first time community financial contributions for crop, animal and plant insurance, together with mutual funds for animal and plant diseases and environmental incidents,[79] and such measures were expressly linked with WTO compatibility.[80]

MICHAEL CARDWELL*

III. CITIZENSHIP AND FUNDAMENTAL RIGHTS

A. Citizenship

1. Introduction

Free movement for EU citizens has been consistently recognized by the Court as a fundamental right.[1] Standing alone, article 18 EC remains a weak legal basis for Citizenship to become the 'fundamental status' of nationals of one of the Member States of the EU. To ensure that the full benefit of article 18 EC can be enjoyed by EU citizens the Court has consistently intervened to remove barriers imposed by Member States which restrict the rights provided for in article 18 EC. Most frequently this has required the Court to consider article 18 EC in conjunction with Article 12 EC to prevent discrimination on grounds of nationality. Increasingly with a more mobile population the exercise of Citizenship rights is raising questions concerning the payment of pensions and other social security benefits. One issue which the Court has addressed in two recent judgments, *Nerkowska*[2] and *Zabłocka-Weyhermüller*,[3] concerns the lawfulness of national legislation which imposed a residence requirement upon the recipients of a non-contributory social benefit. In these cases the Court was asked to consider whether national legislation regulating pension payments, and which were outside the scope of Regulation 1408/71, could be set aside even where the objective of that legislation was, inter alia, to promote societal solidarity with victims of war and oppression.

2. Case Law

In *Nerkowska* the case concerned a Polish national born in 1946 on the territory of what today is known as Belarus. In the aftermath of World War II many ethnic Poles who

[79] Council Regulation 73/2009 [2009] OJ L 30/16 Arts 70 and 71.

[80] See eg European Commission COM(2008)306, Explanatory Memorandum (proposing that such measures should be subject to financial ceilings, unless with certainty they met the conditions of the 'Green Box' (ie within Annex 2 to the Uruguay Round Agreement on Agriculture)).

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[1] See for example Case C-184/99 *Gryzelczyk* [2001] ECR I-6193; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Joined Cases C413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-; Case C-224/02 *Pusa* [2004] ECR I-5763. Case C-1/05 *Jia* [2007] ECR I-1.

[2] Case C-499/06 *Halina Nerkowska* v *Zakład Ubezpieczeń Społecznych* (Judgment of 22 May 2008).

[3] Case Krystyna *Zabłocka Weyhermüller* v *Land Baden-Württemberg* (Judgment of 4 December 2008).

[*ICLQ* vol 58, October 2009 pp 1002–1012] doi:10.1017/S0020589309001456

https://doi.org/10.1017/S0020589309001456 Published online by Cambridge University Press

were born on the territory of the Soviet Union suffered significant hardship and oppression. The applicant herself lost her parents who were deported to a Siberian labour camp and she herself was deported to the Soviet Union in 1951 where she lived in harsh conditions for six years. In 1957 Ms Nerkowska was permitted to return to Poland where she lived and worked until 1985 when she left Poland to settle in Germany. Ms Nerkowska remained a Polish citizen during this time. In 2000 she applied to her local Social Security office for a disability pension because of her incapacity to work which was linked to her treatment while living in the Soviet Union. The payment of such pensions is governed by the 1974 law on the provision of war and military invalids and their families and article 3 states that such pensions are payable exclusively by the State. Furthermore, article 5 permits the payment of such pensions to Polish nationals who are permanently resident on the territory of the Republic of Poland. However, due to her permanent domicile in Germany payment of the pension to Ms Nerkowska was suspended and on appeal to the Social Security office in 2006 the payment was once again refused on the grounds that the applicant did not have a permanent residence in Poland.

Ms Nerkowska appealed this decision to the Regional Court of Koszalin contending that she was entitled to the pension and that following Polish accession to the EU her current residence could not be a ground for non-payment of the benefit and was contrary to article 18 EC. It was this court which referred the question to the Court of Justice under article 234 EC seeking clarification on whether Polish law restricted the applicant's rights available under article 18 EC.

The pension claimed by the applicant is not covered by Community instruments for the coordination of social security systems. In addition, as the pension is paid wholly by the State the purpose of the pension is to compensate victims of war and oppression. Article 4 (4) of Regulation 1408/71, which provides for the exportability of social security benefits, expressly excludes 'benefit schemes for victims of war or its consequences'. Both Advocate General Maduro[4] and the Court concluded that the benefit at issue came within the scope of the exception provided for under article 4 (4) Regulation 1408/71. In particular it was noted that the pension paid was non-contributory and was paid by way of compensation for the suffering endured following deportation to the Soviet Union. A direct legal consequence of this is that as benefit did not come within the scope of Regulation 1408/71 Poland retained competence to regulate the conditions under which the pension was granted. Prima facie this would seem to include the competence to impose a residence requirement upon one of its own nationals who seeks to take advantage of the benefit. Yet both the Advocate General and the Court refer to the pervasive scope of the Treaty and that national rules concerning access to compensatory benefits of the type at the centre of this dispute must be granted subject to the provisions of the Treaty. In the context of this dispute this means that national competence must be exercised in such a manner that the free movement rights provided for under article 18 EC cannot be extinguished. In arriving at this conclusion both the Advocate General and the Court followed the principle previously laid down in the judgments of *Bidar*[5] and *Tas Hagen and Tas*[6] that Citizenship of the

[4] Opinion of Advocate General Maduro in Case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych* (28 February 2008).
[5] C-209/03 *Bidar* [2005] ECR I-2119.
[6] Case C-192/05 *Tas-Hagen* [2006] ECR I-10451.

https://doi.org/10.1017/S0020589309001456 Published online by Cambridge University Press

Union is a 'fundamental right'. Furthermore, free movement and residence are integral components of EU Citizenship and in the case of Ms Nerkowska a residence requirement could not be applied as a condition to receive compensation which the Polish State had already acknowledged she was entitled to receive.

In *Zabłocka-Weyhermüller* the applicant was a Polish-born national who married her German born husband Mr Weyhermüller in 2002. Mr Weyhermüller, who was recognized as a severely disabled war victim, died in 2004. Until his death he was in receipt of a pension which included various 'top-up' allowances payable to him due to the war injuries he had suffered. Upon his death the applicant requested for a full war widows' pension in accordance with the Federal War Victims Relief Law. In her application Mrs Zabłocka-Weyhermüller described herself as a Polish citizen and made clear her intention to relocate to Poland. The applicant was awarded her widows' pension on the basis of Federal War Victims Relief Law which under paragraphs 40 and 64e permits a partial pension to be paid to widows. The amount was set at 224 Euros per month which was significantly lower than Mr Weyhermüller's final pension payments of 1419 Euros per month.

Mrs Zabłocka-Weyhermüller requested an increase in the monthly payment made to her on the ground that the previous amounts were significantly higher, but this was rejected by the competent decision-making authority. The competent authority cited, inter alia, a justification for the decision as being the applicant's intention to change her permanent domicile and return to Poland. It further rejected the argument put forward by the applicant that the reduced pension payment could not be justified because she intended to relocate to Poland which since 2004 has become Member State of the EU. Mrs Zabłocka-Weyhermüller appealed to the administrative court which referred the question of the imposition of residency requirements and their compatibility with the payment of non-contributory benefits to the European Court of Justice. In the course of the national proceedings the amount to be paid by war widows' pension was increased by the competent authority to 372 Euros, but this was still well short of her late husband's entitlement. The German Court asked whether article 18(1) EC precludes legislation of a Member State under which the latter refuses to pay certain benefits granted to surviving spouses of victims of war solely because they are domiciled in the territory of another Member State. The Court following the reasoning of previous judgments, including the judgment in *Nerkowska*, concluded that the rights contained within article 18 EC would be impaired if the applicant could not receive her full pension entitlement.

3. Comment

In both *Nerkowska* and *Zabłocka-Weyhermüller* the Court is reviewing domestic legislation which does not fall within the direct scope of Community law. In neither case was the benefit at issue considered to be an exportable social security entitlement coming within the scope of Regulation 1408/71; by contrast the pensions payable in both instances were acknowledged by the Court as being non-contributory compensation payments which were governed solely under domestic rules and procedures. The reasoning within both judgments is based upon the scope *ratione materiae* of Community law. The Court addresses the issues raised by the disputes by considering the applicability of article 18 EC in such circumstances. The Court acknowledged that competence for the allocation of non-contributory compensation benefits lies with the

https://doi.org/10.1017/S0020589309001456 Published online by Cambridge University Press

Member States, but it stresses that Member States must exercise that competence in accordance with Community law. Recalling the judgment of the Court in *Tas Hagen and Tas*[7] the Court highlights that Articles 17 and 18 EC are not intended to extend the scope *ratione materiae* of the Treaty to wholly internal situations. However, the Court distinguishes the wholly internal situation and states that the scope *ratione materiae* of Community law *does* include those circumstances which involve the exercise of the freedoms provided within article 18 EC.[8] Consequently any purely national measure which can act as a barrier to the exercise of this freedom, even if it concerns Member State rules governing the payment, to one of its own nationals, of non-contributory compensation payments will not be permitted under Community law.

The Court's reasoning in both judgments is based upon the principle that Citizenship of the EU is a fundamental right which guarantees all EU citizens the right to free movement and to reside anywhere in the EU. Consequently no barrier or deterrent to the exercise of this right may be placed upon any citizen and this includes national rules governing domicile requirements for the payment of non-contributory pension payments.

In *Nerkowska* the justification for the residence requirement given by the Polish government was based upon a public interest argument that Polish society through payment of such compensation is demonstrating solidarity with victims of war and oppression. Accordingly to receive the payments the Polish government contended that it is legitimate to restrict that obligation of solidarity to those individuals who have retained a sufficient degree of connection with Polish society. At this juncture it is worth bearing in mind that the law on the provision of war and military invalids and their families was introduced in 1974 under the Communist regime when the understanding of societal solidarity was restricted to only those persons resident in Poland. Thus Polish ex-combatants and victims of Soviet oppression living outside of Poland, of which there many, would not have been entitled to such compensation under this law. Furthermore, the phrasing of the legislation in 1974 is deliberately intended to exclude such individuals. It would therefore appear from the submission of the Republic of Poland that the understanding of societal solidarity has not significantly altered since the political changes of 1989, nor would accession to the EU appear to have significantly altered this view.

For the Polish government residency in Poland is the prerequisite for the Polish State to demonstrate solidarity with a victim and this argument is not without merit. The Court of Justice has itself acknowledged in judgments such as *Bidar* and *Collins* that the Citizenship rights granted under the Treaty do not immediately open access to social benefits in a host State. Thus in *Bidar* the Court held that the requirement of some 'genuine link' with the Member State prior to the awarding of a student loan was permissible. Once this was established Bidar was entitled to equal treatment with United Kingdom students. In *Collins* the Court held as an EU citizen, he was entitled to equal treatment in the provision of social welfare benefits. However, States were entitled to restrict benefits to those with a 'genuine link' to the domestic labour market. Once he demonstrated that he was actively seeking employment in the United Kingdom for a reasonable period then he would be entitled to equal treatment.

[7] ibid para 22.
[8] See for example the judgment of the Court in Case C-403/03 *Schempp* [2005] ECR I-6421.

https://doi.org/10.1017/S0020589309001456 Published online by Cambridge University Press

Bidar and *Collins* demonstrate that in cases where individuals seek to rely upon Article 18 EC as justification for access to social security benefits in a host State the Court is prepared to impose the requirement of a genuine link which in practice amounts to a residence requirement for a minimum period. In *Bidar* the Court felt that his presence in the United Kingdom for three years and attending school satisfied this requirement. *Bidar* and *Collins* can both been termed as 'access' cases where an individual is seeking to exercise rights in another Member State. Why then did the Court prevent the use of a residence requirement in *Nerkowska*? If we consider the facts of the case more closely and apply the Court's interpretation of the 'genuine link' from *Bidar* it is arguable that the Polish government could be justified in applying the residency requirement. Though Ms Nerkowska had lived and worked in Poland between 1957 and 1985 she had not been permanently resident on that territory from 1985 to when she applied for the pension in 2000.

The Court dismissed the solidarity argument of the Polish government and held that the residence condition goes beyond what is necessary to achieve the objective pursued. Furthermore the Court concluded that the 1974 law constitutes a restriction to the rights contained within article 18 EC because it may act as a deterrent to Polish nationals who would not exercise their rights under article 18 EC because of the fear of losing their pension. Yet this logic does seem at odds with the accepted requirement of a 'genuine link' with the Member State that the Court laid down in *Bidar* and *Collins* and which concerned access to social advantages payable by the host State. Applying these criteria, Ms Nerkowska being absent from Poland for fifteen years would prima facie not satisfy the test of a genuine link with the society in which the benefit is sought. Moreover, as the pension sought was accepted by the Court to fall outside the scope of Community law and Ms Nerkowska remained a Polish citizen while residing in Germany then it may be argued that the dispute displays the features of applying article 18 EC within a prima facie internal legal space.

On this issue the Opinion of Advocate General Maduro is interesting. At paragraph 23 the Advocate General states that:

> . . . a Member State can no longer make an obligation of solidarity dependent on integration established by a condition requiring connection with a national territory. Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link to integration only within the narrow bounds of the national community, but also within the wider context of the society of the peoples of the Union.

This statement questions the autonomy of Member States and their competence to regulate the granting of the kind of pension sought by Ms Nerkowska without reference to Community law. By arguing for a move away from what are perceived as narrow and restrictive national criteria to a more general application of EU Citizenship the Advocate General supports a pervasive and integrationist application of article 18 EC. The right within article 18 EC to reside freely within an EU and which in the words of the Advocate General is not based upon the 'narrow bounds of national community' could appear to include an application of EU Citizenship in circumstances of residence by a citizen within their home State. The statement above is interesting as the Advocate General would appear to sweep aside national legal competence that operates within internal borders and within which societal solidarity has been traditionally understood. The Advocate General would appear to favour an interpretation of solidarity that arises between citizens who reside *anywhere* within the EU and thereby viewing borders and Member State competence within those borders as potential obstacles to the exercise of

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the fundamental rights under article 18 EC. The Opinion and the judgment therefore focus on the conditions for the exercise of rights under article 18 EC without necessarily giving due consideration to the merit of the national rules for the payment of the pension or the purpose of the pension itself.

In its submission the Polish Government relied upon the earlier judgment of the Court in *Tas Hagen and Tas* to rebut the argument that the residence requirement was disproportionate. In that judgment the Court held that a residence criterion is inappropriate if the purpose is to limit the obligation of solidarity in so far as it is based solely upon the date on which the application for the benefit is submitted. In such cases the Court held that this was liable to lead to different results for persons who are resident abroad and whose degree of integration into the society of the Member State granting the benefit is in all respects comparable. The Polish government interpreted this as meaning that a residence requirement imposed over a longer period would demonstrate a genuine difference with regard to the level of integration sought by the Member State. Thus in Ms Nerkowska's situation an absence of fifteen years could suggest a lack of societal integration. It would therefore follow that if the judgments of *Bidar* and *Collins* are correct then the judgments of *Nerkowska* and *Zabłocka-Weyhermüller* could, at the very least, be considered as inconsistent. *Bidar* and *Collins* conclude that the longer the presence in a Member State then the more genuine the link with that Member State which will trigger the application of the EU Citizenship provisions. By analogy it may be concluded that the longer the absence from a Member State then the *less* genuine the link. Consequently even though Ms Nerkowska was not domiciled in Poland for fifteen years the Court through the application of the EU Citizenship rules enabled her to secure a pension as to decide otherwise would restrict her right to freely reside in the another EU Member State. This reasoning raises one final issue concerning the *Nerkowska* judgment.

The focus of both the Advocate General and the Court in *Nerkowska* was on the rights within article 18 EC. It was by virtue of article 18 EC that she received the pension and this rebutted the residence requirement. However, this judgment does not necessarily protect access to the pension itself for *all* Polish citizens living outside of Poland. In the 1980's many Polish citizens took up residence in the United States or other non-EU countries. As their movement does not come with the scope of Article 18 EC it remains open to the Polish government to refuse to pay them this type of pension because they do not meet residency requirements. Ultimately the Court's judgment does not address the question of whether a residency requirement can be an appropriate prerequisite to payment of this type of pension. It merely states that EU does not allow residency requirements to interfere with article 18 EC rights, the effect of which is to introduce a blanket restriction on all residency requirements in such circumstances without necessarily giving in-depth consideration to the merits of the requirement and the purpose and nature of the pension which is being sought. Nor does the judgment immediately benefit Polish citizens who have taken up residency outside of the EU making any application they may make for such a pension dependent upon national legislation being applied in a manner which allows all Polish citizens irrespective of their residency to be granted the pension.

The primary effect of the judgments in *Nerkowska* and *Zabłocka-Weyhermüller* is that they have permitted the exportability of non social security benefits. The Court has bypassed the provisions of Regulation 1408/71 which expressly exclude benefit

https://doi.org/10.1017/S0020589309001456 Published online by Cambridge University Press

schemes for victims of war or its consequences and used the rights contained within article 18 EC to move and reside freely within the EU as the justification for its judgment. The judgments continue the trend of the Court's expansive interpretation of the Citizenship provisions in article 18 EC which it had consistently acknowledged as being a fundamental right granted to all EU citizens by the Treaty. While the applicants in these cases and other similarly affected citizens can take advantage of the judgments to obtain pensions which otherwise would have been denied to them they do mark another inroad in to the autonomy of Member States to regulate access to social benefits which fall outside the scope *ratione materiae* of Community law.

These judgments further illustrate the move towards what Dougan has described as the emergence of a 'European welfare space';[9] an objective which the Opinion of Advocate General Maduro in *Nerkowska* and the Court's judgment in both cases would appear to endorse. On one level the judgments offer assistance to those citizens who have taken advantage of the rights contained within article 18 EC and who have a legitimate entitlement to State assistance but are denied by virtue of narrow residency criteria. Yet the judgments provide uncertainty particularly in relation to the question of societal solidarity. These and other judgments of the Court are changing the relationship between citizens and their own Member States and redefining the concept of social solidarity as one with a Communitarian interpretation. The judgments in *Nerkowska* and *Zabłocka-Weyhermüller* would seem to suggest that the Court is prepared to consider that access to social entitlements arises from EU citizenship rights and not through national criteria. If this is the case then Community legislation concerning exportability of compensatory non-contributory benefits has become overdue.

B. Fundamental Rights

1. Introduction

The extent to which the European Court of Justice protects fundamental rights and the legal priorities it encounters when doing so were discussed in the judgment of *Kadi*.[10] In this case the Court, mindful of the need to give effect to international obligations arising from a United Nations Resolution[11] was nevertheless anxious not to do so at the expense of undermining the fundamental rights of individuals. That said the Court's judgment has raised questions of how far should the Court give effect to an international obligation, which in this case sought targeted action against terrorist suspects, even if to do so would leave the individual without an effective remedy. Ultimately the Court was being asked to prioritise fundamental principles contained within the Treaties; namely ensuring consistency with binding international obligations agreed

[9] See M Dougan, 'The Spatial Restructuring of National Welfare States within the European Union: the Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon' in R Nielsen, U Neergaard and L Roseberry (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon*, (DJØF Publishing, Copenhagen, forthcoming in 2009).

[10] *Yassin Abdullah Kadi & Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Joined Cases C-402/05 P and C-415/02 P) Judgment of 3 September 2008.

[11] See further M-G Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 56 ICLQ 77.

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through the UN while simultaneously ensuring the adequate protection of an individual's fundamental rights.

2. The Kadi Judgment

The facts concerned Mr Kadi, a Saudi Arabian national and the Al Barakaat Foundation of Sweden who were both designated as being as associated with Usama bin Laden, Al Qaeda or the Taleban. In accordance with a number of Resolutions of the United Nations (UN) Security Council, all States that are Members of the UN were required to freeze the funds and other financial resources controlled directly or indirectly by such persons or entities. In order to give a coherent effect to those UN Resolutions within the European Community, the Council adopted Regulation 881/2002 ordering the freezing of the funds and other economic resources of the persons and entities whose names appear in a list annexed to that Regulation. That list was regularly updated in order to take account of changes in the summary list drawn up by the Sanctions Committee, an organ of the UN Security Council. On 19 October 2001 the names of Mr Kadi and Al Barakaat were added to the summary list then added to the list annexed to Regulation 881/2002.

Mr Kadi and Al Barakaat brought actions before the Court of First Instance (CFI) for annulment of Regulation 881/2002. They claimed that the Council was not competent to adopt the Regulation and that it infringed their fundamental rights, in particular, the right to property and the right to conduct a defence. In its judgments of 21 September 2005[12] the CFI rejected all the pleas in law raised by Mr Kadi and Al Barakaat and confirmed the validity of the Regulation. The CFI ruled, in particular, that the Community Courts had, in principle, no jurisdiction to review the validity of the Regulation at issue, given that the Member States are bound to comply with the resolutions of the UN Security Council according to the terms of the Charter of the United Nations, an international treaty that prevails over Community law. Through this approach the CFI sought to attain what Tridimas and Gutierrez-Fons have described as a 'golden balance'[13] in which the primacy of the UN Charter over Community law was accepted but with the CFI evaluating whether the decision-making process in the UN Security Council complied with the fundamental principles of Community law. The CFI's reasoning, placing the obligations to fulfil the UN Resolution above all other considerations, adopted an internationalist rather than a constitutionalist approach and Tridimas and Gutierrez-Fons criticize this for being 'neither logically inevitable nor constitutionally secure'. The applicant's challenged the judgment of the CFI and appealed to the Court of Justice.[14]

On appeal, the Court's judgment was primarily concerned with the substance and impact of the measure on the applicants and in particular whether it had infringed their fundamental rights. The ECJ held that the CFI had erred in law in ruling that the Community Courts had, in principle, no jurisdiction to review the *internal* lawfulness

[12] Case T-315/01, *Yassin Abdullah Kadi & Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities* [2005] ECR II-3649.

[13] See T Tridimas, and J Guiterrez-Fons 'EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?' (2008) 21 September 2008 Social Science Research Network, 20. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271302 (Accessed 4 May 2009).

[14] ibid 20–23.

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of the contested Regulation. The Court held, following the reasoning of Advocate General Maduro that judicial review by the Court of the validity of *any* Community measure in the light of fundamental rights is a constitutional guarantee based upon the principle of the rule of law. On that reasoning the Court concluded that as an autonomous legal system the EC Treaty may not be prejudiced by an international agreement. Consequently in contrast to the CFI the Advocate General and Court adopt a constitutionalist solution to resolving the dispute which places the protection of fundamental rights at the centre of the Court's reasoning. The Court's judgment emphasised that the review of lawfulness ensured by the Community Courts applies exclusively to the Community act intended to give effect to the international agreement, and not to the international agreement itself. A judgment given by the Community Courts deciding that a Community measure intended to give effect to a resolution of the UN Security Council is contrary to a higher rule of law in the Community legal order would not entail any direct challenge to the primacy of that resolution in international law.

In practice the fundamental rights at issue were access to the Court under article 230 EC and the ability to conduct a defence and the right to protect personal property. article 47 of the Charter of Fundamental Rights contains the right to an effective remedy and both the Advocate General and the Court make reference to this obligation. On the question of a right to conduct a defence the Court followed the Opinion of Advocate General Maduro. The Court held at paragraph 334 that in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities whose funds are to be frozen, it must be concluded that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were not adequately respected. In respect to the seizing of the applicants' assets the Court held that this constituted an unjustified restriction on the right to property and annulled the Regulation 881/2002 in so far as it freezes Mr Kadi and Al Barakaat's funds.

Despite finding against the substance of the Regulation 881/2002 that it did breach the fundamental principles of EC law the Court did acknowledge that an annulment of the Regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures. This is because in the period before the Regulation is replaced, the person and entity concerned might take steps to prevent measures freezing their funds from being applied to them again. Moreover, the Court noted that it is conceivable that, on the merits of the case, the imposition of those measures on Mr Kadi and Al Barakaat may prove to be justified. As a result, the Court maintained the effects of the Regulation for a period of no more than three months running from the date of the judgment, in order to allow the Council to remedy the infringements found. However, the significance of the rejection by the Court of the initial Council Regulation should not be underestimated.

3. Comment

The *Kadi* judgment speaks volumes about how the Court considers the relationship between EC law and international law and how it has prioritized the protection of fundamental rights within the EU. The Court, following the reasoning of Advocate General Maduro, disagrees with the CFI and opts for a constitutionalist rather than internationalist reasoning. The Court's reasoning separates the question of the internal

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application and effect of the Regulation, which it concluded violated Kadi's and Al Barakaat's fundamental rights, from the objective of the UN Resolution which, in principle, the Court has acknowledged is legitimate. The fine line which the Court walks is to preserve what it views are distinct Community values concerning the protection of fundamental rights while simultaneously trying to comply with the primacy of the UN Resolution in international law. Tridimas and Gutierrez-Fons[15] and Tridimas[16] view the Court's constitutionalist interpretation as correct because the Court must determine the effect of international obligations within the Community legal order by reference to the conditions set by Community law and in particular the high Community standards for the protection of fundamental rights.

Despite the proactive nature of the Court in protecting the fundamental rights of the applicants the judgment is not beyond criticism. The Court's reasoning suggests a shift away from the loyal cooperation between the EU and the UN under which hitherto the EU and in particular the Court has ensured that UN Security Council Resolutions are given their full effect.[17] de Búrca[18] has criticized the Court for adopting a 'sharply dualist tone' to the relationship between international law and EC law which de Búrca suggest marks a shift away from the monist interpretation that has hitherto guided the Court. According to de Búrca the motivation of the Court was to pursue an agenda which maintains the autonomy of Community law, which is increasingly dualist in attitude towards international law and which regards internal constitutional governance, of which the protection of fundamental rights are the cornerstone, as its priority.

The constitutionalist arguments of the Court of Justice and Advocate General arise in part from the development of fifty years of case law whose primary purpose has been to protect and promote European integration whether economic or constitutional. This integration has been based upon principles of democracy, equality and the respect for fundamental rights which the Court, in the *Kadi* judgment, believes should not be undermined by external obligations. The Court does not consider that this judicial self-confidence is at odds with international obligations; rather that European integration has created a distinct international legal order which differs from other forms of international cooperation, not least than by its commitment to place the protection of fundamental rights at the centre of its judicial activities. By placing itself at the centre of the integration process the Court considers it has a duty to protect the Treaty objectives and fundamental rights generally.

The dispute in *Kadi* offers an interesting parallel with the relationship between national courts and the Court of Justice in the early 1970s concerning the question of adequate protection of fundamental rights under Community law. In the *Internationale Handelsgeselschaft* judgment[19] the Court addressed the concerns of the *Budesverfassungsgericht* that European integration may undermine the protection

[15] ibid 21.

[16] T Tridimas, 'Terrorism and the ECJ: Empowerment and democracy in the EC Legal Order' (2009) 34 European Law Review 114–5.

[17] See for example the judgment if the Court in Case C- 84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS* v *Minister for Transport, Energy and Communications and others* [1996] ECR I-3953.

[18] G de Búrca, 'The EU, the European Court of Justice and the International Legal Order after *Kadi'* (2008) Social Science Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313 29 December 2008 (accessed May 5th 2009).

[19] Case 11/70 *Internationale Handelsgeselschaft* [1970] ECR 1125.

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afforded to fundamental rights to German citizens under the German Constitution. The judgment of the Court in *Internationale Handelsgesellschaft* is noteworthy because it has long defined judicial attitudes towards fundamental rights protection in Community law both within the Court of Justice and in national courts. This is because in its judgment the *Bundesverfassungsgericht* stated that it would only accept European integration 'so long as' it was based upon a respect for fundamental rights. The concerns of the *Bundesverfassungsgericht* were based upon a constitutionalist interpretation of the protection of fundamental rights in Germany that fundamental rights are entrenched in the German Constitution and cannot be restricted. In particular the *Bundesverfassungsgericht* was concerned that Community law might be adopted which is in breach of these fundamental rights and that there is no remedy within Community law by which to challenge this. In the *Kadi* judgment the constitutionalist reasoning of the Court contains many similarities with that of the *Bundesverfassungsgericht*. In particular, the possibility that external rules may undermine the internal constitutional guarantees of fundamental rights protection within the EU is a cause for concern and equally unattractive to the Court of Justice 2009 as it was to *Bundesverfassungsgericht* when it was seeking to protect fundamental rights under the German Constitution in the 1970s.

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