

An Overview of the *Kadi*¹ CJEU Case Law

ARIANE AQUILINA

On 15 October 1999 the UN Security Council adopted Resolution 1267 aimed at condemning terrorism and demanding that the Taliban turn over Osama bin Laden. Paragraph 4(b) of this Resolution declares that states must:

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.²

On 15 November 1999 the Council of the European Union adopted a common position and subsequently went on to adopt 'a complete implementation of the Security Council decisions, without additional content.'³ On 19 October 2001 Mr Sheikh Yassin Abdullah Kadi was added to a list published by the Sanctions Committee which listed people and entities who in its opinion should have their assets frozen due to suspected connections with Osama bin Laden. The European Commission went on to adopt Regulation 881/2002 with Mr Kadi's name specifically mentioned in an appendix thereto. Mr Kadi began a case against this Regulation stating, inter alia, that his rights to property and his right to a fair hearing were being violated.

The Court of First Instance, now known as the General Court of the EU, 'dismissed the actions for the reason that it had no jurisdiction to review the lawfulness of the decision of the EU institution in question.'⁴

¹ Case C-402/05 P and C-415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351

² United Nations Security Council Resolution 1267 1999 4(b)

³ S Danosh, 'The Kadi Case: The International Position of the European Union after the Ruling' (European Forum at the Hebrew University 2009) 7

<<http://www.ef.huji.ac.il/publications/Danosh.pdf>> accessed 18 February 2014

⁴ A Posch, 'The Kadi Case: Rethinking the Relationship Between EU Law and International Law?' (The Columbia Journal of European Law 2009) <http://www.cjel.net/online/15_2-posch/> accessed 18 February 2014

The General Court maintained that this Regulation was being implemented from a UN Security Council Resolution over which it had no competence. It did however admit to having competence to declare whether the Regulation was in line with what is known as *jus cogens*, that is, the idea that there are specific fundamental values that are common in international law and that may not be abused of or violated. The Court of First Instance decided that in this case there was no actual violation of Mr Kadi's *jus cogens* rights.

This judgment was subsequently appealed and this time the Court of Justice of the European Union took a different approach. It decided to look into whether Regulation 881/2002 was in fact lawful and in line with the fundamental rights at the very heart of the European Union legal order. The Court found that Mr Kadi had not been able to pursue judicial review of the grounds on which he had been included within this list of individuals subject to sanctions, and that furthermore he had not even been informed of why he had been so included. The Court delivered its judgment in 2008 where it concluded that Mr Kadi's right to be heard, right to effective judicial review, and right to property had in fact been violated. This case is known as ***Kadi I***.

However, in 2009, Mr Kadi was again blacklisted in UN Security Council Resolution 1904. This time, he was given a summary of reasons for the relisting. Mr Kadi brought another case against this situation. The General Court promptly applied the precedent set down in ***Kadi I***, and in the case known as ***Kadi II***, it struck down the relisting of Mr Kadi. On appeal, the Grand Chamber of the Court of Justice of the European Union (the "CJEU") upheld this General Court decision on 18 July 2013. It is prudent to note that Mr Kadi in 2012 already been removed from the blacklist by the UN Ombudsperson.

One of the main points of interest to come out of the Kadi cases is that both the General Court and the CJEU have adopted a trend of being, 'much less deferential to the EU institutions, and even to international institutions such as the UN Security Council, when considering challenges based on fundamental rights.'⁵ The CJEU was also criticised for deciding on a UN Security Council Resolution that is to be considered outside of its competence. However in ***Kadi I***, the CJEU stated 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.'⁶ The Court declared that it was not reviewing the UN Security Council Resolution itself, but rather the implementation of the Resolution within the EU. In doing so the Court basically said that, 'Security Council resolutions remain "untouchable", but the acts by which the EU/EC implements the resolutions are not and are subject to the

⁵ P Craig and G De Burca, *EU Law: Text, Cases, and Materials* (5th, Oxford University Press, Oxford 2011) 377

⁶ Case C-402/05 P and C-415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 para 285
<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=163358>> accessed 24 February 2014

fundamental rights and principles that form the basis of the Community/Union legal order.⁷

This means that above and beyond the implementation of UN Security Council Resolutions, and other international agreements, there is the principle of fundamental human rights that the EU must protect and uphold even against such international instruments. In doing this the CJEU did not set up a different hierarchical structure that put EU Law above International Law, but rather adamantly set out its position of defending fundamental human rights that are so central to the EU itself. It is important for the EU to protect its citizens' fundamental rights particularly as if it does not do so, Member States themselves 'would probably feel tempted to take safeguarding these guarantees into their own hands.'⁸ This may give rise to a confusing and dangerous situation where the primacy of both International Law and EU Law may be called into question.

Kadi II further emphasised the need for judicial review and the right to effective judicial protection. The Court declared that the right of defences includes the fact that authorities are to disclose any evidence on the basis of which a defendant is listed and that the defendant must have a chance to provide his own comments about the evidence presented. Furthermore, the CJEU stated that reasons that are given for application of sanctions must be 'individual, specific, and concrete.'⁹ It also made it clear that the individual must be 'placed in a position in which he may effectively make known his views on the grounds relied on against him,'¹⁰ and the competent EU authority 'must examine, in the light of comments made by the individual concerned, whether those reasons are well founded.'¹¹

In **Kadi II** the ECJ came to the conclusion that in fact, 'none of the reasons for listing Mr Kadi set out in the UN Narrative Summary was substantiated by the evidence.'¹² Apart from this the ECJ also came to the conclusion that laws and regulations implemented from institutions other than the EU, must still comply with the fundamental rights that are respected and protected in the EU ambit. 'The ECJ rejected the argument that the EU institutions only rubber stamp UN designations.'¹³

Mr Kadi is now officially de-listed from the blacklist set up by the Sanctions Committee. **Kadi I** and **Kadi II** are complex cases that have had an important effect in setting up certain precedents within the EU legal order. They revealed the strong commitment the EU has to the protection of fundamental human rights, particularly

⁷ R A Wessel, 'The Kadi Case: towards a More Substantive Hierarchy in International Law?' [2008] International Organizations Law Review 5 323, 326

<<http://www.utwente.nl/mb/pa/research/wessel/wessel55.pdf>> accessed 18 February 2014

⁸ J Kokott C Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' [2012] The European Journal of International Law Vol 23 no 4 1015, 1019

<<http://www.ejil.org/pdfs/23/4/2343.pdf>> accessed 18 February 2014

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

¹⁰ Court of Justice of the European Union Press Release No 93/13 (Curia 2013) 2

<<http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-07/cp130093en.pdf>> accessed 18 February 2014

¹¹ Ibid

¹² M Rushton, 'Kadi II: ECJ confirms annulment of Mr Kadi's EU listing' (Carter-Ruck Blog 2013)

<<http://www.carter-ruck.com/Blog/?p=513>> accessed 20 February 2014

¹³ M Lester, 'The ECJ's Judgment in Kadi II' (European Sanctions 2013)

<<http://europeansanctions.com/2013/07/21/the-ecjs-judgment-in-kadi-ii/>> accessed 20 February 2014

the right to judicial protection of those very rights, even if protecting such rights may mean going against instruments handed down by other international institutions. In the opinion he gave on the **Kadi** case, Advocate General Poiares Maduro summarized it by stating:

The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right.¹⁴

¹⁴ General Advocate P Maduro, 'Opinion of General Advocate Poiares Maduro Case C-402/05 P' (2008) para 52 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005Co402:EN:HTML>> accessed 20 February 2014