1216-2574 / USD 20.00

ACTA JURIDICA HUNGARICA
48, No 4, pp. 411–420 (2007)
DOI: 10.1556/AJur.47.2007.4.6

PETRA LEA LÁNCOS*

Case Note: Sison v. Council[1]–Human Rights or the Fight Against Terrorism–Do We Really Have to Choose?!

On 1 February of this year the European Court of Justice (ECJ) in its capacity as an appeals forum to the Court of First Instance (CFI) passed yet another judgement relating to European acts containing lists defining persons suspected of association with terrorist activities. The judgement touches upon the important questions of access to documents of the European institutions as well as the human rights related to a fair trial and an effective legal remedy. It sheds light on the fact that although certain decision-making powers have been relocated to the European level, a parallel accommodation of legal protection has not followed suit thus leading to an unsatisfactory protection of human rights. In cases relating to terrorism, the European courts seem uneasy in applying the European Convention on Human Rights (ECHR) by which the Community is bound. This tendency creates serious discrepancies in the legal regime of an entity committed to the respect of freedom, human rights and the rule of law.[2]

1. Facts of the case

Professor José Maria Sison is the chief political consultant of the National Democratic Front of the Philippines in the peace negotiations with the Government of the Republic of the Philippines. After being released from Philippine prisons, he obtained refugee status in the Netherlands in 1988 and has been living there since. On 12 August 2002, the US Office of Foreign Asset Control listed Mr. Sison as a terrorist and ordered the freezing of his assets. Just one day later, without notice and without giving him the opportunity for a hearing

* Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg
E-mail: plancos@mpil.de, petralea@gmail.com

[1] Case C-266/05, Judgment of the Court of 1 February 2007–José Maria Sison v. Council of the European Union ("judgment"), *not yet reported*.

[2] Article 6(1) of the Treaty establishing the European Union (TEU).

the Dutch authorities listed Mr. Sison in a "sanction regulation against terrorism" ordering the freezing of his assets and the termination of all social benefits due to him. Two months later the Council of the European Union adopted Decision 2002/848/EC[3] linking Mr. Sison to the so-called New People's Army, a paramilitary communist revolutionary group classified as a terrorist organization by numerous countries as well as the EU[4] and listing him as a terrorist suspect in the meaning of Decision 2580/2001[5]–the basic European act for the purpose of combating terrorism. Two further Council decisions followed[6] repealing the decision establishing the original list; however, both new decisions maintained Mr. Sison on the list of suspected terrorists.

2. The applications

Under Regulation 1049/2001 on the public access to documents (Regulation)[7] which ensures among others natural persons residing in a Member State the right of access to documents of Community institutions[8] Mr. Sison requested[9] the Council to grant access to all documents that led to his inclusion and maintenance on the lists contained in the mentioned decisions as well as the

[3] Council Decision of 28 October 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ L 195 of 30 October 2002).

[4] http://en.wikipedia.org/wiki/New_People's_Army (3.03.2007).

[5] "Natural persons committing or attempting to commit an act of terrorism, participating in or facilitating the commission of any act of terrorism" Article 2 para 3 indent i) of Council Regulation (EC) No. 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism (OJ 2001 L 344).

[6] Council Decision of 12 December 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC (Decision Nr. 2002/974/EC; OJ 2002 L 337) and Council Decision of 27 June 2003 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/974/EC (Decision Nr. 2003/480/EC; OJ 2003 L 160).

[7] Regulation (EC) No. 1049/2001 of the European Parilament and of the Council of 30 May 201 regarding public access to European Parliament, Council and Commission documents ("Regulation", OJ 2001 L 145).

[8] Article 2(1) of the Regulation.

[9] Confirmatory applications of 11 December 2002, 3 February 2003 and 5 September 2003.

disclosure of the identity of States submitting documents relevant in this respect.[10] With regard to each application the Council refused access to such documents, stating that these were classified as 'sensitive'' documents in the meaning of the Regulation[11] and even partial access would prejudice the public interest regarding public security, and further, that the disclosure of the identity of the submitting states would undermine the public interest relating to the soundness of international relations of the Union. The Council pointed out that the Regulation provides for exceptions in such cases[12] as well as in cases where disclosure has not been consented to by the originator.[13]

3. Findings of the Tribunal in the judgement under appeal (T-110/03)

Mr. Sison brought three successive actions before the CFI for the annulment of the Council decisions refusing access. The three cases were joined,[14] whereas the first case was declared as inadmissible and unfounded, the second as unfounded and only the third was dealt with in essence by the Tribunal. In the judgement under appeal the CFI in general noted, that "it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities (…) is kept secret so that (…) effective action can be taken."[15] The Tribunal further confirmed that "institutions enjoy a wide discretion" in justifying the refusal of access with reference to the public interest in areas covered by the *mandatory exceptions*[16] provided for by the Regulation.[17] It found that, consequently, judicial review of such decisions is

[10] Item 10 of the judgment.

[11] Article 9(1) of the regulation provides: "Sensitive documents are documents originating from the institutions or the agencies established by them, from member States, third countries or International Organizations, classified as 'TRÉS SECRET/TOP SECRET' 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4 (1) (a), notably public security, defence and military matters."

[12] Article 4(1)(a) of the regulation.

[13] *Ibid.*, Articles 4 (4)–(5).

[14] Joined cases T-405/03, T-150/03 and T-110/03, Judgment of the Court of First Instance of 26 April 2005–José Maria Sison v. Council of the European Union ("judgment under appeal") [2005] ECR II-1429.

[15] Item 77 of the judgment under appeal.

[16] Italics by me.

[17] *Ibid.*, item 46.

"limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated and whether there has been a manifest error of assessment of facts or a misuse of powers."[18] In particular it stated that the "Council was not obliged, under the exceptions provided for [by the Regulation], to take into account the applicant's particular interest in obtaining the documents requested", namely, that these were necessary for him to secure his rights to a fair trial in the proceedings before the CFI.[19]

3.1. The appeal before the ECJ

In his appeal against the judgements of the CFI, Professor Sison claimed that the ECJ set aside the contested judgements and annul the Council decisions refusing access to the requested documents, while the Council claimed the dismissal of the appeal.[20] As the appeals against the judgements of the CFI dismissing the first two cases as unfounded was dismissed by the ECJ as inadmissible for lack of arguments brought in the appeal against these, the Court solely dealt with the appeal against third case, notably T-110/03.[21] The appellant put forward five grounds of appeal centred upon his rights to a fair trial and access to documents, as well as the infringement of the duty to state reasons, the presumption of innocence and the right to an effective legal remedy. In its judgement the ECJ found one of the grounds for appeal inadmissible and all of the others unfounded, and it therefore dismissed the appeal.[22] In the following I shall restrict my analysis to the first ground for appeal related to the breach of the right to a fair trial and an effective legal remedy.

3.2. Breach of fair trial rights and the right to effective legal remedy

3.2.1. Arguments in appeal

In his first ground of appeal the appellant referred to the principle of a fair trial in general and defence rights in particular, as well as the right to an effective legal remedy. The appellant submitted that in the light of Article 6(3)(a) of the

[18] *Ibid.*, item 47.
[19] *Ibid.*, items 53 and 71.
[20] Items 21–22 of the judgment.
[21] *Ibid.*, items 23–24.
[22] *Ibid.*, item 109. In fact, ironically the Court even ordered Mr. Sison to pay the costs of the proceedings although all his assets had been previously frozen and all his social benefits had been cut.

European Convention on Human Rights (ECHR) on the right to a fair trial the Council is obliged to take into account his "legitimate interest in obtaining access to those documents, which concern him personally"[23] as "everyone (…) has the right to be informed (…) of the nature and cause of the accusation against him."[24] Further, according to Mr. Sison, in the light of the same provision the CFI infringed his defence rights by dismissing his actions, limiting its scope of judicial review and dismissing the fair trial argument, thereby also breaching his right to an effective legal remedy enshrined in Article 13 ECHR.[25]

3.2.2. Findings of the Court

Concerning the appellant's particular interest regarding the access to the documents in question, the ECJ pointed out that the CFI correctly observed that the purpose of the Regulation is to provide for general access to documents and not to "protect the particular interest which a specific individual may have in gaining access to one of them."[26] The Court found that exceptions contained in Article 4(1)(a) of the Regulation provide for a mandatory refusal of access "without the need (…) to balance (…) those interests against those which stem from other interests."[27] Thus, the ECJ goes on to state "even assuming that the appellant has (…) a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue" such a right cannot be enforced by reference to the Regulation at hand.[28] Exactly for this reason the Court rejected both claims regarding the infringement of defence rights and the right to an effective legal remedy. It seems to be saying that these rights cannot be exercised by recourse to the Regulation for the latter has not been designed for this purpose, and thus decisions denying access under the Regulation cannot result in a breach of such rights.

[23] *Ibid.*, item 28.

[24] Article 6(3)(a) ECHR reads: "Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

[25] Article 13 ECHR reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[26] Item 43 of the judgment.

[27] *Ibid.,* item 46.

[28] *Ibid.,* item 48.

3.2.3. Assessment

As a preliminary question it is important to note that not only the Member States but also the EC as well as "Community institutions are bound by the ECHR",[29] specifically, in accordance with the jurisprudence of the European Court of Human Rights.[30] As regards defence rights, arguments directly invoking the ECHR in cases before the European courts are admissible in so far as the Tribunal and the Court of Justice afford a "protection equivalent to that guaranteed by Article 6 of the ECHR".[31] However, it may be questionable whether the appellant may rely on Article 6(3)(a) ECHR in his case at all, for he has formally not been "charged with a criminal offence" as required by the Article and indeed, he was not facing criminal charges in any EU country.[32] However, in *Deweer v. Belgium*[33] the European Court of Human Rights pointed out that the word 'charge' constituted an autonomous concept of a much rather substantive than formal meaning, where for example the "situation of the suspect has been substantially affected."[34] It cannot be denied that the freezing of assets or the revocation of benefits constitutes such a substantial change. A

[29] Brown, L. N.–McBride, J.: Observations on the proposed accession by the European Community to the European Convention on Human Rights. *American Journal of Comparative Law,* 29 (1981) 695.

[30] „Where (...) an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice", Opinion 1/91, [1991] ECR I-06079; "The commitments emanating from the ECHR are already explicitly integrated in the EU treaties; they are an integral part of the community's legal order", Lerch, M.: European Identity in International Society–A Constructivist Analysis of the EU Charter of Fundamental Rights, *Constitutionalism Web-Papers*–ConWEB No. 2/2003 (note 12), at 6; see further: Lavranos, N.: Concurrence of jurisdiction between the ECJ and other international courts and tribunals, EUSA Ninth Biennial International Conference (31. 3.–2. 4. 2005), Texas, 17; see also the Charter of Fundamental Rights Article 52(3) and its commentary, Borowsky, M.: Tragweite und Auslegung der Rechte und Grundsätze, marginal notes 10, 29, 30, 37, in: Meyer, J. (ed.): *Charta der Grundrechte der Europäischen Union*, Baden-Baden, 2006.

[31] Case T-112/98, Judgment of the Court of First Instance of 20 February 2001–Mannesmannröhren-Werke AG. v. Commission of the European Communities [2001] ECR II-729.; see also: Brown, McBride, *op. cit*., 695.

[32] http://www.statewatch.org/news/2004/nov/sison-application-2-T-150.pdf (24. 05. 2007), 4.

[33] Judgment of the European Court of Human Rights, *Deweer v. Belgium*–6903/75 [1980] ECHR 1 (27 February 1980).

[34] Peukert, W.: Artikel 6 (Verfahrensgarantien), marginal note 48, in: Frowein, J. A. and Peukert, W.: *EMRK-Kommentar*, Kehl, 1996.

further qualification is that the reason for such a 'charge' must be a criminal offence, thus protection under Article 6 ECHR is guaranteed in all cases where the act allegedly committed by the suspect is deemed criminal in the legal order of the jurisdiction in question.[35] It is obvious from the preamble of Council Regulation No. 2580/2001 on combating terrorism[36] that terrorism constitutes a criminal act under European law. It follows, that both the Council and the Tribunal are fully bound by the fair trial rights enshrined in the ECHR which may further be invoked before the CFI and the ECJ. Thus, it seems that the Court's brief hint in the judgment to the contrary ("even assuming that the appellant has (…) a right to be informed in detail") is undue and Article 6(3)(a) applies in full.

As regards the concurrence of the CFI and the ECJ in stating that the purpose of the Regulation is not to protect particular interests in obtaining access to documents, this statement holds true; however, this does not mean, that human rights do not figure in cases where a certain legislative act is not explicitly designed to consider, or does not even mention, human rights. Although it is correct that fair trial claims may not be based on the Regulation itself, the 'mandatory refusal' provided for by Article 4(1)(a) of the Regulation cannot hold without an at least possible exception for human rights. Consequently, the Council cannot use a specific 'blanket' provision of the Regulation to rid itself of the duty to respect human rights in general, and the right to a fair trial in particular. It follows that the Council cannot dispense with balancing public interests against "other interests" such as those related to securing the defence rights of the appellant.[37] Naturally, the Council may still arrive at the conclusion in the individual case that the public interest as regards for example public

[35] *Ibid.*, marginal note 35, see further: http://www.legislationline.org/?tid=105&jid=60&less=false.

[36] See recitals 1 and 2 of Council Regulation No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344); Peukert, *op. cit.*, marginal note 36.

[37] Effective legal remedy requires that "the question whether the impugned measure would interfere with the individual's [specific human] right (...) and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined." Cameron citing the Judgment of the European Court of Human Rights, *Segerstedt-Wiberg and others v. Sweden*–62332/00, *not yet reported* (6 June 2006), in: Cameron, I.: The European Convention on Human Rights, due process and United Nations Security Council counter-terrorism sanctions, Report prepared for the Council of Europe (2006), http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.% 20Cameron%20Report%2006.pdf (24.05.2007), 20; see also: Borowsky, *op. cit.*, marginal note 21.

security justifies a proportional restriction of the individual interest in gaining access to documents which may prove necessary for the realization of defence rights. At the same time, the legal review of the decisions of the Council and the judgement of the CFI may lead to a different result should the Regulation not be interpreted by both judicial instances as excluding a balancing of interests.

In accordance with the above, the Tribunal is also obliged to respect fair trial rights guaranteed by the ECHR. Defence rights guarantee, among other things, that the party to the proceedings is granted "sufficient, adequate and equal opportunity to deliver statements both factually and in a legal sense, and that the party is not put at a disadvantage in comparison to the other [party]."[38] As the ECJ points out, contrary to the assertion of the appellant its defence rights had not been denied by the CFI in the sense that the arguments put forward by the appellant had been indeed considered and *then* dismissed.[39] However, an other aspect of the right to a fair trial is the principle of 'equality of arms' which requires "that all *material* evidence *for or against* the accused must be disclosed to the defence"[40] except in cases where measures restricting disclosure are strictly necessary, with the further qualification that "if a less restrictive measure can suffice then that measure should be employed."[41] The latter requires that the proceeding court has the means to establish whether the refusal of disclosure was strictly necessary and proportionate.

Based on the above it is questionable whether the appellant's right to an effective legal remedy as provided for by Article 13 ECHR has not been violated.[42] It is important to note that the right to effective judicial protection under the ECHR is bound to the breach of a particular human right under the same Convention. The appellant claimed that he had been denied an effective legal remedy against the breach of his right to be informed in detail of the cause of his inclusion on the lists in question, which also entails disclosure of evidence in this respect. As noted above however the ECJ found no breach of the right to be informed in detail. Referring to the fact that no breach of a human right under the Convention has taken place, the Court seems to be saying that this fact excludes the possibility of an infringement of the right to

[38] Peukert, *op. cit*., marginal note 72 (my translation).

[39] Item 50 of the judgment.

[40] Cameron, *op. cit*., 13 (italics in the original).

[41] *Ibid.*, 14, citing the Judgment of the European Court of Human Rights, *van Mechelen and Others v. Netherlands*–21363/93; 21364/93; 21427/93 and 22056/93 [1998] 25 EHRR 647 (23 April 1997).

[42] In general see: Biernat, E.: The *locus standi* of private applicants under article 230 (4) EC and the principle of judicial protection in the European Community, *Jean Monnet Working Paper* 12/03, 22–23.

an effective legal remedy,[43] that is: the lack of breach of a specific human right *per se* excludes the infringement of Article 13 ECHR and therefore also dismissed this part of the appeal. However the Court unduly applied a 'shortcut' in reviewing whether the right to an effective legal remedy has been breached by the CFI. The starting point of the review should not be the determination of whether the right to a fair trial (here: the right to be informed) has been breached or not and drawing conclusions therefrom regarding the infringement of Article 13 ECHR. Rather, the object of the review should have been the proceedings of the first instance court, the examination of whether it provided an effective legal remedy in assessing the breach of the appellant's right to be informed by the Council. Even more so, as the right under Article 13 presupposes merely an "arguable claim"[44] instead of an established breach of a right under the Convention exactly because the right to an effective legal remedy is meant to facilitate the assessment whether such a breach has occurred at all. The right to an effective legal remedy not only secures the right to bring a case before a legal forum but also that the remedy provided by the latter is 'effective' in the sense that a "competent, independent appeals authority must exist which is to be informed of the reasons behind the decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to (…) security where it finds it arbitrary or unreasonable". Albeit states (and *mutatis mutandis* also the EC) have a "margin of appreciation in how they apply Article 13" especially in areas concerning public security, judicial remedy must still be afforded, and this "must be effective in practice as well as in law".[45] Thus, Article 13 ECHR requires that minimally the proceeding court has access to documents based on which it may establish whether claims exacting secrecy are well founded[46] for "where a national authority does not take sufficiently into account, or is not capable of taking into account, the substance of the individual's arguable *claim* that his or her Convention rights have been breached then there has been a breach of Article 13."[47] Consequently, the review of

[43] Item 52 of the judgment.

[44] Frowein, J. A.: Artikel 13 ("Beschwerderecht"), marginal note 2, in: Frowein, J. A. and Peukert, W.: *EMRK-Kommentar*, Kehl, 1996.

[45] Cameron, *op. cit*., 20.

[46] As Cameron points out "the (minimal) controls which operate in general on collection and transmission of security information could not compensate for the total absence of effective judicial remedies," that is the conduct of the executive must be subject to possible judicial review. *Ibid*., 12–13.

[47] *Ibid*., 19, referring to the Judgment of the European Court of Human Rights, *Klass and other v. FRG*–5029/71 [1978]2 EHRR 214 (6 September 1978) (italics in the original), 19.

whether the CFI has afforded effective judicial remedy as regards the arguable claim relating to the breach of Article 6(3)(a) must entail the assessment whether the Tribunal has accessed the necessary information and examined the proportionality of the contested decision.

Conclusion

It seems that the European courts are yet uncertain in how to apply human rights in cases that relate to the fight against terrorism. The *Sison* case is a good example of this tendency: both the CFI and the ECJ unduly limit their scope of review according the Council excessive discretion in refusing access to documents, which leads to unsatisfactory results as regards the protection and the enforcement of human rights. As Cameron points out, "there are unfortunately many examples of purely formal mechanisms of challenge as far as security matters are concerned", which give the illusion that human rights have been safeguarded, whereas in reality they have been mocked by faint proceedings. This way, there may be even more harm done than good[48] for the EU in general and the victims of human rights infringement in particular.

[48] *Ibid*., 14.