

Judicial Review of Sanctions Decisions: “The Wrong Point in the Wrong Court with the Wrong Defendant”?

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Euro judicial review

1. Judicial review of decisions to include individuals and companies in the EU’s targeted sanctions measures usually takes place in Luxembourg. The effect of being included in these measures (Decisions and Regulations of the Council and Commission) is usually a prohibition on holding assets or economic resources in the EU, and a travel ban, for the individuals and companies listed in the annex to each measure.
2. The grounds for their inclusion depend on the particular common foreign and security policy goal of each sanctions regime; people are included if they have been identified as being “responsible for undermining the rule of law” in Zimbabwe or Burma, for example, or of “violent suppression of the people” in Syria, of “misappropriating State funds” in Egypt and Tunisia, or of supporting Iran’s “nuclear proliferation programme”.
3. Natural and legal entities included in the annexes to these various European “restrictive measures” may apply to the General Court of the EU (formerly called the Court of First Instance) to annul their inclusion, with an appeal to the CJEU. The European Court’s approach to those cases, including the appropriate standard of judicial review, is the subject of much debate in the case law (including in the ongoing *Kadi* saga¹).

Domestic judicial review

4. The cases discussed in this article concern similarly complex questions about the appropriateness of judicial review of sanctions decisions, but in a domestic context, and whether and to what extent the English courts will judicially review decisions taken by the UK Foreign and Commonwealth Office (FCO) and/or HM Treasury in the context of targeted sanctions. Like other Member States of the EU, the UK’s role in the sanctions process is to propose lists of people and companies to be included in EU sanctions lists, which are discussed and voted on in the European Council. The United Kingdom has ongoing duties to co-operate with the EU by keeping information on targets up to date and accurate, and by requesting de-listings where appropriate.
5. The English courts are currently working out how far parties can judicially review decisions in this context. Applicants that have brought actions for annulment in the European Courts are increasingly bringing domestic judicial review claims also. There may be a

¹ See, e.g. *Kadi v Council of the European Union* [2009] 1 AC 1225; *Kadi v European Commission* [2011] 1 CMLR 24.

number of reasons why this is so. One is that the Luxembourg Court can take years to reach a judgment, does not tend to grant either interim measures or damages in sanctions cases, and has not recognised that individuals have a continuing interest in establishing that their inclusion was unlawful once they have been de-listed. Another reason may be that the English courts can give different remedies; orders requiring the FCO to make representations to the European Council, data protection remedies, and so on.

6. The ability to bring judicial review claims is not controversial in the case of decisions by the Secretary of State to nominate alleged terrorists for inclusion in lists held by the UN Security Council 1267 Committee, because those lists are drawn up by national governments, and the Secretary of State's decisions are therefore susceptible to review (and have been reviewed on a number of occasions). The cases that raise more difficult issues are government decisions relating to the various "autonomous" sanctions imposed by the EU, on the basis of listing proposals by Member States, where the decision to include a person or company is made by the European Council, not the Member State.

Initial unsuccessful cases

7. In the first case of this kind, the Divisional Court (Moses LJ and Sullivan J) declined to grant interim relief to Melli Bank Plc. In *R (Melli Bank Plc) v Her Majesty's Treasury, Foreign and Commonwealth Office* [2008] EWHC 1661 (Admin), the Bank asked the Divisional Court for an interim injunction to prevent sanctions against it from being enforced in the United Kingdom, pending its application for interim measures being determined by the Court of First Instance, because it was suffering in financial and reputational terms by having been added to the EU's Iran sanctions on the sole basis that it was a subsidiary of Melli Bank Iran.
8. The Divisional Court held that in principle a national court has jurisdiction to grant interim relief in order to protect a claimant's European law rights (Joined Cases C-143/88 and 92/89 *Zuckerfabrik* [1991] ECR I-415). However, it would not do so because the court had no serious doubts about the validity of the EU measure listing Melli Bank Plc (i.e. the ability of the EU to list wholly owned subsidiaries of listed entities), the Bank accepted that any decision on the legality of the UK measure depended upon the European Court ruling on the validity of the EU regulation, and the European Court was about to rule on interim measures in any event. The court said that it would be undesirable for piecemeal removal by Member States of what should be uniform sanctions, it had not heard from the European Council, and the Bank would not suffer serious and irreparable harm if the domestic court did not grant interim relief before the European Court would consider whether to do so. The court held that the Bank had taken "the wrong point in the wrong court with the wrong defendant" (para. 82).
9. The second attempted judicial review was also unsuccessful. In *R (El-Maghraby and El Gazerly) v HM Treasury and Foreign and Commonwealth Office* [2012] EWHC 674 (Admin) the claimants argued that the UK regulations implementing the EU's Egyptian sanctions regime were *ultra vires* the European Communities Act 1972 and the Human Rights Act 1998.
10. The court rejected this argument on the grounds that the claimants' real attack was on the EU measures not their domestic implementation and there was an alternative

(indeed, a primary) remedy, in Luxembourg, where the claimants were challenging the EU regulation. The domestic courts could not infringe the principle in Case 314/85 *Firma Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199 that only the European Courts can declare a European law to be invalid, and the court rejected the *ultra vires* argument on the basis that the European Communities Act simply requires the United Kingdom to give effect to EU law, which it has done; again, the real attack was on the EU measure.

11. The court in *El-Maghraby and El Gizaerly* did, however, hear a judicial review of the Secretary of State's interpretation of funds for "basic needs" in the licensing regime (no *Foto-Frost* problem arose there because licensing is for Member States) and found that the Government was correct not to have regard to the applicant's previous lifestyle.

Recent successes and pending cases

12. There are signs that claimants may have more success in recent attempts to ask the judicial review courts to review (a) unlawful listing proposals and (b) refusals by the FCO to request de-listings, although there are no substantive judgments yet.
13. Judicial review of unlawful listing proposal and refusals to request de-listing have recently been held to be possible, but difficult, by Ouseley J in *R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3297 (Admin) [2013] 2 CMLR 10. Mr Bredenkamp was listed in the EU's sanctions against Zimbabwe on the basis of a listing proposal by the UK underpinned by evidence described as "thin" in a cable disclosed by Wikileaks. The court held a preliminary issue on whether the *Foto-Frost* principle (summarised above) precluded the challenge.
14. Ouseley J held that the *Foto-Frost* principle is a narrow one (paras 43–45). It does not prevent a national court from holding that an EU act is valid, or from ruling on domestic unlawfulness which also criticises EU processes or acts, nor is it an assertion by the European Courts of exclusive "competence" in areas which concern the EU legal order. It "leaves the field open, in the interests of justice, to a challenge to what domestic authorities did en route to the enactment of Community decisions . . . Unless a ruling that a Community act is invalid is the inevitable precursor to success for the Claimant, the claim should continue". The court held that it is not inevitable that the Administrative Court would have to rule on the validity of an EU act in deciding on the legality of the listing proposal or a decision to refuse to make a de-listing request.
15. Whereas the court in *El-Maghraby* described a refusal to request a de-listing as being "a matter of the UK's foreign policy and thus wholly unsuitable for judicial review" (para. 21), Ouseley J in *Bredenkamp* described the refusal to request delisting as "a clear cut national decision not to take a particular step" which did not depend on a finding of invalidity by the Luxembourg Court (para. 53). The case is listed for a hearing on public interest immunity issues in June 2013, with a substantive hearing to be listed after that.
16. Support for the reviewability of decisions not to make a delisting petition can be found in *Sayadi and Vinck*, in the UN Human Rights Committee (1472/2006 of 22 October 2008). The Belgian domestic court had ordered the Belgian Government to request that the applicants be delisted, but it did not do so. The Committee found violations of Arts

12 and 14 of the International Covenant on Civil and Political Rights (restrictions on free movement, honour and reputation): “The State party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal” (para. 12).

17. There have been a handful of judicial reviews along *Bredenkamp* lines challenging FCO listing proposals and/or refusals to delist. *R (Azizi and Sedghi) v Secretary of State for Foreign and Commonwealth Affairs* and *R (Meskarian and Zavvar) v Secretary of State for Foreign and Commonwealth Affairs* settled in late 2012 after permission was granted by the Administrative Court and the claimants were de-listed by the EU.
18. In both cases, the claimants had been included in the Iranian sanctions list on the sole basis of their occupation in a bank that had not been accused of any wrongdoing (and neither had the claimants). The claimants argued that in those circumstances, having got the claimants into this situation by proposing that they be listed (in the *Azizi/Sedghi* case, on the basis of a serious mistake of fact), the Government had a duty to assist them in righting the wrong by requesting their de-listing (by analogy with *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [2003] UKHRR 76).
19. *R (Europäisch-Iranische Handelsbank) v Secretary of State for Foreign and Commonwealth Affairs* (CO/10718/2012) is currently pending. A German bank (EIH) is challenging the FCO’s decision to propose that the European Council add it to EU Iranian sanctions. The FCO initially argued that *Foto-Frost* precluded the challenge, but permission for judicial review was granted in February 2013 following the *Bredenkamp* judgment on that preliminary issue summarised above.
20. There is a pending judicial review in Ireland, brought by Mr Ayadi (who was designated in UN and EU counter-terrorist sanctions measures at the same time as Mr Kadi). Ayadi is challenging the implementation of the UN Al-Qaida sanction regime in Ireland (where he lives). He has made a declaration that the Irish authorities violated principles of natural justice, the presumption of innocence, his right to respect for his reputation and his property rights, and is seeking damages.
21. An unresolved issue for both Luxembourg and domestic judicial review proceedings (and for claimants and the Government) is the position of individuals and companies who have been de-listed from EU sanctions lists. Financial and other institutions frequently continue to treat them as if they were still sanctioned (for example, their bank accounts are automatically closed). This has been recognised as a problem by the Government, by de-listed individuals, and by the *Independent Review of Terrorist Legislation* (Second Report on the Operation of the Terrorist Asset-Freezing Act 2010, paras 5.2–5.10). As noted above, the status of ongoing actions for annulment where the applicant is de-listed during the procedure is an unresolved issue in the Luxembourg case law (see, e.g. the Advocate General’s recent opinion in Case T-239/12 *Abdulrahim v Council*).

Freedom of information

22. Finally, an interesting freedom of information issue. The Egyptian Government has applied for judicial review of HM Treasury’s decision not to provide Egypt

with information to assist Egypt to trace and repatriate assets that it considers have been misappropriated from the state: *R (Arab Republic of Egypt) v HM Treasury* (CO/2592/2012). At least one of the individuals targeted by the Egyptian sanctions has been given permission to intervene.

23. Egypt asked the United Kingdom for information about funds frozen in the United Kingdom by operation of the European sanctions against Egypt. Article 9(1) of Regulation No. 270/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, imposes an obligation on all “natural and legal persons, entities and bodies” in the EU to supply to their national authorities “any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in accordance with Article 2(1)”. Article 9(2) provides that such information may be used only for the purposes for which it was provided or received, and on that basis the United Kingdom refused to supply Egypt with the information.
24. Before the hearing, the Regulation was amended with a new Art. 9(3) in November 2012, which states: “[p]aragraph 2 shall not prevent Member States from sharing that information, in accordance with their national law, with the relevant authorities of Egypt and other Member States where necessary for the purpose of assisting the recovery of misappropriated assets”. That amendment may not provide a complete answer, since Art. 9(3) must be applied consistently with the Data Protection Directive 95/46/EC.
25. The general rule under the Data Protection Directive and the Data Protection Regulation is that no personal information may be supplied to a third country unless the decision-maker is satisfied that the recipient country provides an adequate level of protection to data subjects. By way of derogation, personal data may be supplied to third countries which do not provide adequate protection in certain limited circumstances, including where such disclosure is required “on important public interest grounds, or for the establishment, exercise or defence of legal claims” (Art. 26(1)(d) and Art. 9(6)(d) respectively). As derogations from important EU law rights, Art. 26(1)(d) of the Data Protection Directive and Art. 9(6)(d) of the Data Protection Regulation (to the extent relevant) must be strictly construed. The case remains pending.

Conclusion

26. The case law on judicial review of sanctions decisions is developing. Since Ouseley J’s judgment in *Bredenkamp*, it is no longer possible to dismiss domestic judicial review in this context as necessarily involving “the wrong point in the wrong court with the wrong defendant”.