The *Kadi* case

Maya Lester QC of Brick Court Chambers recalls working on the *Kadi* case with David Vaughan CBE QC

Working on a case with David Vaughan was more lifestyle choice than junior brief. For one thing, it was a guaranteed way of being in a leading constitutional case—it is very hard to tell David's CV apart from a list of cases in a major textbook on European Union law. For another, it felt like being hunkered down for weeks on end in Churchill's war rooms.

Some of his former juniors will recall some of the following: the small, scribbled marginal additions to drafts in his unmistakeable tiny blue handwriting ('in that matter', 'in this regard'); his 'popping down' to his junior's room every five minutes to see how his changes looked on the screen; asking for repeated printouts for him to read through again and again in his lovely corner room in chambers while Classic FM lilted soothingly from the Bose.

Other juniors may well recall the 'cons' in which David would magisterially marshal his team ('I'll tell you what I'd find terribly helpful...'); and his instant response emails dictating case strategy invariably signed 'DV', and frequently sent to the whole of chambers by mistake.

The *Kadi* case was no different. I became involved (as so often) by chance. I happened to be in David Anderson QC's corridor when Pushpinder Saini took silk and David needed a new junior in a case I had heard was something to do with a UN Security Council resolution. For a case that involved such a roll-call of UK eminent legal minds over the years (including Sir Nicholas Forward, Judge Christopher Vajda, Sir Michael Wood, Lord Pannick QC, David Anderson QC, Vaughan Lowe QC, Professor Piet Eeckhout, Professor James Crawford SC, Lord Wallace of Tankerness, Daniel Beard QC, and Dr Cian Murphy), the case had remarkably little to do with the United Kingdom. Yassin Kadi, a businessman from Saudi Arabia, had sued a London magazine in defamation in 1995 for suggesting that his charitable foundation had been connected with an assassination attempt on President Mubarak in Ethiopia. He asked Carter-Ruck to act for him, and the magazine apologized and settled the claim in May 2001. When planes were flown into the World Trade Centre four months later and Mr Kadi became subject to a worldwide asset freeze and travel ban on grounds of a connection with terrorism, he knew where to turn for help: Guy Martin of Carter-Ruck. Terrorist asset freezing orders had been placed on a list of people by the UN Security Council in a process described by the then White House General Counsel David Aufhauser as being 'almost comical... We just listed out as many of the usual suspects as we could and said, let's go freeze some of their assets.'

David Vaughan came into *Kadi 2* in the Court of Justice when David Anderson became Independent Reviewer of Terrorism Legislation. Mr Anderson had already persuaded the Court in *Kadi 1* that an inviolable UN Security Council resolution was no bar to the rule of law and judicial review applying in the European Union: 'The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC treaty' (Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and others*, para 285).

In truth we had been riding on David Vaughan's coat-tails even then. Vaughan had acted for the People's Mojehadin Organization of Iran (PMOI) in what is in many ways the founding case for EU judicial review of sanctions measures, Case T-267/07 *People's Mojahedin Organization of Iran v Council* (later joined by Marie Demetriou QC in Case T-284/08). His strong instinct for the winning strategy led him to emphasize the crucial importance of due process in designating organizations accused of involvement in terrorism. David Vaughan borrowed principles from a fishing licensing case (for which we know he had a lifelong soft spot), Case C-135/92 *Fiskano v Commission*, establishing that everyone adversely affected by an EU penalty is entitled to know the case against them, to be heard, and to effective judicial review. In *PMOI* he urged the Court of First Instance (as it was in 2006) to apply those principles to terrorist asset freezing and he succeeded. In some ways *Kadi* was an obvious application—Mr Kadi had been included on the blacklist with no reasons and no chance to make observations, and the position was no different just because the origin of the EU terrorist asset freeze was the United Nations.

When Mr Kadi was relisted by the EU (now a common practice), this time including the UN's summary of reasons for his inclusion, David Vaughan battled on, undeterred by the fact that we were a lone voice against 13 Member States and three appellants arguing that the international legal order had been heretically turned upside down in *Kadi 1*. David, as ever, said we were 'bound to win' (he was unencumbered by the usual barristerial aversion to definitive advice on prospects of success), and he was right (see Joined Cases C-584/10 P, C-593/10 P and C-595/10). He marshalled his troops, went into battle with a formidable team of international lawyers, and we were successful. The Court said that relisting Mr Kadi on the basis of the vague UN summary of reasons without further assessment by the EU institutions was only paying lip service

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United Nations building, New York. (Cameron Davidson/Alamy)

to the principles in *Kadi 1*—rights of defence had been respected only in the most superficial and formal sense.

The *Kadi* case had more far-reaching implications than any case I have known. It led to the creation of a new layer of due process in the United Nations (not easy to achieve), namely the UN Ombudsperson to the Al-Qaida Sanctions Committee. It also resulted in a large body of jurisprudence and scholarship on EU and UN restrictive measures, on which I have been lucky enough to have spent much of the last decade. And it also led to the US State Department watching every judgment handed down in Luxembourg, new rules of procedure in the General Court of the EU to cater for classified evidence, and different state practices when considering and imposing sanctions.

The implications of *Kadi* are still being worked out. Do the same principles apply to country sanctions measures as to terrorist asset freezing? How should the *Kadi 2* obligations on the EU institutions for implementing UN resolutions apply in practice? What if there is sensitive material that cannot be shown to applicants without endangering national security? What if the UN had recommended keeping Mr Kadi on the UN list rather than delisting him the day before the Court of Justice hearing in *Kadi 2*?

In *Kadi*, as in all his other cases, David Vaughan believed utterly in his client. The Vaughan cocktail of empathy, humanity, energy, passion and experience meant that every client knew he was 100 per cent behind them and would fight to the end. Where others might have shied away from conventionally less popular clients, David embraced them: Yassin Kadi, the PMOI, and 121 members of the Zanu PF party in Zimbabwe for whom we later appeared (Case T-190/12 *Tomana v Council and others*). The way clients felt about him is illustrated by the letter Leslie Vaughan received from the PMOI on David's death: 'Your husband stood with us in the darkest days of our history and defended justice.'

He approached every case, including *Kadi*, with an infectious sense of fun. My first ever case in practice was acting with David for the British Horseracing Board in the Office of Fair Trading investigation into the Orders and Rules of Horseracing in 2001, and later in the *Attheraces* litigation (collective selling of media rights by racecourses: [2005] CAT 29). David's first assignment for us was a 'research' trip to the Windsor evening races. He had no hesitation in making sure we travelled to Harare even when he was not in the best of health, because of the importance he placed on speaking to the real people affected by a case. (I had no idea at Bar School that junior 'barristering' would involve interviewing witnesses in wellies on African chicken farms.) He was also supremely egalitarian and a true team player—as Euro juniors we grew up being sent with him to conduct EU-law training all over Eastern Europe. His enthusiasm for the late-night drinking songs in Estonia and Hungary and running (unrobed) from Finnish sauna to ice-cold lake will stay with me for ever. We must try to continue David Vaughan's legacy by approaching our cases with the open-minded commitment, energy, enthusiasm and fun he taught us. □