee, following the advice of the Ombudsperson, decided to delist Mr Kadi, and on 11 October 2012 his name was removed by the Commission from Annex I to Regulation of 881/2002.

Nevertheless, the hearing in the appeals went ahead on 16 October 2012, since there was a continuing interest in the outcome for the reasons explained subsequently by Advocate General Bot and affirmed by the Court in *Abdulrahim v Council and Commission*.⁴³

⁴¹ Paras 171–174.

⁴² Paras 183–184.

⁴³ Case 239/12 P *Abdulrahim v Council and Commission*, Opinion delivered on 22 January 2013; judgment of 28 May 2013. And see the Opinion in *Kadi IV*, para 42.

In his Opinion in *Kadi IV*, the Advocate General first sought to explain that the Court's reference to 'full review' in *Kadi II* meant 'precisely the opposite of the one adopted by the General Court'.⁴⁴ The reasoning of this passage is unconvincing, not to say (*pace* Pope Francis) jesuitical. Indeed, it is significant that, in its judgment in *Kadi IV*, the Court did not seek to make any such apologia but simply repeated the words of *Kadi II*.⁴⁵ The point may perhaps best be left for judicial hermeneutists to torment their students.

Nevertheless, *ex malo bonum*. The Advocate General pointed out that

As the Ombudsperson has acknowledged, the judgment of the Court of Justice in *Kadi* led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed, even though the Office of the Ombudsperson is not a judicial body.⁴⁶

The next part of the Opinion sets out the Advocate General's own preferred approach which involves making a distinction between (a) a 'normal' review of the 'external' lawfulness of the contested regulation, and (b) a 'limited' review of its 'internal' lawfulness.⁴⁷

A normal review of external lawfulness implies 'a strict review of compliance with essential procedural requirements and of the existence of a procedure which respects the rights of the defence'. In this particular context, that will involve a 'rigorous review' of

whether [the contested act] was adopted in a procedure which respected the rights of the defence. In particular, it must ascertain whether the reasons [*motifs*] for listing were communicated to the person concerned, whether those reasons are sufficient to permit him to defend himself properly, whether he was able to submit his comments to the Commission and whether the latter took them adequately into consideration. ...

By contrast, in the context of the contested regulation, the requirement of a procedure which respects the rights of the defence does not extend so far as to require the EU institutions to obtain from the Sanctions Committee all the information or evidence [*tous les éléments d'information ou de preuve*] which was available and then to transmit it to the listed person so that he can submit his comments on its relevance.⁴⁸

The second of these paragraphs illustrates the second linguistic problem discussed above, since, in the case of this Opinion, we are rightly concerned with the language in which it was written. *Éléments d'information* are not the same as *éléments de preuve*, and the distinction is brought out clearly enough in the distinction between 'information' and 'evidence' in the English text. However, the problem arises again in a subsequent paragraph, where the Advocate General says:

I take the view that the references made by the Court of Justice in its judgment in *Kadi* to the need for listed persons to be communicated the 'evidence adduced against them' or 'used against them' relate only to the communication of a sufficiently detailed

⁴⁴ Opinion in *Kadi IV*, para 61.

⁴⁵ Judgment in *Kadi IV*, para 97.

⁴⁶ Opinion, para 83.

⁴⁷ Para 95.

⁴⁸ Paras 97–8 and 103.

statement of reasons, but not to the communication of the evidence or information held by the Sanctions Committee in support of the listings decided by it.⁴⁹

The statement makes perfectly good sense in the original French but is little short of nonsense in English. However, the point is not central to the Advocate General's reasoning on the issue of 'limited review of internal lawfulness', where he says:

I consider that the different components of the substantive lawfulness of an EU act giving effect to decisions of the Sanctions Committee must ... be limited to ascertaining the existence of a manifest error.

That is the case, first, with the review of the accuracy of the facts claimed. ... Since the substantive accuracy of the facts must be presumed to have been established by the Sanctions Committee, only a manifest error in the factual finding made is capable of leading to the annulment of the implementing act.

The same holds, second, for the review of the legal classification of the facts. In my view, the EU judicature must simply ascertain that the Commission did not commit a manifest error when it took the view, in the light of the statement of reasons, that the legal conditions permitting the adoption of a freezing measure were satisfied.

Lastly, with regard to the review of the content of the contested act, the review by the EU judicature must be limited, in view of the broad discretion enjoyed by the Sanctions Committee in determining whether inclusion on the list is appropriate, to ascertaining that the listing is not manifestly inappropriate or disproportionate in the light of the importance of the objective pursued, namely the fight against international terrorism.

In summary, the review performed by the EU judicature of the internal lawfulness of EU acts giving effect to decisions taken by the Sanctions Committee must not, in principle, call into question the merits of the listing, except in cases where the implementation procedure for that listing within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts or in the assessment of the proportionality of the measure.⁵⁰

The Advocate General then went on to apply his criteria to the facts of the case, and concluded, as is obvious, that the reasoning of the General Court was vitiated by errors of law because, in essence, the Court had required from the Commission more than the Commission had provided or indeed could have provided.

IX. *ZZ V HOME SECRETARY*

Shortly before giving judgment in *Kadi IV*, the Court gave judgment in *ZZ v Home Secretary*, a reference from the Court of Appeal of England and Wales.⁵¹ The case concerned the interpretation of Article 30(2) of Directive 2004/38/EC,⁵²

⁴⁹ Para 114.

⁵⁰ Opinion, paras 105–110.

⁵¹ Case 300/11, *ZZ v Secretary of State for the Home Department*, judgment of 4 June 2013.

⁵² Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

which provides that, where a Member State takes a decision to restrict the freedom of movement and residence of Union citizens,

the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

The United Kingdom had put in place a system analogous to the Canadian system referred to in *Chahal* (quoted above) where material regarded as confidential on security grounds could be tested by a ‘special advocate’ without being disclosed to the individual concerned. The question in the case was whether this system was compatible with Article 30(2), read in the light of Article 47, of the Charter of Fundamental Rights, which enshrines the right to an ‘effective remedy before a tribunal’ – ie effective judicial protection.

In answer to the question referred, the Court set out the procedural rules by which effective judicial protection can be guaranteed. These formed the basis of the subsequent judgment in *Kadi IV* and are in essence the following:

1. The person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons.
2. The parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.
3. If precise and full disclosure is opposed on grounds of State security, the competent court must have at its disposal and apply techniques and rules of procedural law which accommodate both legitimate State security considerations and the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle [*le principe du contradictoire*].
4. To that end, Member States must (i) provide for effective judicial review of (a) the existence and validity of the alleged reasons of State security and (b) the legality of the decision taken and (ii) prescribe techniques and rules relating to that review. These rules must enable the court to examine all the grounds and the related evidence on the basis of which the decision was taken.
5. A *court* must be entrusted with verifying whether the reasons of State security stand in the way of precise and full disclosure of the grounds on which the decision in question is based and of the related evidence. There is no presumption that the reasons invoked by a national authority exist and are valid.
6. If the court concludes that State security does not stand in the way of precise and full disclosure, the competent national authority will be given the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority does not authorise their disclosure, the court will proceed to examine the legality of the decision on the basis solely of the grounds and evidence which have been disclosed.

7. If, on the other hand, State security does stand in the way of disclosure, judicial review must be carried out by a procedure which strikes an appropriate balance between the requirements of State security and those of the right to effective judicial protection, while limiting any interference with the exercise of that right to that which is strictly necessary. That procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision.
8. Where disclosure of the underlying evidence is liable to compromise State security in a direct and specific manner (for example endangering the life, health or freedom of persons or revealing the methods of investigation specifically used by the national security authorities), the court must assess whether and to what extent the restrictions on the rights of the defence are such as to affect the evidential value of the confidential evidence.
9. In summary, the court must, first, ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in a manner that takes due account of the necessary confidentiality of the evidence and, second, draw the appropriate conclusions from any failure to inform him.⁵³

X. *KADI IV* – THE COURT OF JUSTICE

In its judgment in *Kadi IV*, the Court referred briefly, and without further comment, to its judgment in *Kadi II* including the use of the phrase ‘in principle, full review’. The discussion of the principles to be applied is headed simply ‘The extent of the rights of the defence and of the right to effective judicial protection’. To a considerable extent, the judgment applies by analogy the principles laid down in *ZZ*, taking into account the special characteristics of the UN listing procedure and the changes that had been made to it since *Kadi II*.

Recognising the soundness of the maxim that the law does not require the impossible (*lex non cogit ad impossibilia*), the Court said:

In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person *available to that authority* and relied on as the basis of *its* decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee...⁵⁴

The Court then laid particular stress on the requirement to ‘ensure that the individual is placed in a position in which he may effectively make known his views on the grounds advanced against him’ and ‘the obligation to examine, carefully and impartially, whether the alleged reasons [in the summary of

⁵³ *ZZ*, paras 53–68.

⁵⁴ Judgment in *Kadi IV*, para 111 (emphasis added).

reasons] are well founded, in the light of those comments and any exculpatory evidence provided with those comments'. That may involve going back to the Sanctions Committee and, through that Committee, to the Member State which proposed the listing of the individual concerned. Moreover,

without going so far as to require a detailed response to the comments made by the individual concerned, the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures.

...

The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person, ... the Courts of the European Union are to ensure that that decision ... is taken on a sufficiently solid factual basis. That entails a verification of the [facts alleged]⁵⁵ in the summary of reasons underpinning that decision ... with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.⁵⁶

Applying by analogy the criteria set out in *ZZ* (above), the Court held that the reasoning of the General Court was defective in relation to four of the allegations against Mr Kadi, but well founded in rejecting as insufficiently detailed and specific the allegation that he owned several firms in Albania through which money was funneled to extremists and in some cases received working capital from Usama bin Laden.⁵⁷

The Court then looked again at the other four allegations. In each case, the Court focused, not simply on the text of the summary of reasons, but also on the explanations given by Mr Kadi and the basis on which the Commission had rejected them. The outcome was that

none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.

So, although the reasoning of the General Court was held to have been wrong in respect of four out of five allegations, the result – annulment of the Commission Regulation – was held to have been correct.

⁵⁵ For no obvious reason, the English text uses the expression 'allegations factored'. The French text reads *faits allégués*.

⁵⁶ Paras 114–116 and 119.

⁵⁷ Para 141.

XI. CONCLUSION

The *Kadi* saga illustrates a feature of any system based on case-law – namely, that a durable principle of general application rarely emerges from a single judgment. The first statement is often too broad or has been stated in such a way as to lead to unintended consequences or erroneous inferences as to what the court intended. The first statement of principle will be explained, refined or even abandoned in favour of a better. The EU system, based on the case-law of the Luxembourg courts, is no different in this respect.

The problem with which the General Court and the Court of Justice were faced at the beginning of the *Kadi* saga was quite novel. The UN listing system was manifestly deficient as regards due process and procedural fairness, and it did not offer judicial protection in any form. The Court of Justice was surely right in *Kadi II* to draw attention to this deficiency, and to insist on the obligation of the judiciary to ensure minimum standards of due process and procedural fairness even in the face of risks of terrorism. That is essentially what judicial protection, as a distinct principle of law, is about. Moreover, the stand taken by the Court led to some significant improvements in the UN procedure, albeit still lacking in full judicial protection.

The ensuing problems arose from the introduction of five words ('in principle, the full review'). With hindsight, the words were unnecessary. But it is questionable whether, without them, and the head-to-head confrontation between the General Court and the Advocate General that ensued, the principles set out in *ZZ*, and applied in *Kadi IV*, would have emerged so clearly.

One important lesson of the saga is that attempts to classify and distinguish different standards or levels of judicial review without regard to the facts and circumstances of the instant case are quite as likely to lead to confusion and misunderstanding as to the efficient discharge of judicial business. It is not without cause that judges like Nial Fennelly prefer to assess the facts of the case before them in the light of their own conception of fairness and common sense.

