JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 July 2006 (*)

(Common foreign and security policy – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Competence of the Community – Freezing of funds – Fundamental rights – Jus cogens – Review by the Court – Action for annulment and damages)

In Case T-49/04,

Faraj Hassan, residing in Brixton (United Kingdom), represented by E. Grieves, Barrister, and H. Miller, Solicitor,

applicant,

v

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

and

Commission of the European Communities, represented by J. Enegren and C. Brown, acting as Agents, with an address for service in Luxembourg,

defendants,

APPLICATION, first, for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9), as amended by Commission Regulation (EC) No 2049/2003 of 20 November 2003 amending Regulation No 881/2002 for the 25th time (OJ 2003 L 303, p. 20), and, second, for damages,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2005,

gives the following

Judgment

Legal context

1 Under Article 24(1) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the members of the United Nations ‘confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf’.

2 Under Article 25 of the Charter of the United Nations, '[t]he Members of the [UN] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

3 Article 41 of the Charter of the United Nations states:

'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

4 By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

5 According to Article 103 of the Charter of the United Nations, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Background to the dispute

6 On 15 October 1999 the Security Council of the United Nations ('the Security Council') adopted Resolution 1267 (1999), in which it inter alia condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security, deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, '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 authorised by the Committee on a case-by-case basis on the grounds of humanitarian need.'

7 In paragraph 6 of Resolution 1267 (1999) the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4 .

8 Taking the view that action by the Community was necessary in order to implement that resolution, on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1). Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999).

9 On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).

10 On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, inter alia, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to appropriate authorities to be brought to justice. The Security Council decided in

particular to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999). Accordingly paragraph 8(c) of Resolution 1333 (2000) provides that the States are, inter alia, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaeda organisation'.

11 In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.

12 In paragraph 17 of Resolution 1333 (2000), the Security Council called upon all Member States and all international and regional organisations, including the United Nations and its specialised agencies, to act strictly in accordance with the provisions of that resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement.

13 In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed inter alia by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.

14 Taking the view that action by the Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1). Article 4 of that Common Position provides:

'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'

15 On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted 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 No 337/2000 (OJ 2001 L 67, p. 1). This measure puts into effect in the Community the measures provided by Security Council Resolution 1333 (2000) and Common Position 2001/154/CFSP.

16 On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Articles 1 and 2 of that resolution provide, in essence, that the measures, in particular the freezing of funds, imposed by Article 4(b) of Resolution 1267 (1999) and by Article 8(c) of Resolution 1333 (2000) are to be maintained. In accordance with paragraph 3 of Resolution 1390 (2002), those measures are to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council will either allow those measures to continue or decide to improve them.

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

18 On 27 May 2002, on the basis of Articles 60 EC, 301 EC and 308 EC, the Council adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9).

19 Article 1 of Regulation No 881/2002 defines what is meant by 'funds', 'freezing of funds', 'economic resources' and 'freezing of economic resources' .

20 Under Article 2 of Regulation No 881/2002:

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

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

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

21 Annex I to Regulation No 881/2002 contains the list of persons, entities and groups affected by the freezing of funds imposed by Article 2 ('the list at issue').

22 Annex II to Regulation No 881/2002 contains the list of competent national authorities for the purposes of that regulation.

23 Article 7 of Regulation No 881/2002 provides :

'1. The Commission shall be empowered to:

– amend or supplement Annex I on the basis of determinations made by either the United Nations Security Council or the Sanctions Committee, and

– amend Annex II on the basis of information supplied by Member States.

2. Without prejudice to the rights and obligations of the Member States under the Charter of the United Nations, the Commission shall maintain all necessary contacts with the Sanctions Committee for the purpose of the effective implementation of this Regulation.'

24 Since then the list at issue has been amended or added to on numerous occasions by Commission regulations adopted on the basis of determinations carried out by the Sanctions Committee.

25 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.

26 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.

27 Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of that Common Position provides that, when implementing the measures set out in Article 3 of Common Position 2002/402/CFSP, the European Community is to provide for the exceptions permitted by United Nations Security Council Resolution 1452 (2002).

28 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of the Security Council's Resolution 1452 (2002), to adjust the measures imposed by the Community.

29 Under Article 1 of Regulation No 561/2003:

'The following Article shall be inserted in Regulation (EC) No 881/2002:

"Article 2a

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.

The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.

The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

…"'

30 On 12 November 2003, the Sanctions Committee adopted an addendum to its consolidated list of entities and individuals to be subject to the freezing of funds under Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) (see Sanctions Committee Press Release SC/7920 of 14 November 2003). That addendum includes the name of the applicant, identified as being a person associated with the Al-Qaeda organisation in the following terms:

'29. *Name: 1: Faraj 2: Farj 3:Hassan 4: Al Saadi

Title: na Designation: na DOB: 28.11.1980 POB: Libia Good quality a.k.a.: a) Mohamed Abdulla Imad, POB: Gaza, DOB: 28.11.1980 b**)** Muhamad Abdullah Imad, POB: Giordania, DOB: 28.11.1980 c**)** Imad Mouhamed Abdellah, POB: Palestine, DOB: 28.11.1980, Domicile: Viale Bligny 42, Milan, Italy Low quality a.k.a.: Hamza 'the Libyan' Nationality: na Passport no.: na National identification no.: na Address: na Listed on: 12 Nov. 2003 Other information: na.'

31 On 20 November 2003, the Commission adopted Regulation (EC) No 2049/2003 amending for the 25th time Regulation No 881/2002 (OJ 2003 L 303 p. 20). Article 1 and point 2(a) of the Annex to that regulation amended Annex I to Regulation No 881/2002 by adding the following entry under the heading 'Legal persons, groups and entities':

'Faraj Farj Hassan Al Saadi, Viale Bligny 42, Milan, Italy. Place of birth: Libya. Date of birth: 28 November 1980 (alias (a) Mohamed Abdulla Imad. Place of birth: Gaza. Date of birth: 28 November 1980; (b) Muhamad Abdullah Imad. Place of birth: Jordan. Date of birth: 28 November 1980; (c) Imad Mouhamed A Abdellah. Place of birth: Palestine. Date of birth: 28 November 1980; (d) Hamza "the Libyan").'

32 On 30 January 2004, the Security Council adopted Resolution 1526 (2004), designed, first, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and, secondly, to strengthen the mandate of the Sanctions Committee. Paragraph 3 of Resolution 1526 (2004) provides that those measures are to be further improved in 18 months, or sooner if necessary.

33 Paragraph 18 of Resolution 1526 (2004) states that the Security Council 'strongly encourages all States to inform, to the extent possible, individuals and entities included in the [Sanctions Committee's] list of the measures imposed on them, and of the [Sanctions Committee's] guidelines and Resolution 1452 (2002)'.

34 On 29 July 2005 the Security Council adopted Resolution 1617 (2005). This provides, inter alia, for the continuation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures are to be reviewed within 17 months with a view to their possible further strengthening or sooner if necessary.

Procedure

35 By application lodged at the Registry of the Court of First Instance on 12 February 2004, the applicant brought this action against the Council and the Commission.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

37 By separate document lodged at the Registry of the Court of First Instance on 21 October 2005, the applicant applied for legal aid pursuant to Article 94 of the Rules of Procedure of the Court of First Instance in the version then in force.

38 At the hearing on 25 October 2005 the parties presented their oral arguments and their answers to the questions asked by the Court.

39 By measure of organisation of procedure prescribed by the President of the Second Chamber of the Court of First Instance of 24 January 2006, the applicant was requested to produce, within a period to be fixed by the Registry, notification issued by one of the competent authorities referred to in Article 2a(2) of Regulation No 881/2002, establishing that he had made an application for a derogation from Article 2 of that regulation in order to obtain legal aid in these proceedings, in a sum that must be less than EUR 10 000, and that that application had been granted in compliance with those provisions.

40 Enclosed with a letter registered at the Registry of the Court of First Instance on 7 March 2006 the applicant produced the notification in question, in the form of a licence issued on 21 February 2006 by the Financial Sanctions Unit of the Bank of England.

41 By order of 3 April 2006, the President of the Second Chamber of the Court of First Instance granted the applicant legal aid, appointed his present lawyers to represent him and authorised the payment to them of a sum of EUR 4 000.

Forms of order sought

42 The applicant claims that the Court should:

– annul in whole or in part Regulation No 881/2002, as amended by Regulation No 2049/2003, or the latter regulation only;

– or, in the alternative, declare Regulations No 881/2002 and No 2049/2003 to be inapplicable to the applicant;

– take such further action as it may deem appropriate;

– order the Council to pay the costs;

– order the Council to pay damages.

43 At the hearing the applicant stated that his action challenged Regulations No 881/2002 and No 2049/2003 only in so far as they are of direct and individual concern to him, of which the Court of First Instance took formal note in the minutes of the hearing.

44 The Council contends that the Court should:

– dismiss the claims for annulment and for a declaration of inapplicability of Regulations No 881/2002 and No 2049/2003 as being inadmissible in so far as they are directed against the Council;

– in the alternative, dismiss the claims for annulment and for a declaration of inapplicability as being unfounded;

– dismiss the claim for damages as inadmissible or as unfounded;

– order the applicant to pay the costs.

45 The Commission contends that the Court should :

– dismiss the claim for damages as being inadmissible;

– dismiss the action;

– order the applicant to pay the costs.

Facts

46 The applicant states that he is a Libyan national, married and with one child who currently lives with his mother in Pakistan. He is detained in Brixton Prison (United Kingdom), awaiting the outcome of extradition proceedings brought at the request of the Italian authorities. He is sought by the latter in respect of charges connected to organising and directing a terrorist organisation and a network of counterfeit documents. The applicant wholly denies the charges of terrorism and states that he has applied for asylum in the United Kingdom.

The claim for annulment

Admissibility

Arguments of the parties

47 The Council submits, first, that the main claim for annulment of Regulation No 881/2002 is inadmissible as it was brought out of time, that regulation having been published on 29 May 2002.

48 The Council submits, secondly, that the main claim for annulment of Regulation No 2049/2003 is inadmissible in so far as it is directed against it, since the Commission, and not the Council, is the author of that act.

49 The Council submits, thirdly, that the alternative claim for a declaration that Regulation No 881/2002 is inapplicable is inadmissible in so far as that claim is directed against the Council. It relies in that regard on the case-law to the effect that the possibility provided by Article 241 EC of invoking the inapplicability of a regulation does not constitute an independent right of action and may be brought only incidentally (Case 33/80 *Albini* v *Council and Commission* [1981] ECR 2141, paragraph 17; Case T-154/94 *CSF and CSME* v *Commission* [1996] ECR II-1377, paragraph 16). The alternative claim is thus admissible only in relation to the Commission, as ancillary to the claim for annulment of Regulation No 2049/2003.

50 The Council submits, fourthly, that the alternative claim for a declaration of inapplicability of Regulation No 2049/2003 is inadmissible, since the applicant brought a valid application for annulment of that regulation within the prescribed period.

51 The applicant replies, first, that the main claim for annulment of Regulation No 881/2002 is admissible, as it was instituted, as required by the fifth paragraph of Article 230 EC, within two months of the day on which it came to his knowledge. That regulation came to his knowledge only when Regulation No 2049/2003, in which his name appears, was published. The applicant submits accordingly that time did not start to run until the date on which the latter regulation was published. The applicant adds that he would in any case have had no locus standi to bring proceedings for the annulment of Regulation No 881/2002 before Regulation No 2049/2003 was enacted.

52 The applicant replies, secondly, that the main claim for annulment of Regulation No 2049/2003 is admissible in so far as it is directed against the Council, since the adoption of Regulation No 2049/2003 was made possible only by the framework created by Regulation No 881/2002. It is crucial that the Court should be able to review the validity of Regulation No 881/2002 as it is that regulation which abrogates the rights usually available under Community law. That is a different question from the one which relates to the validity of the actions of the Commission under Article 7(1) of Regulation No 881/2002.

Findings of the Court

53 With regard to the first two issues of admissibility raised by the Council concerning the main claim for annulment of Regulation No 881/2002, as amended by Regulation No 2049/2003 or that latter regulation only (see paragraphs 47 and 48, above), it is to be noted that originally Council Regulation No 881/2002, adopted on 27 May 2002, did not concern the applicant whose name was not included in the list in Annex I. It was not therefore open to him to seek annulment of that regulation pursuant to the fourth paragraph of Article 230 EC. However, Commission Regulation No 2049/2003 amended that list, precisely in order to add (inter alia) the applicant's name, following updating of the Sanctions Committee's list (see paragraphs 30 and 31, above). Thus, in the circumstances of this case, as from the day on which Regulation No 2049/2003 entered into force, Regulation No 881/2002, as amended by that act, must be considered to refer expressly to the applicant.

54 On this point, it is necessary to take into consideration the special role assigned to the Commission by Article 7(1) of Regulation No 881/2002, a provision which empowers that institution to amend or supplement Annex I on the basis of determinations made by the Sanctions Committee (see paragraph 23, above). Regulations in which the Commission amends or supplements that list differ in that manner from the implementing regulations commonly adopted by that institution under the fourth indent of Article 211 EC, in accordance with which the Commission, in order to ensure the proper functioning and development of the common market, exercises the powers conferred on it by the Council for the implementation of the rules laid down by the latter. In fact, though they constitute measures for the implementation of Council Regulation No 881/2002, those Commission regulations directly amend part of the enacting terms of that regulation.

55 That being so, the Court of First Instance considers that the applicant is entitled to seek annulment either of Regulation No 2049/2003 alone, or of Regulation No 881/2002, as amended by Regulation No 2049/2003, in so far as those measures are of direct and individual concern to him.

56 It follows too that the claim for annulment of Regulation No 881/2002 cannot be regarded as out of time, given that it is not directed against Regulation No 881/2002 in its original form, but rather against the version of that regulation as amended by Regulation No 2049/2003. To that extent, the first head of inadmissibility raised by the Council must be rejected.

57 As regards the issue of which institution(s) it is against which the claim for annulment must in due form be brought, there are grounds for observing, first, that, the Commission being the author of Regulation No 2049/2003, the claim for annulment can quite obviously be brought against that institution.

58 Second, given the special role assigned to the Commission by Article 7(1) of Regulation No 881/2002, and having regard to the matters noted in paragraph 54, above, the claim for annulment of this regulation, as amended by Regulation No 2049/2003, may also be validly directed against the Council as the author of Regulation No 881/2002 so amended.

59 That solution is, moreover, in keeping with the principle that acts adopted on the basis of a delegation of powers are ordinarily imputable to the delegating institution, with the result that the action against the act of the body to which power has been delegated is admissible as being brought against the delegating institution (see, to this effect, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 39, at p. 58; Joined Cases 32/58 and 33/58 *SNUPAT* v *High Authority* [1959] ECR 127, at p. 127, and Joined Cases T-369/94 and T-85/95 *DIR International Film and Others* v *Commission* [1998] ECR II-357, paragraphs 52 and 53). In the present case, the Commission exercising competence conferred on the Council by Articles 60 EC, 301 EC and 308 EC, on the basis of an express delegation of powers made to it for that purpose, the action against the measures it adopts by virtue of that competence may be directed against the Council.

60 The second head of inadmissibility raised by the Council must therefore be dismissed.

61 With regard to the third and fourth heads of inadmissibility put forward by the Council with regard to the alternative claims for a declaration that Regulations Nos 881/2002 and 2049/2003 are not applicable (see paragraphs 49 and 50, above), they must be rejected in the light of the answer given to the first two points.

Substance

62 In support of his claims for annulment of Regulations No 881/2002 and No 2049/2003 ('the contested regulations'), the applicant essentially relies on a single plea in law based on the infringement of his fundamental rights and of the general principle of proportionality. More specifically, his objections concern, first, the alleged infringement of his right to property and to respect for his private and family life and, secondly, the alleged infringement of the right to be heard and the right to a fair trial. The applicant also contends that Regulation No 881/2002 is invalid, on the ground that it infringes the same rights and principle.

63 The arguments alleging breach of fundamental rights and of the principle of proportionality may appropriately be examined together. Indeed, investigating whether any fundamental rights have been infringed by the contested regulations necessarily includes an assessment of those measures' compliance with the principle of proportionality in the light of the objective pursued (Opinion of Advocate General Léger in Joined Cases C-317/04 and C-318/04 *Parliament* v *Council* [2006] ECR I-0000, paragraph 107).

Arguments of the parties

– Concerning the alleged infringement of fundamental rights in general

64 The applicant states that Article 6(2) EU requires the Union to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), and as they result from the constitutional traditions common to the Member

States, as general principles of Community law. He maintains that the contested regulations infringe those fundamental rights and general principles.

65 In this respect, the applicant denies that the Council and the Commission were obliged to adopt the contested regulations without any regard to the fundamental rights and general principles in question. As institutions of the Union, the Council and the Commission are bound first and foremost by Community law. In the present case, the action is directed against acts adopted with no regard to that law. The fact that the Council decided to be bound by the system of sanctions instituted by the Security Council is irrelevant in that regard, as, according to the applicant, that decision is itself fundamentally flawed.

66 The applicant argues more specifically that the Community is not a member of the United Nations and is accordingly not subject to the obligations imposed, in that capacity, on the Member States of the United Nations. In particular, the Community is not bound by the principle that the obligations of the Members of the United Nations under the Charter of the United Nations take priority over all their other international obligations. It is therefore wrong to argue that the Security Council resolutions in question take priority over Community law.

67 The applicant also submits that, if it is not to infringe the principle of the right to an effective judicial remedy, the Court can and must review all aspects of the validity of the contested regulations, in the light of all the pleas put forward in the action.

68 The Council and the Commission challenge the applicant's arguments, referring to Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-0000, '*Yusuf*', under appeal, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-0000, '*Kadi*', under appeal.

– The objection based more particularly on infringement of the right to property and the right to respect for private and family life

69 The applicant argues that the contested regulations have the effect, first, of preventing him from having the peaceful enjoyment of his possessions and of depriving him of all substantive economic freedom, in breach of Article 1 of the First Protocol to the ECHR. That measure, which is more serious than certain criminal punishments, also has an adverse effect on his dependants.

70 Secondly, the freezing of the whole of his funds has the effect of annihilating his private and family life, in breach of Article 8 of the ECHR. Furthermore, the applicant has been branded a terrorist and his reputation has been damaged at the international level.

71 More specifically, the applicant submits that that measure is disproportionate to the aim pursued, in that it is based solely on his inclusion in the list maintained by the Sanctions Committee, without any detailed balancing of the public and private interests at stake.

72 At the hearing the applicant emphasised the especially drastic consequences for him and his family of the freezing of all his funds and economic resources. In his view, that measure deprives him in practice of any means of subsistence.

73 The Council and the Commission take issue with the applicant's arguments, referring to *Yusuf* and *Kadi*.

– The objection based more particularly on infringement of the right to be heard

74 The applicant argues that the contested regulations were adopted in contravention of his right to be heard, as guaranteed by Article 6 of the ECHR. More specifically, he complains that the defendants did not give him the opportunity effectively to make known his views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented against him, either before or after the adoption of the contested regulations (Case C-49/88 *Al-Jubail Fertilizer and Saudi Arabian Fertilizer* v *Council* [1991] ECR I-3187, paragraph 17).

75 The applicant points out that the right to a fair hearing has been recognised as a fundamental right (Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137) and that observance of the right to be

heard must be guaranteed in all proceedings initiated against a person which are likely to culminate in a measure adversely affecting that person (Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39; see also Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 15, and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9).

76 In the present case, Regulation No 881/2002 lays down no procedure for the consultation of the person concerned, whether before or after the freezing of his funds. The individual cannot therefore prevent that measure having effect against him or subsequently procure his removal from the disputed list by challenging its correctness or relevance before the Community institutions.

77 A prior hearing of the applicant was all the more essential in this case, as the rights at stake are fundamental ones, the interference with those rights is excessive and unlimited as to time and there is no equitable procedure that might allow him to obtain his removal from the list maintained by the Sanctions Committee (see, in that regard, paragraphs 82, 83 and 89, below).

78 In support of his propositions, the applicant relies on two decisions of the US Court of Appeals for the District of Columbia circuit, dated 6 and 8 June 2001 respectively, ruling on the legality of the proscription by the United States Secretary of State of two Iranian organisations accused of being 'foreign terrorist organisations' under the Anti-Terrorism and Effective Death Penalty Act 1996. In those decisions, the US Federal Court of Appeals held, in particular, that the proscription of the parties concerned without a prior hearing infringed the constitutional rules as to due process, unless the Secretary of State could show that such a hearing would prejudice the security of the United States or other foreign policy goals. Those two cases show that procedural requirements must not automatically be abrogated in circumstances such as those which exist in the present case and that it is not evident that the intended effects of the contested regulations would be jeopardised if the parties concerned were given a prior hearing. At no stage in the present case have the defendants argued, still less demonstrated, that a prior hearing of the applicant would have been incompatible with the security of the European Union or any attendant urgency.

79 The applicant also contends that his inclusion in the disputed list without a prior hearing is unlawful in that it is based on an abrogation of all rights of autonomous decision-making, the Sanctions Committee's list having been purely and simply 'imported' without scrutiny by the Community institutions and without those institutions having had the opportunity of being involved in its preparation. In that regard, the applicant restates his proposition that the Community was not bound to adopt the Sanctions Committee's list without complying with the fundamental principles of Community law, as it is not a member of the United Nations.

80 In addition, the measure at issue is disproportionate to the legitimate aim of restricting economic support for the Al-Qaeda network. The applicant points out that he has been in custody in the United Kingdom since 16 May 2002, so that the risk of his manipulating economic assets once alerted to his likely inclusion in the disputed list was substantially diminished. In any event, the defendants could have taken steps to restrict his economic freedom while the consultation and prior hearing procedure took place, instead of ordering the immediate freezing of his funds. That would have achieved the aim of the Sanctions Committee, while at the same time allowing the applicant the benefit of preliminary safeguards.

81 Even if a prior hearing of the applicant was not appropriate in this case, he submits that he ought, at the very least, to have been given the right to be heard subsequently, so that he might have his name removed from the list at issue. The applicant submits that the Council could give him the opportunity of a fair hearing with regard to the justification for his remaining on that list, while at the same time complying with the spirit of Resolution 1267 (1999) and its successors. During such a hearing, the applicant would no longer constitute a threat for the purposes of the resolutions in question, as he would already be subject to restrictive measures. The Council would thus be in a position to ensure that the correct decision was taken in relation to him. If such a decision were to lead to his removal from the list at issue, the applicant maintains that it is highly unlikely that the Sanctions Committee would object, its action be undermined or the pursuit of its aims be prejudiced.

82 As regards the procedure for removal of a name from the Sanctions Committee's list laid down under Resolution 1267 (1999) and implemented by the Committee's Guidelines for the Conduct of its Work (see paragraph 109 below), the applicant contends that it is wholly ineffective and materially infringes the right to a fair hearing.

83 In that regard, the applicant points out that: (i) the individual has no direct access to the Sanctions Committee, but must approach the Committee through the Member State of his nationality or residence, which then consults the State which designated him; (ii) the individual does not know either the basis upon which he was included in the Sanctions Committee's list or the identity of the State which requested his inclusion; (iii) the removal procedure has no terms of reference or procedures for time-limits or rules of disclosure, and (iv) the procedure also does not provide for access to an independent or impartial tribunal to challenge on the merits the refusal of the State concerned to petition the Sanctions Committee for removal or the Committee's decision to reject such a petition.

84 In his reply, the applicant adds that it is both untenable and unrealistic to argue that he should approach the United Kingdom Government or the Libyan Government for their support in proceedings before the Sanctions Committee for removal of his name from the list. The United Kingdom would not be objective, in view of the current extradition proceedings against the applicant, and the applicant has every reason to fear persecution by Libya as a suspected terrorist.

85 The Council and the Commission take issue with the applicant's arguments, referring to *Yusuf* and *Kadi*.

86 As regards the two decisions of the US Court of Appeals for the District of Columbia on which the applicant relies (paragraph 78 above), the Commission maintains that they are in no way relevant to the present case, as those decisions concern measures adopted by the United States and not measures transposing resolutions of the Security Council.

– The objection based more particularly on infringement of the right to an effective judicial remedy

87 The applicant argues that the contested regulations were adopted in breach of his right to an effective judicial remedy, as guaranteed by Article 13 of the ECHR (see, in that regard, Case 222/84 *Johnston* [1986] ECR 1651). Especially in the context of the present proceedings, such a right, which would allow him to challenge factual assertions or to obtain disclosure of the factual basis of the decisions of the Sanctions Committee and the defendants, is not available to him.

88 As regards the substance, the applicant wholly denies any involvement or connection with Usama bin Laden, Al-Qaeda, the Taliban or any form of terrorism. He would have been in a position to demonstrate this by any permissible legal means if an equitable mechanism had been available to him for that purpose. The applicant assumes that it is the proceedings brought against him in Italy on the ground of alleged illegal acts connected with 'terrorist aims' committed in Milan from December 2001 until September 2002 which form the basis of his inclusion in the list maintained by the Sanctions Committee. In that regard, the applicant states that one of his co-accused has been acquitted of all the charges of terrorism brought against him for lack of evidence, by decision of the investigating magistrate of Milan of 16 December 2003 (Annex 4 to the application). The applicant envisages that the charges against him will take a similar course. In any event, those charges do not allege any connection with Usama bin Laden, Al-Qaeda or the Taliban.

89 At the hearing the applicant more particularly maintained that the conclusions reached by the Court of First Instance in *Yusuf* (in particular, in paragraphs 344 and 345) and *Kadi* (in particular, in paragraphs 289 and 290) cannot be transposed to the circumstances of this case. In his view, there is no effective mechanism for reviewing the individual measures freezing funds adopted by the Security Council. On this head, the applicant argues that the procedure for removal from the list put in place by the Sanctions Committee was essentially political and did not, therefore, guarantee any effective judicial remedy, especially if, as in this case, the person involved should be exposed to the hostility of the government of his country of residence or nationality.

90 The Council and the Commission take issue with the applicant's arguments, referring to *Yusuf* and *Kadi*.

Findings of the Court

91 Subject only to the specific point of law relating to the breach of the right to respect for private and family life that will be considered in paragraphs 126 and 127, below, the Court of First Instance has already ruled, in *Yusuf* (paragraphs 226 to 346) and *Kadi* (paragraphs 176 to 291), on all the points of law raised by the parties in connection with the single plea raised in support of this action.

92 On that occasion, the Court held, in particular, as follows:

– from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty (*Yusuf*, paragraph 231, and *Kadi*, paragraph 181);

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

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

– first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (*Yusuf*, paragraph 254, and *Kadi*, paragraph 204);

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

– Regulation No 881/2002, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations (*Yusuf*, paragraph 264, and *Kadi*, paragraph 213);

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

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

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

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

– the freezing of funds provided for by Regulation No 881/2002 infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of

proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens* (*Yusuf*, paragraphs 288 and 289, and *Kadi*, paragraphs 237 and 238);

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

– in these circumstances in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (*Yusuf*, paragraph 320, and *Kadi*, paragraph 274);

– nor were the Community institutions obliged to hear the persons concerned before Regulation No 881/2002 was adopted (*Yusuf*, paragraph 329) or in the context of the adoption and implementation of that act (*Kadi*, paragraph 259);

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

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

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

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

adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens* (*Yusuf*, paragraphs 341 to 345, and *Kadi*, paragraphs 286 to 290);

– the arguments relied on to challenge the contested regulations alleging breach of the right to an effective judicial remedy must consequently be rejected (*Yusuf*, paragraph 346, and *Kadi*, paragraph 291).

93 As the applicant acknowledged at the hearing, in its examination of the *Yusuf* and *Kadi* cases the Court gave exhaustive answers to the arguments, in essence identical, put forward in those cases by the parties in their written pleadings, concerning the sole plea raised in support of this action (in respect of the similar arguments put forward by the parties in the *Yusuf* case, see *Yusuf*, paragraphs 190 to 225, and, in respect of the similar arguments put forward by the parties in the *Kadi* case, see *Kadi*, paragraphs 138 to 175). That is particularly the case in relation to the applicant's arguments claiming that Security Council resolutions are not binding on the Member States (paragraphs 65, 66 and 79, above), and the alleged breach of fundamental rights as guaranteed by the ECHR, particularly the right to property (paragraphs 69 and 71, above), the right to be heard (paragraphs 74 to 84, above) and the right to an effective judicial remedy (paragraphs 67, 87 and 88, above).

94 As to the two decisions of the US Court of Appeals for the District of Columbia (see paragraph 78, above), put forward by the applicant in support of his argument that he might, and ought to, have been heard by the institutions before the contested regulations were adopted, they have no bearing on the circumstances of this case, as the Commission has correctly pointed out (see paragraph 86, above).

95 Nevertheless, it is necessary to add the following points in response to the arguments more specifically propounded by the applicant at the hearing concerning, on the one hand, the allegedly excessive strictness of the measure freezing all his funds and economic resources (paragraph 72, above) and, on the other, the alleged invalidity in the circumstances of the conclusions reached by the Court in *Yusuf* and *Kadi* concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned (paragraph 89, above).

96 With regard, first, to the allegedly excessive strictness of the measure freezing all the applicant's funds and economic resources, it is to be borne in mind that Article 2a of Regulation No 881/2002, added to the latter by Regulation No 561/2003 which was adopted as a result of Resolution 1452 (2002), provides, among other exceptions, that, upon a request made by an interested person, and provided that the Sanctions Committee does not expressly object, the competent national authorities may declare the freezing of funds or economic resources to be inapplicable to funds or economic resources which they have determined are 'necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges' (paragraph 29, above). The use of the word 'including', repeating the text of Resolution 1452 (2002), shows that neither that resolution nor Regulation No 561/2003 provides a specific and exhaustive list of 'basic expenses' that may be exempted from the freezing of funds. The determination of the kinds of expenses capable of being so classified is therefore left, to a large extent, to be assessed by the competent national authorities responsible for the implementation of the contested regulations under the supervision of the Sanctions Committee. In addition, funds necessary for any 'extraordinary expenses' whatsoever may henceforth be unfrozen, on the express authorisation of the Sanctions Committee.

97 For the rest, it is indeed to be recognised that the freezing of the applicant's funds, subject only to the exceptions provided for by Article 2a of Regulation No 881/2002, constitutes an especially drastic measure with respect to him, which is capable even of preventing him from leading a normal social life and of making him wholly dependent on the public assistance granted by the authorities of the United Kingdom.

98 Nevertheless, it is to be recalled that that measure constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, for the purpose in particular of preventing terrorist attacks of the kind perpetrated in the United States of America on 11 September 2001 (*Yusuf*, paragraphs 295 and 297, and *Kadi*, paragraphs 244 and 246).

99 Any measure of this kind imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in

no way responsible for the situation which led to the adoption of the sanctions (Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 22). Nevertheless, the importance of the aims pursued by the regulation imposing those sanctions is such as to justify those negative consequences, even of a substantial nature, for some operators (*Bosphorus*, paragraph 23).

100 In *Bosphorus*, paragraph 99 above, the Court of Justice ruled that the impounding of an aircraft belonging to a person based in the Federal Republic of Yugoslavia but leased to an 'innocent' external economic operator acting in good faith was not incompatible with the fundamental rights recognised by Community law, when compared with the objective of fundamental general interest for the international community, which was to put an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina. In its judgment of 30 June 2005 in Bosphorus v. Ireland, No 45036/98, not yet published in the Reports of Judgments and Decisions, the European Court of Human Rights also held that the impoundment of the aircraft did not give rise to a violation of the ECHR (paragraph 167), having regard to the nature of the interference at issue and to the general interest pursued by the impoundment and by the sanctions regime (paragraph 166).

101 With yet stronger reason must it be held in the present case that the freezing of funds, financial assets and other economic resources of the persons identified by the Security Council as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban is not incompatible with the fundamental rights of the human person falling within the ambit of *jus cogens*, in light of the objective of fundamental general interest for the international community which is to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts (see, to this effect, *Yusuf*, paragraph 298, and *Kadi*, paragraph 247).

102 It has, moreover, to be remarked that the contested regulations and the Security Council resolutions implemented by those regulations do not prevent the applicant from leading a satisfactory personal, family and social life, given the circumstances. So, according to the interpretation given at the hearing by the Council, which is to be approved, the use for strictly private ends of the frozen economic resources, such as a house to live in or a car, is not forbidden per se by those measures. That is all the more true where everyday consumer goods are concerned.

103 That being so, there are no grounds for challenging the findings made by the Court of First Instance in *Yusuf* and *Kadi* in the light of the arguments more specifically developed by the applicant at the hearing and relating to the alleged ineffectiveness of the exceptions to the freezing of funds provided for by Regulation No 561/2003.

104 With regard, secondly, to the alleged invalidity, in the circumstances of this case, of the conclusions reached by the Court in *Yusuf* and *Kadi*, concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned, the applicant pleads, on the one hand, that the freezing of his funds amounts to confiscation and, on the other, that the machinery for review of the individual measures for freezing of funds decided by the Security Council and put into effect by the contested regulations is ineffective.

105 So far as concerns, first, the allegedly confiscatory nature of the freezing of the applicant's funds, it is advisable to bear in mind that the Court held in *Yusuf* (paragraph 299) and *Kadi* (paragraph 248) that freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. In addition, in its assessment of the compatibility of such a measure with *jus cogens*, the Court attached special significance to the fact that, far from providing for measures for an unlimited or unspecified period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed (*Yusuf*, paragraph 344, and *Kadi*, paragraph 289).

106 Now, the applicant has not put forward any evidence or argument that might shake the foundation of those findings in the particular circumstances of this case. On the contrary, those findings have in the meantime been corroborated by the fact that, like the four resolutions that preceded it (see paragraphs 12, 16, 26 and 32 above), Resolution 1617 (2005), adopted on 29 July 2005, that is to say, within the maximum period of 18 months prescribed by the previous resolution 1526 (2004), once more provided for a mechanism for review 'in 17 months, or sooner' (see paragraph 34, above).

107 As regards, second, the effectiveness of the mechanism for review of the individual fund-freezing measures adopted by the Security Council and implemented by the contested regulations, it is advisable to bear in mind, in addition to the findings summarised in paragraph 92, above, that in *Yusuf* (paragraph 309 et seq.) and *Kadi* (paragraphs 262 et seq.), the Court noted that the persons concerned might address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds.

108 On the basis of the measures referred to in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and set out afresh in paragraph 1 of Resolution 1526 (2004) and Resolution 1617 (2005), the Sanctions Committee is in fact responsible for the regular updating of the list of persons and entities whose funds must be frozen pursuant to those resolutions.

109 With particular regard to an application for re-examination of an individual case, for the purpose of having the person concerned removed from the list of persons affected by the sanctions, the 'Guidelines of the [Sanctions] Committee for the conduct of its work' ('the Guidelines'), adopted on 7 November 2002, amended on 10 April 2003 and revised (without substantial amendment) on 21 December 2005, provide in section 8, entitled 'De-listing', as follows:

'(a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

(b) The government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;

(c) The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(d) If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(e) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.'

110 The Court has previously found that, by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard (*Yusuf*, paragraph 312, and *Kadi*, paragraph 265). The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its Resolution 1526 (2004). Under paragraph 18 of that resolution, the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'.

111 Although the procedure described above confers no right directly on the persons concerned themselves to be heard by the Committee, the only authority competent to give a decision on a State's petition on the re-examination of their case, so that they are dependent, essentially, on the diplomatic protection afforded by the States to their nationals, such a restriction of the right to be heard by the

competent authority is not to be deemed improper in the light of the mandatory prescriptions of the public international order. On the contrary, with regard to the challenge to the validity of decisions ordering the freezing of funds belonging to individuals or entities suspected of contributing to the financing of international terrorism, adopted by the Security Council through its Sanctions Committee under Chapter VII of the Charter of the United Nations on the basis of information communicated by the States and regional organisations, it is normal that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels, in which the national authorities referred to in Annex II of Regulation No 881/2002 play an indispensable part (*Yusuf*, paragraphs 314 and 315, and *Kadi*, paragraphs 267 and 268; see also, by analogy, the order of the President of the Second Chamber of the Court of First Instance of 2 August 2000 in Case T-189/00 R *'Invest' Import und Export and Invest Commerce* v *Commission* [2000] ECR II-2993).

112 Although the Sanctions Committee takes its decisions by consensus, the effectiveness of the procedure for requesting to be removed from the list is guaranteed, on the one hand, by the various formal consultation mechanisms apt to facilitate that agreement, provided for in section 8(b) to (e) of the Guidelines and, on the other, by the obligation imposed on all Member States of the United Nations, including the members of that committee, to act in good faith in that procedure in accordance with the general principle of international law that every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*), enshrined in Article 26 of the Treaty of Vienna on the Law of Treaties, concluded in Vienna on 23 May 1969. In this connection it must be observed that the Guidelines are binding on all the Member States of the United Nations by virtue of their international legal obligations, in accordance with the Security Council resolutions at issue. In particular, it follows from paragraph 9 of Resolution 1267 (1999), paragraph 19 of Resolution 1333 (2000) and paragraph 7 of Resolution 1390 (2002) that all States are required to cooperate fully with the Sanctions Committee in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of those resolutions.

113 With more particular regard to the petitioned government, which is the government to which the request for removal from the list is addressed and which is, therefore, in most cases that of the petitioner's country of residence or nationality, the effectiveness of that procedure for removal from the list is further guaranteed by the obligation imposed on it by section 8(b) of the Guidelines to review all relevant information supplied by the person concerned and then to make a bilateral approach to the designating government.

114 Here it may be added that particular obligations are imposed on the Member States of the Community when a request for removal from the list is addressed to them.

115 The Sanctions Committee having, with its Guidelines, interpreted the Security Council resolutions in question as conferring on interested persons the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute (see paragraphs 108 and 109 above), Regulation No 881/2002, which gives effect to those resolutions within the Community, must be interpreted and applied in the same way (*Yusuf*, paragraph 276, and *Kadi*, paragraph 225). That right must accordingly be classed as a right guaranteed not only by those Guidelines but also by the Community legal order.

116 It follows that, both in examining such a request and in the context of the consultations between States and other actions that may take place under paragraph 8 of the Guidelines, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law, provided that the respect of those fundamental rights does not seem capable of raising any impediment to the proper performance of their obligations under the Charter of the United Nations (see, a contrario, *Yusuf*, paragraph 240, and *Kadi*, paragraph 190).

117 The Member States must thus ensure, so far as is possible, that interested persons are put in a position to assert their point of view before the competent national authorities when they present a request to be removed from the list. Furthermore, the discretion that it is to be recognised that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in arranging for the effective protection of their rights, having regard to the specific context and nature of the measures affecting them.

118 Thus, the Member States would not be justified in refusing to initiate the review procedure provided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to examine the precise reasons for which they were included on the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence.

119 Similarly, having regard to the fact, noted in paragraph 111, above, that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by the States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination.

120 It may be added that, as the Court noted, following the United Kingdom Government, in *Yusuf* (paragraph 317) and *Kadi* (paragraph 270), it is open to the persons involved to bring an action for judicial review based on the domestic law of the State of the petitioned government, indeed even directly on Regulation No 881/2002 and the relevant resolutions of the Security Council which that regulation puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination and, more generally, against any infringement by that national authority of the right of the persons involved to request their removal from the list at issue. At the hearing in this case the Council thus relied, to that effect, on a decision given by a court of a Member State ordering that State to request, as a matter of urgency, the Sanctions Committee to remove the names of two persons from the list in question, on pain of paying a daily penalty (tribunal de première instance de Bruxelles (Court of First Instance, Brussels), Fourth Chamber, judgment of 11 February 2005 in the case of Nabil Sayadi and Patricia Vinck v Belgian State).

121 On this point it is also to be borne in mind that, according to the Court of Justice's settled case-law (Case C-443/03 *Leffler* [2005] ECR I-9611, paragraphs 49 and 50, and the cases there cited), in the absence of Community provisions it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law. The Court has made it clear that those rules cannot be less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). The principle of effectiveness must lead the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d'être and objective of the Community act in question.

122 It follows that, in an action in which it is alleged that the competent national authorities have infringed the right of the persons involved to request their removal from the list at issue, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, which may lead it to refrain from applying, if need be, a national rule preventing that (*Leffler*, paragraph 121, above, paragraph 51, and the case-law there cited), such as a rule that excluded from judicial review the refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals.

123 In the present case, the applicant has not made any distinct specific allegation before the Court of First Instance of any failure by the United Kingdom authorities to cooperate in good faith in relation to him. If he should none the less consider that he has suffered from such a failure to cooperate, it is for him to avail himself of the opportunities for judicial remedy offered by domestic law mentioned above.

124 In any case, such a lack of cooperation, even if it were proved, in no way means that the procedure for removal from the list is in itself ineffective (see, by analogy, the order of the President of the Court of First Instance of 15 May 2003 in Case T-47/03 R *Sison* v *Council* [2003] ECR II-2047, paragraph 39, and the case-law there cited).

125 That being so, there are no grounds for challenging the assessment made by the Court of First Instance in *Yusuf* and *Kadi* concerning the arguments more specifically developed by the applicant at the hearing with regard to the alleged incompatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons involved.

126 Finally, in so far as *Yusuf* and *Kadi* do not answer the applicant's argument that the freezing of his funds involves not only a breach of his right to property, guaranteed by Article 1 of the First Additional Protocol to the ECHR, but also a breach of his right to respect for private and family life, guaranteed by Article 8 of the ECHR, and an attack on his reputation (see paragraph 70, above), it is to be borne in mind that it is solely in the light of the rules of *jus cogens*, and of no others, that the Court has the power to carry out its judicial review in this case.

127 Even if the right to respect for private and family life and the right to a reputation may be regarded as falling within the ambit of the rules of *jus cogens* relating to the protection of the fundamental rights of the human person, only arbitrary interference with the exercise of those rights could be considered to be contrary to those rules (on this point, see Article 12 of the Universal Declaration of Human Rights, which states that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation').

128 Now, there has clearly been no such interference with the applicant's exercise of those rights (see, to that effect and by analogy, *Yusuf*, paragraphs 292 to 303, and *Kadi*, paragraphs 241 to 252).

129 It follows from all the foregoing that the claim for annulment of the contested regulations must be rejected as unfounded.

The claim for damages

Arguments of the parties

130 The Council and the Commission maintain that the claim for damages is inadmissible.

131 In the forms of order sought in the application the applicant merely claims that the Council should be ordered to pay damages. There are no arguments in the application itself in respect of that claim, nor is there any reference to Articles 235 EC and 288 EC. Accordingly, the applicant does not purport to establish that the conditions for a successful claim for damages exist (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). Such a claim does not comply with Article 44(1) of the Rules of Procedure of the Court of First Instance (Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, paragraphs 54 to 59; and Case T-38/96 *Guérin Automobiles* v *Commission* [1997] ECR II-1223, paragraphs 42 and 43).

132 In response to the arguments raised by the applicant in his reply, the Council and the Commission add that the claim for damages is an independent form of action (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325), which cannot be treated as synonymous with the claim for annulment. It is therefore necessary to include a separate claim for damages and to provide at least a brief summary of the grounds relied on. The applicant has made no effort to do so.

133 If the claim for damages should none the less be held to be admissible, the Council submits that it is, in any event, unfounded. The Council states that, according to case-law, the Community can incur non-contractual liability only where a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council andCommission* [1992] ECR I-3061, paragraph 12). Now, for the reasons already stated, the contested regulations do not infringe any rule of law currently in force.

134 In addition to the lack of legal arguments, the Council contends that there is a lack of factual arguments in support of the claim for damages. It is for the applicant to produce to the Community judicature the evidence to establish the fact and the extent of the loss which he claims to have suffered (Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97).

135 The Council maintains that, in any event, the damage alleged in the present case cannot be attributed to the Community, but only to the Security Council. It refers, to that effect, to Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraphs 73 and 74.

136 In his reply, the applicant states that, as with costs, the claim for damages is contingent on the outcome of the claim for annulment, without its being necessary to set out a separate plea in law. The essential point is that damages should be sought in the application and that the defendants should

have been put on notice of that point. The applicant submits, for the avoidance of doubt, that the conditions to which damages are subject under Community law will be satisfied in the present case if the alleged infringements are established. It is only after the latter have been held to exist, however, that the Court may rule on any damages and costs.

137 The arguments set out at paragraphs 69 and 70, above, are sufficient to show the draconian effect of Regulation No 881/2002 on the applicant's financial position. Furthermore, the basis on which the applicant claims damages is clear and manifest. As regards the cause of the damage, the applicant maintains that the Council's contention that its source lies in the action of the Security Council falls away if his arguments relating to annulment are accepted.

Findings of the Court

138 As the Council and the Commission have observed, in the forms of order sought in his application the applicant did no more than claim that the Council should be ordered to pay damages, without further detail. The application itself contains no qualitative or quantitative argument concerning that claim.

139 Now, by virtue of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, every application must state the subject-matter of the proceedings and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on should be indicated, at least in summary form, coherently and intelligibly in the application itself (Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64).

140 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (see *Guérin Automobiles* v *Commission*, paragraph 131, above, paragraphs 42 and 43, and *Chiquita Brands and Others* v *Commission*, paragraph 139, above, paragraph 65, and the case-law cited there).

141 In contrast, a claim for an unspecified form of damages is not sufficiently concrete and must therefore be regarded as inadmissible (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 9; Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraph 181, and *Chiquita Brands and Others* v *Commission*, paragraph 139, above, paragraph 66).

142 Although the application need not necessarily contain figures quantifying the loss allegedly suffered, it must at the very least state clearly the factors that make it possible to assess the nature and extent of the loss, so that the institution may defend itself. In such circumstances, the lack of numerical information in the application does not affect the rights of the defence, so long as the applicant produces that information in the reply, so allowing the defendant to take issue with it both in its rejoinder and at the hearing (Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Usines de la Providence and Others* v *High Authority* [1965] ECR 911, at p. 935; Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 29, and Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 67).

143 In the present case, the claim for damages in the application wants even a hint of any particulars and must therefore be declared inadmissible. Indeed, even if the application did contain the information that made it possible to identify the actions which it is complained the institutions committed, it says nothing about the nature or character of the alleged damage or the reasons why the applicant believes that there is a causal link between those actions and that damage.

144 The applicant has not even made any serious effort in his reply to make good those defects. Contrary to what he maintains in his reply (see paragraph 136, above), the conditions for the admissibility of a claim for damages cannot be reduced to no more than simply putting forward an abstract request, as in the case of costs.

145 In any event, having regard to the documents before the Court and the arguments put forward in support of the claim for annulment, the claim for damages must be dismissed as unfounded given that, in the first place, consideration of the claim for annulment has revealed no illegality that might constitute a wrongful act capable of giving rise to liability on the part of the Community. In the second place, the applicant has adduced no evidence to prove the reality and extent of the loss alleged. In the third place, such loss is not to be ascribed to the adoption of the contested regulation, but rather to the Security Council resolutions given effect by those regulations, with the result that the applicant has not demonstrated the existence of a direct causal link either (see, to that effect, *Dorsch Consult* v *Council and Commission*, paragraph 135, above, paragraphs 73 and 74).

146 The action must therefore be rejected in its entirety.

Costs

147 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, he must be ordered to pay the costs, in accordance with the forms of order sought by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.